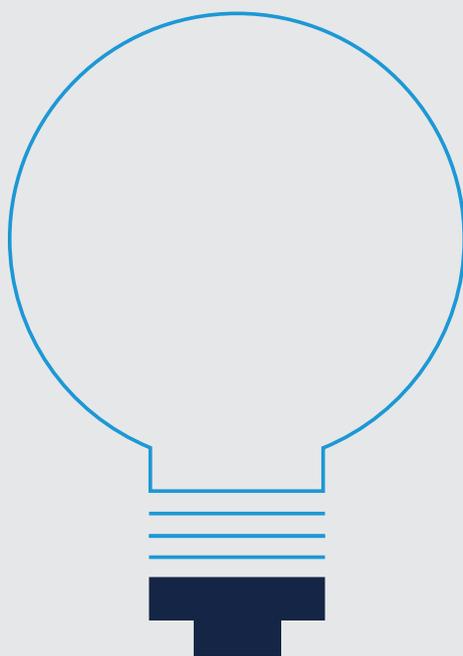


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Litigating Patents in Germany

Practitioner's guide with summary overviews
on revocation actions and utility models



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This brochure gives a short overview of the essentials of patent infringement proceedings in Germany. Since it addresses mainly the practitioner, the framework consists of issues of procedural law. Substantive law is discussed where applicable.

Where practical advice is given, application to a particular case is subject to careful review of the circumstances of the case. Any liability is excluded.

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A. The Courts

Among the more than one hundred first instance courts (District Courts) for civil proceedings in Germany, only about ten have competence for patent infringement cases. Each of these courts has jurisdiction over patent infringement suits in a certain part of the country. An alleged infringer can always be sued before the court having jurisdiction for the territory in which the infringer is resident or, at the plaintiff's choice, before the court competent for the territory in which acts of the alleged infringement have been committed. In cases where the alleged infringement has taken place all over the country, e.g. where a product is advertised over the Internet, the plaintiff may choose between all patent infringement courts.

A consequence of this rather free choice of venue is that some of the courts have become particularly popular for plaintiffs. A major part patent infringement suits are dealt with by the District Court of Düsseldorf, where nowadays three panels hear practically exclusively patent and utility model (see box „Utility Models“) cases. However, the courts in Munich and Mannheim also see many patent suits on their dockets.

Utility Models

A utility model is, like a patent, an instrument for protecting inventions. It has essentially the same effects like a patent, but its maximum term is 10 years instead of 20 years for patents. Moreover, utility models are not available for process inventions.

The substantive requirements for protection are very similar to those for patents. In particular, they also require novelty and inventive step. As opposed to patents, foreign prior uses do not count as prior art, and the inventor enjoys a six months grace period, i.e. his or her own publications do not prejudice protection. Moreover, pre-dating patent and utility model applications can be a bar to protection only if granted or registered, respectively, with claims relating to the same subject-matter (i.e. no whole-contents-approach as for patent applications e.g. under Article 54(3) of the European Patent Convention).

The procedural differences are more fundamental. Utility models are registered without substantive examination of novelty and inventive step, so that they can become effective within a few weeks or months from application. Any third party may attack a utility model with a revocation request, upon which all substantive protection requirements are examined by the German Patent and Trademark Office (GPTO) and, upon appeal, the Federal Patent Court as second instance. Defendants in infringement proceedings have, alternatively, the option to raise an invalidity defence, upon which the infringement court examines the substantive protection requirements (an option not available for patents in Germany).

A utility model can exist in Germany next to a parallel patent, even with identical claims. A utility model application may serve as priority application for a patent application and vice versa. In the latter case, the utility model application can be filed, even after the one year priority term, until a two months period after conclusion of the patent grant or opposition proceedings has expired. The term for such a „branched off“ utility model is counted from the application date of the patent application. It is admissible to formulate entirely new claims for the „branched off“ utility model, provided that the subject-matter was originally disclosed. As long as the ten year period has not expired, utility models may offer very comfortable division options for patent applicants.

