

Germany

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1. **Split nullity/infringement system**

A fundamental feature of the German patent system is that actions on the merits for patent infringement and proceedings for patent invalidity are heard separately from one another and before different courts/instances. In an infringement action on the merits, there is no invalidity defence. See Section 4 below.

2. **Lawyers**

In German patent infringement litigation, each party must be represented by a lawyer (*Rechtsanwalt*). Usually, the team in patent litigation will also include a patent attorney (*Patentanwalt*) to support the lawyer. In a patent revocation action, each party may be represented by a lawyer and/or by a patent attorney.

Lawyers have rights of audience in every court, and there is no need to instruct “local” lawyers. However, one exception to this applies to the final instance in patent infringement proceedings. In the case of proceedings before the Federal Court of Justice (*Bundesgerichtshof*), each party must be represented by a specialised lawyer. Other lawyers are not admitted to this court.

3. **The court system**

3.1 **Patent infringement cases**

Patent infringement cases are heard in three instances: District Courts (*Landgerichte*), Higher Regional Courts (*Oberlandesgerichte*) and the Federal Court of Justice.

At first instance, there are 12 District Courts which are competent and specialised for patent infringement litigation (roughly one court per federal state (*Bundesland*)). The litigator has a choice of forum if, as is usually the case, the infringing acts occur nationwide. Three professional judges make up a District Court’s chamber. There is no jury.

All judges are lawyer-judges. Judges are not simply senior lawyers; they are a separate profession with specialised training. In general, these lawyer-judges do not have a technical background. Nevertheless, some of the most frequently chosen District Courts such as Düsseldorf and Mannheim hear over 100 patent infringement cases per year, and they have developed a good understanding of technical issues.

The District Court of Düsseldorf, in particular, has an excellent reputation internationally for its expertise and the quality and predictability of its decisions. The German courts hear more patent infringement cases than those of any other European country.

From the District Courts, an appeal lies to the specialised senates of Higher Regional Courts (one per District Court, for example, from the District Court of Düsseldorf to the Higher Regional Court of Düsseldorf). In general, the appeal court is bound to the findings of fact of the court of first instance. Exceptions apply if the findings of fact are incomplete. However, a party may only introduce new facts in appeal proceedings if it has not acted negligently in not presenting the facts in first instance. Like the first instance court, the appeal court sits with three professional lawyer-judges. Again, the judges are experienced in patent infringement cases.

From the Higher Regional Courts, a further appeal is possible to the Federal Court of Justice, which is located in Karlsruhe. Such further appeal is restricted to a legal review and is only admissible if:

- the matter is of general relevance; or
- the appeal is desirable in order to develop a point of law or to make the law more consistent; or
- the appeal is desirable in order to correct significant errors in the appeal judgment.

Such appeals in patent matters are heard by the 10th Senate of the Federal Court of Justice, which sits with five professional lawyer-judges, all of whom will have very wide experience in patent matters.

In theory, a leapfrog appeal that leads from the District Courts directly to the Federal Court of Justice is also possible. However, such leapfrog appeal is rarely practised, as it requires consent from both parties and from the Federal Court of Justice.

Only one judgment of the court is given in patent infringement cases and there are no dissenting opinions of individual judges.

3.2 Patent revocation cases

Patent revocation cases are heard in two instances: the Federal Patent Court (*Bundespatentgericht*) and the Federal Court of Justice.

Only the Federal Patent Court, which is located in Munich, is competent at first instance. The Federal Patent Court has specialised senates for the different fields of technology. Five professional judges make up a senate. Two of them, including the presiding judge, are lawyer-judges, while the remaining three have a technical background.

From the Federal Patent Court, an appeal lies to the 10th Senate of the Federal Court of Justice. Such appeal is not restricted – at least under present law (as at September 2008) – to a legal review. The parties are free to introduce new facts on appeal.

Again, in patent revocation cases, only one judgment of the court is given. No dissenting opinions of individual judges are given.

3.3 Actions on the merits

Two types of actions on the merits are available in patent infringement litigation.

