September 26, 2013

Via electronic mail
secretariat@unified-patent-court.org

Preparatory Committee of the Rules of Procedure
for the Unified Patent Court
European Patent Office

Re: Comments on the Fifteenth Draft of the Rules of Procedure of the Unified Patent Court, as issued for public consultation on June 25, 2013

To Whom It May Concern:

On behalf of the American Bar Association Section of Intellectual Property Law, I am pleased to submit the attached comments to the Fifteenth Draft of the Rules of Procedure of the Unified Patent Court, as issued for public consultation on June 25, 2013.

Please note that these views are being presented only on behalf of the Section of Intellectual Property Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing these comments, we would be happy to provide further input.

Sincerely,

Robert O. Lindefjeld
Chair, ABA Section of Intellectual Property Law
The views stated in this submission are presented on behalf of the Section of Intellectual Property Law (the “Section”) of the American Bar Association (ABA) only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Intellectual Property Law of the American Bar Association (the “Section”) hereby responds to the solicitation for comments on draft rules of procedure (“Rules”) of the Unified Patent Court (the “UPC”), published for comment on June 2013.

The membership of the Section includes 24,000 lawyers, associates, and law students. Most of the members are based in the United States of America, but a substantial number have lived and worked abroad, and some do so currently. Members of the Section have substantial expertise in intellectual property (“IP”) rights laws in the United States and around the world. Our membership includes lawyers in the law departments of businesses and the faculties of law schools, as well as in private practice and in government. In addition, many non-U.S. attorneys are active as Associate Members in the Sections and have contributed their expertise and insights to the Section’s work.

The Section welcomes the goals of the drafters of the draft Rules of Procedure to establish the operations of the Unified Patent Court in Europe by providing an efficient system to enforce patent rights across Europe, to obtain a pan-European declaration of non-infringement or revocation of an invalid patent. The Section appreciates the opportunity to comment on the draft Rules to assist Europe in achieving these goals. These Comments offer the perspective of the Section based on our members’ experience in the United States and abroad in the fields of IP rights and international business law. These comments are not intended to be comprehensive, but reflect some of the issues raised by our members. The Section hopes that these comments will assist the drafting committee as it evaluates these draft Rules. We welcome future opportunities to submit additional comments and urge the drafting committee to allow full notice and public consultation on all future drafts.
GENERAL COMMENTS AND EXECUTIVE SUMMARY

The Section recognizes and appreciates the efforts made in the draft Rules to establish the operations of the Unified Patent Court in Europe. The draft Rules are aimed at providing fair and efficient enforceability or revocation of patents and declarations of non-infringement. The draft Rules contain provisions on actions that can be lodged; by whom, by what means, and in which languages; preservation and collection of evidence; and procedural operations throughout the process.

A few areas of this fifteenth draft of the Rules of Procedure remain of concern to the Section and could benefit from further consideration. The first area relates to the opt out provisions. In particular, concerns arise regarding the difference between the date attributable to a patent for an opt out of the Unitary Patent system versus the date attributable to an action filed against the patent. A more consistent rule for “attribution” of dates needs to be resolved.

A second area involves bifurcation of infringement and revocation actions, the need for further consideration of the timeframes during which actions can be filed, consultation among the local/regional division and the central division, and the timing of stays.

Additionally, numerous Rules would benefit from clarification, further explanation or consideration, including, inter alia, rules relating to decisions on applications for provisional measures; the joining of actions; and questioning and cross-examination of witnesses and experts.

The Section, in principle, supports establishment of Rules of Procedure for operations of the Unified Patent Court in Europe. It is important that, before the UPC becomes operational, the law must be unambiguous with respect to the procedure.

The following comments relate to specific provisions of the draft Rules and are submitted by the Section to raise particular concerns. The draft provisions addressed are set forth in italics.

SPECIFIC COMMENTS REGARDING THE RULES OF PROCEDURE

Rule 5 – Opt out option

Rule 5 - Lodging of an Application to opt out and withdrawal of an opt out

4. Subject to Rule 5.3 the Registrar shall as soon as practicable enter the Application to opt out in the register. Subject to Rule 5.5, the optout [sic] shall be regarded as effective from the date of entry in the register.