The panels that hear patent infringement cases consist of three judges, all with a law degree. The case may be assigned to one judge only, but this happens very rarely. There are no technical judges. However, the courts may retain the services of technical experts and of candidates, i.e. persons with technical degrees during their training to become patent attorneys who work at the courts at some stage of their education. In addition, the parties may aid the court in technical questions with the help of patent attorneys and written opinions of hired experts specializing in the technical field at issue. Lack of technical expertise on the judges' side is usually not a problem.

However, German patent infringement courts have no competence to rule on the validity of patents. A defendant wishing to invoke invalidity of the patent-in-suit, must at-

tack the patent separately either in opposition proceedings before the European or German patent office or with a revocation action before the Federal Patent Court in Munich (see box „Revocation Actions“). This „bifurcation“ within the German court system often brings defendants in difficult situations, especially because infringement proceedings normally run faster than opposition and revocation proceedings. To avoid an adverse infringement judgment while the attack on the patent is still pending, the defendant has to press for a suspension of the infringement proceedings by demonstrating a high likelihood of success of the attack. This mostly requires presentation of prior art, against which the patent has not yet been examined and which is either novelty-destroying or at least clearly more relevant for inventive step than the prior art already considered during examination. It is generally advisable for prospective defendants to oppose potential patents-in-suit pre-emptively without waiting for an infringement action to be filed or threatened with.

Revocation Actions

After expiry of the nine months opposition term or conclusion of opposition proceedings, a patent may be attacked with a revocation action to be brought before the Federal Patent Court in Munich. For European patents, this court's rulings affect the German parts only. Such an action cannot be filed in parallel to opposition proceedings, i.e. a running opposition term or pending opposition is a bar to a revocation action. The party concerned may consider an own opposition or, after expiry of the opposition term, intervention in pending opposition proceedings (cf. Article 105 of the European Patent Convention).

One major difference between opposition and revocation procedures is that the latter are significantly more expensive. The court fees and reimbursable legal fees depend on the value of the proceedings which should reflect the value of the patent. If this value is set, for instance, to € 1,000,000, the plaintiff has to pay court fees of € 24,012 as a retainer.

Patent revocation cases are heard by panels consisting of five judges, two with a law degree and three technical judges. The technical judges are assigned to each case

according to their technical background, so that adequate technical qualification of the panel for the particular case is ensured.

Patent revocation proceedings last about 18 to 36 months and are concluded by a hearing upon which the judgment is proclaimed. Several months before the hearing, the court shall issue a preliminary opinion on the case and set deadlines for further submissions. Arguments, prior art or new patent claims, e.g. for auxiliary requests of the patentee, filed after such deadlines may be rejected for late filing.

The Federal Patent Court's judgments may be appealed before the Federal Court of Justice within a one month appeal term. The appeal procedure likewise ends with a hearing upon which the judgment is proclaimed, usually within 12 to 24 months.

The German practice regarding claim amendments is more liberal than that of the European Patent Office and its Boards of Appeal. For instance, the problem of an „unescapable trap“ (cf. G 1/93) does not exist, i.e. patent claims containing a limiting, however originally undisclosed, feature may be rescued with disclaimers according to which such features shall be ignored when assessing patentability. Moreover, amendments based on intermediate generalizations are widely accepted. As a consequence, a full revocation is more difficult to achieve in German revocation proceedings as it is in European opposition proceedings. This is another reason why it is generally highly recommendable to primarily attack relevant European patents with oppositions, even if infringement proceedings are not imminent.

B. The Claims

If a patent is infringed, the patentee or its licensee may seek relief by enforcing the following most important claims:

- **Cease and desist claim:** Any infringer has to stop the illegal acts immediately. This is the most important remedy. Proportionality of the injunction is normally not an issue, i.e. if infringement is established, a requested injunction will inevitably be awarded. The only exceptions of practical relevance concern situations in which compulsory licenses are justified (in case of standard essential patents, the courts have to judge whether the plaintiff followed the procedure outlined in the ECJ's judgement in re C-170/13).