First, a patent proprietor or licensee under a patent can file a suit for patent

infringement. In such a suit, the plaintiff typically claims for, *inter alia*:

- cease and desist;
- information and rendering of accounts; and
- a declaratory judgment on damages (see Section 10 below).

Secondly, an alleged patent infringer can file a suit for declaration of non-infringement. The condition for such declaratory judgment is that the plaintiff has a legal interest in the judgment, for example, because it has received a warning letter from the patent proprietor. In response to a suit for declaration of non-infringement, the patent proprietor or licensee under a patent may file a suit for patent infringement. As soon as this suit has been tried in an oral hearing, the alleged infringer loses its legal interest in an independent declaration of non-infringement and consequently has to declare the suit for declaration of non-infringement terminated.

A patent revocation action can be filed by any party at any time, at least as long as the patent is in force.

3.4 Decisions from other jurisdictions

German courts usually take note of decisions from other jurisdictions, especially if the patent in suit is a European patent. Decisions of UK and Dutch courts are particularly persuasive for German courts. Decisions of US courts are taken into consideration to a lesser extent, as substantive US patent law differs considerably from both European and German patent law.

3.5 Requirements before filing an action

There are no special requirements that must be satisfied before an action can be filed. In particular, neither an attempt to reach an amicable solution, nor a warning letter are required. Nor are they of particular practical importance. Sending a warning letter prior to commencing an action does have the advantage that the defendant would have to bear the costs of the proceedings, even if it immediately acknowledged the claims in court. However, such acknowledgement is rarely given. Furthermore, a warning letter has the disadvantage that it may give the infringer the opportunity to launch a so-called “torpedo”, that is, to file a suit for a declaratory judgment of non-infringement in another European country. If proceedings in the other country are slow, even an inadmissible suit for a declaratory judgment may considerably delay a patent infringement suit in Germany. This is a much-disputed effect of relevant European procedural law (ie Council Regulation (EC) No 44/2001).

4. Procedure and time scale of proceedings

In the case of both an action on the merits for patent infringement and a suit for declaration of non-infringement, a judgment at first instance typically takes approximately eight to 12 months. The duration of the proceedings depends mainly on the chosen forum. If a neutral expert is appointed by the court, the duration may exceed this kind of time-scale by up to one or two years.

Following the filing of the action, the court will serve the statement of claims

upon the defendant within about one week. If the defendant is located in another European country, service will take approximately one or two months. The timetable for the court proceedings will be set by the court either in writing, or in an early preparatory oral hearing that is summarised by the court in writing. The defendant will be given several weeks, or up to a few months, to file a reply writ. After the reply writ, both parties usually file one further writ. The writs should contain detailed statements of facts, offers of evidence and legal evaluations. They are crucial for the preparation of the oral hearing. The main oral hearing typically lasts only a few hours. The hearing is directed by the presiding judge, who plays an active role. Opening the hearing, the court summarises the parties' pleadings. Frequently, the court gives some indication as to its provisional assessment of the case. The court may pose specific questions to counsel for the parties, and the counsel respond to these orally. The court decides whether additional evidence needs to be gathered, for example, by appointing a neutral expert or – rarely – by hearing witnesses. If a neutral expert is appointed, a further oral hearing may be held once the expert has submitted his report. The court pronounces its decision one week, or up to a few weeks, after the (last) oral hearing. It then delivers its written decision with grounds from one week, up to a few weeks later.

Typical steps and likely time scales of infringement proceedings before the District Court of Düsseldorf can be shown as follows (the time periods indicated are based on experience and may vary depending on the actual workload of the court):

Filing of the action	
Service of claims upon defendant	1 week from filing
Early preparatory hearing or written setting of timetable	6 weeks from filing
Reply writ by defendant	5 months from filing
Second writ by plaintiff	9 months from filing
Second writ by defendant	10 months from filing
Main oral hearing	11 months from filing
Decision announced by court	12 months from filing
Written grounds delivered by court	12 months from filing
Appeal admissible	1 month from delivery of written grounds

Appeal proceedings to the competent Higher Regional Court in patent infringement litigation typically last around 15 to 18 months.