5. In the event that an action has been commenced in respect of a patent (or patents) and/or an application (or applications) contained in an Application to opt out prior to the date of entry of the Application in the register the Registrar shall notify the applicant of such action as soon as practicable and the Application for opt out shall be ineffective in respect of the patent (or patents) and or application (or applications) in question.

7. A patent or application the subject of an Application to withdraw which has been entered on the register may not thereafter be the subject of a further Application to opt out.
[9. An Application to opt out may be lodged with the European Patent Office after a date to be announced by the European Patent Office and before the coming into effect of the Agreement. The Application shall be accompanied by the fixed fee provided for in Rule 5.3 and shall otherwise comply with any instructions for lodging the Application issued by the European Patent Office. At the date of entry into force of the Agreement in accordance with Article 59 of the Agreement the European Patent Office will transfer details of all such Applications and all such fees to the Registrar and the Applications shall be treated as entered on the register and effective from the said date of entry into force of the Agreement.]

The Section appreciates that applicants are given the ability to opt out of using the Unified Patent Court by lodging an application with the Registry and paying a fixed fee. Rule 5.4 provides that “the optout shall be regarded as effective from the date of entry in the register,” which shall be “as soon as practicable.” Many applicants may wish to opt out, particularly when the Court is first instituted. If there is a flood of applications, registration of all the applications could take weeks or even months. The addition of Rule 5.9 to the fifteenth draft of the Rules is a positive step to handle the initial situation by providing that the date of entry into the register will be the date of entry into force of the Agreement. However, this does not resolve the entire issue.

According to Rules 17.1 to 17.3, an infringement action before the Court of First Instance is also entered into the register as soon as practicable. However, “the action shall be regarded as pending before the Court as from the date of receipt attributed to the Statement of claim.” See Rule 17.3. Although not specifically stated in the Rules, it is presumed that a revocation action before the Court of First Instance would similarly be regarded as pending from the date of receipt attributed to the Statement of Claim. The attributed date of receipt for an action could be much earlier than the date of entry into the register. No definition or guidance is provided for what date of receipt will be “attributed,” and it is only presumed that this will be the actual date of receipt.

An issue arises from Rule 5.5, which states: “In the event that an action has been commenced in respect of a patent (or patents) and/or an application (or applications) contained in an Application to opt out prior to the date of entry of the Application in the register the Registrar shall notify the applicant of such action as soon as practicable and the Application for opt out shall be ineffective in respect of the patent (or patents) and or application (or applications) in question.” Depending on how the date of receipt is attributed to an action, a revocation action on a particular application could be filed later than an opt out filed by the patentee, yet the revocation could be attributed an earlier date of receipt. This case is demonstrated below:

```
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>02 Jan 15</td>
<td>Applicant files opt out</td>
</tr>
<tr>
<td>05 Jan 15</td>
<td>Registrar receives opt out</td>
</tr>
<tr>
<td>08 Jan 15</td>
<td>Registrar enters opt out into Register</td>
</tr>
<tr>
<td>05 Jan 15</td>
<td>Challenger files revocation action</td>
</tr>
<tr>
<td>07 Jan 15</td>
<td>Registrar enters revocation into Register</td>
</tr>
<tr>
<td>06 Jan 15</td>
<td>Registrar receives revocation action</td>
</tr>
</tbody>
</table>
```
In this scenario, the opt out is filed and received before the action is received. However, the revocation action is received and entered into the register before the opt out is entered. Under Rule 5.5, the opt out shall be ineffective because an action has been commenced before the opt out is considered effective. Even if the activities on 07 Jan 2015 and 08 Jan 2015 in the example above (entry of revocation and entry of the opt out, respectively) were reversed, the opt out would still not be considered effective because the action is deemed effective as of the date of receipt, whereas the opt out is only effective as of the date of entry into the register. This greatly disadvantages patentees who do not wish to participate in the system and defeats the public policy behind allowing patentees to opt out.

The Section encourages the Rules Committee to align these two dates such that the applicant is not disadvantaged. This could be accomplished by defining the “date of entry in the register” for an opt out to be the date of receipt of a properly completed opt out application, thus, applying the same standard for date setting of opt outs as is applied for actions. A second option would be the opposite of the first proposal—defining the date of receipt “attributed” to an action as the date of entry into the register.

Consideration should also be given to the situation in which the date of the opt out and the date of the commencement of an action occur on the same day. The Rules provide no guidance as to which takes priority—the opt out or the commencement of an action. The Section recommends that the opt out should be given priority over the commencement of an action if both are assigned the same date. To support the purpose behind the opt out option, any applicant who wishes to opt out should be given sufficient opportunity to do so before being subjected to actions against the patent.

The Section supports the addition of Rule 5.7, which limits the opt out—opt in to one cycle. This maintains appropriate flexibility for the applicant while providing more certainty for challengers.

Rules 37, 70, and 71; Art. 33(3) of the Agreement—Bifurcation of the case

According to Rules 37, 70, and 71, the decision regarding bifurcation of an infringement case and an action for revocation of a patent or a declaration of non-infringement lies with the local or regional court at which the infringement case is brought. The revocation action or declaration of non-infringement action is stayed until the local or regional court decides how to proceed with the cases.

Rule 37.4 states: “Where the panel decides to proceed in accordance with Article 33(3)(b) of the Agreement, the panel may stay the infringement proceedings pending a final decision in the revocation procedure and shall stay the infringement proceedings where there is a high likelihood that the relevant claims of the patent (or patents) will be held invalid on any ground by the final decision in the revocation procedure.” No indication is provided as to how the panel will determine the likelihood of invalidity of the relevant claims. Presumably, this determination will be based on the written proceedings only. However, it is unclear whether the parties are allowed to present oral arguments or similar consultation. Clarification of this Rule is suggested.

Rule 70.1 explains that “where a claimant has lodged a Statement for revocation (Rule 45) before the central division and the defendant or a licensee entitled to commence proceedings
pursuant to Article 47 of the Agreement subsequently initiates an infringement action in a local or regional division against the claimant in respect of the same patent (or patents).” the provisions of Rule 70 apply. Concerns arise regarding timing for the infringement action. According to this Rule 70.1, if an infringement action is filed at any time subsequent to the filing of a revocation action, further proceedings at the central division are stayed pending a decision by the local or regional court on how (bifurcated or combined) and where (central division or local or regional court) to move forward with the competing actions for infringement and revocation.

Rule 70.3 requires, “[T]he panel appointed in the central division to hear the revocation action pursuant to Rule 48.2 to stay all further proceedings in the revocation action pending a decision of the panel hearing the action for infringement . . .” unless otherwise agreed by the parties. Rule 70.4 requires that the panel take into consideration how far the revocation action in the central division was advanced prior to the stay. However, the Rules do not specify any particular timeframe during which an infringement action can be brought.

This differs from Rule 71.3, which relates to actions for declaration of non-infringement. Under Rule 71.3, to obtain a stay of the action for the declaration of non-infringement, the infringement action must be brought within a three-month period from the date attributed to the action for declaration of non-infringement. If the action for infringement is raised outside of the three-month period, then the central division and the local or regional court involved must consult to agree on further proceedings or stays.

Under the current draft Rule 70.3, it seems that local or regional court need only consider the progress made in the revocation action at the central division. It need not consult with the central division or anyone else. The local or regional court has full discretion to decide whether to suspend the proceedings at the central division. The local or regional court could stay proceedings at the central division very late in the action, even one day before the case is decided in the central division, and leave the revocation action suspended until the end of the infringement proceedings, which could take a year or more. The Rules do not address whether this decision to stay the revocation action pending the outcome of the infringement case, or any of the alternative decisions (i.e., refer the infringement case to the central division; or proceed with both infringement and revocation at the local or regional court), is appealable by either party at this time or a later time. Nor do the Rules address the length of time that the local or regional court has to decide which alternative to use or how long the stay will remain effective until that decision is made.

The Section suggests that guidance should be provided regarding the timeframe during which an infringement action could be filed (Rule 70.1), consultation with the central division to ensure that its concerns with progress are considered (Rule 70.3), and timing indicating how long the stay can remain in effect before the local or regional court decides on its action.

Pursuant to Rules 70 and 71, the decision regarding bifurcation lies in the hands of the panel of the local or regional court. The Section appreciates that this panel is comprised of three legal judges, only one of which is allowed to be a judge from the locality or region where the action is
raised, and one technical judge, who is also likely to hale from a different locality. This diversity is welcomed as a gesture to promote fairness in local or regional courts.

Basic set up of the procedural system
Notably, neither the Agreement nor the Rules of Procedure state whether the Court’s legal system is based on civil law or common law. Presumably, the system is not based on the doctrine of precedent and does not require stare decisis, as this is not specifically mentioned. However, in at least one rule—Rule 243.3—a common law principle is referenced: “Where a [sic] action is referred back to the Court of First Instance, the Court shall be bound by the decision of the Court of Appeal and its ratio decidendi.” Guidance regarding the effect of prior cases would be helpful to practitioners, particularly at the early stages of the Court. Will cited cases be precedential, or at least persuasive? Will UPC decisions be deemed more persuasive than decisions in the national courts and/or outside of Europe? If the facts in a case before the UPC are more similar to the facts in a case from a national court decision than any preceding UPC decision, must the Court give more weight to the UPC decision than the national court’s decision? If the Court finds a national precedent more persuasive than a UPC precedent, or vice versa, is that decision appealable? Clarification on the authority of UPC decisions with regard to other courts within or outside of Europe will help practitioners frame the arguments of law to be made before the Court.

Amicus
Often, the interpretation of law requires consideration of public policy or weighing of alternative arguments or interpretations. Parties to an action may provide their specific views, but these views may not sufficiently provide a broad spectrum of viewpoints. In such cases, it may be helpful to receive additional arguments of the law and views on related policy concerns as they relate to the specific facts of an action. Statements or briefs from amici may be helpful to the Court. Notably, however, no rules specifically provide for submissions from amici. The Section urges the addition of a rule or paragraph which would provide a means for amicus briefs or submissions to the Court, even if only allowed for certain cases or appeals. This could be provided through the intervener route (by adding language to Rule 313), but as such, the intervener should not be treated as a party (as allowed by Rule 315.4).

Specific Rules Needing Further Clarification
Rule 11.2 – Settlement Obligations
Rule 11 relates to settlement of disputes. According to Rule 11.2, “Pursuant to Rule 365 the Court shall by decision confirm the terms of any settlement, including a term which obliges the patent owner to limit, surrender or agree to the revocation of a patent or not to assert it against the other party and/or third parties.” The clause “and/or third parties” in this rule leads to a lack of clarity. This lack of clarity could be resolved by limiting the phrase “and/or third parties” to “and/or specified third parties related to the action” or equivalent terminology. This language ensures that the settlement is limited to only those parties which are intended, and avoids an interpretation that the settlement agreement applies to all third parties.
Rule 19 – Preliminary objection
As currently written, Rule 19.4 only applies to similar actions in three or more regional divisions. Does this exclude multiple actions in local divisions? Does it exclude a combination of regional and local divisions? Should the Rule read “regional and/or local divisions”?

Rule 19.5 states, in part, “The Registry shall as soon as practicable invite the claimant to comment on the Preliminary objection. Where applicable, the claimant may of his own motion correct any deficiency [Rule 19.1(b) or (c)], within 14 days of service of notification of the Preliminary objection. Alternatively the claimant may submit written comments within the same period.” This section is confusing.

The Registry shall invite the claimant to comment (first sentence), and the claimant may submit written comments (third sentence). The claimant may on his own motion correct deficiencies (second sentence). The term “alternatively” does not seem to fit in the third sentence unless the third sentence refers to the second sentence: the claimant may correct the deficiencies or may submit written comments supporting the alleged deficiency without modification.

The Section suggests that this Rule be revised. Depending on the intended meaning, proposed language may be: “The Registry shall as soon as practicable invite the claimant to comment on the Preliminary objection. Where applicable, the claimant may of his own motion correct any deficiency [Rule 19.1(b) or (c)], within 14 days of service of notification of the Preliminary objection. Alternatively within the same period the claimant may submit written comments in support of the alleged deficiency without modifying the submission within the same period. Also, the claimant may of his own motion correct any deficiency [Rule 19.1(b) or (c)], within 14 days of service of notification of the Preliminary objection.”

Rule 25 – Counterclaim for revocation
Rule 25.3 provides that where a counterclaim for revocation is filed against an infringement claimant, but the claimant is not the proprietor or not the only proprietor, any other proprietors shall become parties to the revocation proceedings. It is unclear whether these proprietors may also now join the infringement action as parties, even if they had previously decided not to join.

In this instance, would the proprietor be required to request intervention under Rule 313? If so, under Rule 314, the other parties shall be given the opportunity to be heard, presumably to allow the opposing party to argue against intervention. Does the Court have discretion to deny the proprietor’s joining of the action at this late time? Circumstances under which a proprietor of a patent would not be allowed to join an action, if any, should be described.

The Section recommends adding language and/or cross-references to explain whether and how a proprietor, not originally named in a revocation action but subsequently added, may later join a related infringement action against the party seeking revocation.

Moreover, should this additional proprietor be allowed to join the action, does the proprietor need leave of the Court to file its Statement of claim, falling under Rule 263? One could reasonably argue that the addition of a proprietor as an intervener / party would require an
original pleading of the Statement of claim, and thus, this submission would not be an amendment. However, clarity on this matter is suggested.

**Rule 29 – Defence to the Counterclaim for Revocation**

Rule 29.1, in part, states: “[T]he proprietor shall lodge a Defence to the Counterclaim for revocation . . . .” It is recommended that this Rule be changed to add the claimant, thereby reading: “[T]he claimant and/or proprietor shall lodge a Defence to the Counterclaim for revocation . . . .” Adding the claimant makes Rule 29.1 consistent with Rule 25.3, which clarifies that the claimant and the proprietor might not be the same entity, and Rules 29a.1(e) and (f), which specify that the contents of the Defence to the Counterclaim should contain both “the claimant’s and the proprietor’s response to the defendant’s choice . . . .” and Rule 29a.2, which requires both the claimant and the proprietor to supply copies of documents.

**Rule 30 – Application to amend the patent**

Again in Rule 30, the language is confusing regarding the claimant and proprietor. In Rule 30.1, the term “proprietor” is used alone in the first paragraph, but in subparagraph (a), “claimant proprietor” is used. For clarity, we recommend that the terms in Rules 29 and 30 are consistent, no matter which term is used: “claimant,” “proprietor,” “claimant and/or proprietor,” or “claimant proprietor.”

**Rules 33 and 34 – Allocating a technically qualified judge**

Rule 33.1 provides that any party may request the allocation of a technically qualified judge to the panel hearing an action. Similarly, in Rule 34, the judge-rapporteur may at any time during the written procedure request allocation of a technical judge. It is unclear whether a party can appeal the selection if the party believes that the technical judge is not technically suitable for this particular field. If so, what procedure is needed for this challenge?

**Rule 40 – Accelerated proceedings**

Rule 40 states: “The judge-rapporteur shall accelerate proceedings before the central division where an Application for provisional measures has been lodged [Rule 206].” The timing for acceleration is not described. Does this simply mean that the proceedings are rapidly transferred to the central division? Does “accelerate” actually refer to the speed at which the case will be heard at the central division? For example, does this mean that the case will be given priority at the central division to move ahead of cases already pending at that court? If this case is being transferred to the central division for provisional measures, does the case return to a normal, non-accelerated speed upon its return to the local or regional court? The Section suggests that more guidance should be provided regarding what is meant by “shall accelerate proceedings.”

**Rule 112.4 – Conduct of the oral hearing; Rule 178.5 – Hearing of witnesses; Rule 220.2 – Appealable decisions**

Rule 178.5 states in part: “Under the control of the presiding judge, the parties may put questions to witnesses.” This Rule also controls the hearing of experts of the parties (Rule 181) and court-appointed experts (Rule 188). Rule 112.4 similarly allows the parties to “put questions to the witness or expert.” Presumably, these questions may include cross-examination of witnesses and experts, but this is unclear from the Rules. If cross-examination is allowable, what
procedure is to be used? Furthermore, it is unclear whether interactive communications between witnesses and/or experts are allowed. Clarification on these points is suggested.

Rules 112 and 178 continue, stating: “The presiding judge may prohibit any question which is not designed to adduce admissible evidence.” Thus, questioning of witnesses, party experts, and court appointed experts—and perhaps cross-examination of each—is at the discretion of the presiding judge. Certainly, parties will not always agree with the presiding judge’s discretion. Per Rule 220.2, “Procedural decisions or orders may be appealed with leave of the Court.” However, as noted by the Drafting Committee, the language of Rule 220.2 is unclear. Although the Rule refers to Article 73 of the Agreement, that, too, is unclear. Both the Court of First Instance and the Court of Appeal are named in Article 73. The specific reference to “Court,” which occurs in Article 73(2)(b)(ii), specifically states, “[W]here the Court grants leave to appeal, within 15 days of the notification of the Court’s decision to that effect.” While the use of the word “Court” twice in the same phrase would suggest that it referred to the same court (viz., the Court of First Instance, who issues the decision), this interpretation is not a reasonable one. The court which issues a decision should not be the same court which decides whether an appeal may occur; if the court believed that the decision is in error, it would not have issued that decision in the first place.

A more reasonable interpretation is that the first mention of “Court” in the noted phrase refers back to the Court of Appeal, named in Article 73(2). The Section urges this more reasonable interpretation of the term Court and recommends that the words “of Appeal” be added at the end of Rule 220.2 for clarity.

Rule 211.2 – Decision on the Application for provisional measures
Under Rule 211, the Court may order provisional measures such as injunctions, seizure of goods or assets, etc. Particularly, in Rule 211.2, “[T]he Court may require the applicant to provide reasonable evidence to satisfy the Court with a sufficient degree of certainty that the applicant is entitled to commence proceedings pursuant to Article 47, that the patent in question is valid and that his right is being infringed, or that such infringement is imminent.” (emphasis added). The Section supports Rule 211’s general approach for determining whether provisional measures will be ordered—first reviewing the likelihood of success on the merits. An alternate approach, which first determines the economic consequences to each party, often results in requests for preliminary injunctions being rejected, thereby allowing the challenger to enter the market, only later to be removed from the market once patent validity and infringement are fully considered. Economic consequences can be very difficult to estimate, and ultimately do not weigh into the validity and infringement assessment. Given the extreme importance of such determinations, it is imperative to review likelihood of success on the merits first.

However, more specificity is needed regarding the phrase “sufficient degree of certainty.” Preferably, this phrase should be defined in terms of a legal standard. Does a sufficient degree of certainty require a likelihood of success (more likely than not, preponderance), or does the evidence need to rise to a clear and convincing standard? Given that a patent granted by the European Patent Office has undergone great scrutiny before being allowed, a “sufficient degree of certainty” at the preliminary measures stage should only require a showing that the patent is more likely valid than not valid.
Rule 222 – Subject-matter of the proceedings before the Court of Appeal
Under Rule 222.1, an appeal to the Court of Appeal is a review of the record from the Court of First Instance. Per Rule 222.2, requests, facts, and evidence not submitted at the Court of First Instance may be disregarded at the discretion of the Court of Appeal. Additional submissions may be allowed if, inter alia, the new submissions “could not reasonably have been made.” This standard, however, disregards the situation in which not all issues were fully considered by the lower court. In that situation, certain submissions may not have been needed at the lower court, but could have been made, had they been needed. It is suggested that a scenario be added to Rule 222.2, stating that the Court of Appeal should take into account whether all issues are fully considered by the Court of First Instance, and if not, then additional evidence should be allowed.

Rules 260, 302, and 340 – Connection – Joinder
Under Rule 340, the Court “may, at any time, after hearing the parties, order that two or more actions shall, on account of the connection between them, be heard together.” The phrase “connection between them” is unclear. Rule 302.3 clearly explains, “The Court may order that parallel infringement or revocation proceedings relating to the same patent (or patents) and before the same local or regional division or the central division or the Court of Appeal be heard together where it is in the interests of justice to do so.” The similarities required between actions to meet the requirements of Rule 302.3 are named—same patent, same division or court. However, it is unclear in Rule 340 what connection between actions is required. It is apparent that Rule 340 differs from Rule 302 in the phrase “where actions are in different divisions,” and in that instance, the differentiation between the two Rules is evident. But the connecting factors for the remainder of Rule 340 are not so evident, and differentiation of the Rules is advised.

Furthermore, in Rule 340 it is noted that the parties are to be heard before the Court decides to join actions. Is this a joint consultation such as a hearing, ex parte communications, written submissions? Where the actions are pending in different divisions, do the parties have the ability to request transfer to a completely different (“neutral”) division or, alternatively, the central division?

Rule 262 – Public access to the register
The Section appreciates that the Court will provide public access to many of the documents in the registry, with confidentiality available where needed. The availability of timely-published decisions and orders improves certainty in the law, particularly when cases have precedent or persuasive effect. Providing public access will make such decisions easily citable and available for comparison in arguments of law before the Court.

Rule 263 – Leave to change claim or amend case
This Rule states: “A party may at any stage of the proceedings apply to the Court for leave to change its claim or to amend its case . . . .” For the sake of clarity, it would be clearer to use the phrase “change its Statement of claim or to amend.”

Rule 296.3 – Duration and effects of a stay of proceedings
Rule 296.3 states: “While proceedings are stayed, time shall cease to run for the purposes of procedural periods. Time shall begin to run afresh for the purposes of procedural periods from
the date on which the stay of proceedings comes to an end.” The phrase “begin to run afresh” is not clear. Is it intended that during the period of the stay, time is tolled—meaning that it is delayed for the period of the stay but then begins to run again, continuing from the point at which the stay began and including in the total time any time which had run before the stay? Alternatively, is it intended that once a stay occurs, time is reset, such that when the stay ends, the time begins again from the beginning? The first interpretation (tolling) seems more reasonable than the second (starting over); however, the phrase “begin to run afresh” is unclear. The Section suggests that Rule 296.3 should be explained more clearly.

Timing in general
At numerous locations throughout the draft Rules package, timing for lodging a response or sending notification is described without explaining what trigger initiates the timing. For example, Rules 16.3(a) and (b) state in part, “[T]he Registry shall as soon as practicable invite the claimant to: (a) correct the deficiencies within 14 days; and (b) where applicable, pay the fee for the infringement action within 14 days.” The timing is unclear—within 14 days of what event? Within 14 days of the invitation being sent by the Registry? Within 14 days of receipt of the invitation? Is the 14 day segment in subsection (b) the same 14 days as in subsection (a), or is it 14 days after the 14 days in subsection (a)? The Section recommends that in each case where timing is noted in the Rules, an event which initiates the timeline should be described (e.g., date notification is sent by a party or a court, date of service of notification, receipt of notification, etc.). Rule 356.1 of the draft Rules provides an helpful example where the timing is clear: “A party against whom a decision by default has been given may lodge an Application to set aside that decision within one month of service of the decision.” The Section notes that timing clarity would be helpful in at least the following Rules throughout the package: 27.2(a) and (b) and 27.4; 32.3; 39; 89.2(a) and (b); 207.5(a); 229.2; and 252.2.

Rule 6.3 also lacks clarity due as it relates to timing. The Rule states: “Where the postal or electronic address for service provided by a party pursuant to these Rules has changed that party shall give notice in writing to the Registry and to every other party as soon as such change has taken place.” In many places throughout the Rules, the term “as soon as practicable” is used; yet here, the term “as soon as change has taken place” is used. The Section recommends that the term be changed in this instance to “as soon as practicable.” This will provide consistency and discourage arguments among parties over timing of address changes.

Register, Registry, and Registrar
Additionally, through the Rules, the terms “register,” “Registry,” and “Registrar” are sometimes used interchangeably. A definition for each of these terms could be useful to practitioners to understand any important differences.

Table of Contents
While generally we have not commented on formatting, it is noticeable and comment-worthy that the Table of Contents is not appropriately identifying all sections and rules in this fifteenth Draft of the Rules.
CONCLUSION
The Section hopes that this submission is useful. We would be pleased to respond to any questions regarding these Comments, or to provide any additional comments or information that may be of assistance. The Section welcomes future opportunities to comment as the Rules of Procedure are finalized.