- **Claim for recall of products and removal of products from the market:** An infringer who had shipped the products to commercial customers has to take measures in order get the products returned.

- **Claim for destruction:** the infringing products have to be destroyed at the infringer's expense. Modification of products so that they are no longer covered by the patent may suffice.

- **Claim for damages:** An infringer is liable for damages in case of wilful or negligent action. The threshold for negligence is very low. At least businesses specializing in the relevant technical field are expected to identify and analyze all relevant patents properly.

- **Claim for information:** Any infringer has to provide information about the supply chain and consignees of infringing products, about the quantity of sales and about prices. This information has to be supported by documents, e.g. copies invoices and/or delivery notes.

- **Claim for rendering of accounts:** Where the infringer is liable for damages, the courts usually award a claim for more detailed information. In particular, the infringer has to disclose its calculation of costs and profits. The plaintiff is, however, not entitled to send an auditor to the infringer in order collect the relevant data, i.e. the plaintiff has to rely on the information provided by the counterparty. It is therefore advisable to carry out various test purchases at an ear-

ly stage in order to be able to counter-check the infringer's information. If it turns out that the information provided is inaccurate, the plaintiff may demand that it is confirmed under oath, thereby forcing the infringer to rectify its data.

• **Claim for compensation:** If a party had wilfully or negligently made use of the patentable subject-matter of a published patent application which later on matured into a patent, the applicant is entitled to a compensation for such use. This remedy aims especially at situations of very long grant proceedings. In the case of a European patent application for which English or French is the language of the proceedings up to grant, it is required that the claims of the application be translated into German language and published by the German Patent and Trademark Office or that the claim translation is otherwise brought to the attention of the party that uses the invention.

The claims for damages and compensation are usually enforced in two steps: Initially, the plaintiff commences infringement proceedings, in which establishment of the defendant's liability is sought next to the injunction and other claims. After that stage, the plaintiff computes the damages and compensation according to the information obtained from the defendant. If the parties do not agree on an amount to be paid, the plaintiff may institute further proceedings for payment in which the court has to rule on the amount to be awarded.

The claims are usually owned by the patentee. However, where an exclusive license has been granted, the licensee may enforce an own cease and desist claim next to the patentee (provided that the license had been granted before the patentee filed suit against the infringer). Damages are to be split between the patentee and the exclusive licensee. In case of a non-exclusive license, the patentee may authorize the licensee to enforce the cease and desist claim and assign the claim for damages.

C. The Standard Procedure

Most patent infringement cases are dealt with in the following manner:

I. OUT OF COURT CORRESPONDENCE

While it is not mandatory for a plaintiff to warn the counterparty before an infringement case is taken to court, it is quite common to request the prospective defendant if the claims are accepted voluntarily. A defendant who has not been given opportunity for a voluntary acceptance before initiation of court proceedings, but who accepts the claims immediately after service of the complaint, is usually awarded cost reimbursement from the plaintiff. Plaintiffs wishing to avoid this cost risk are normally required to send warning letters in proper form before filing their complaints. Exceptions to this rule are accepted only under special circumstances.

II. STANDARD INFRINGEMENT PROCEEDINGS

1. Principles

German patent infringement proceedings are known to run relatively efficiently in terms of costs and time. One reason is certainly the exclusion of validity issues due to the „bifurcation“ system (see above under A., last paragraph, and box „Revocation Actions“). Further reasons may be found in some principles governing German law of civil procedure, such as:

a) Absence of ex officio fact finding: It is up to each party to bring forward all facts which are necessary to substantiate its claim or counterclaim, respectively. Likewise, it is generally the parties' task to dispute facts they believe to be incorrect and to present evidence to the court. The court does not investigate for such facts or evidence on its own.

b) Requirement of expedient submissions: The parties shall fulfil the aforesaid task by submitting facts and offers of evidence in writing as early as possible. For instance, a defen-

dant objecting to the admissibility of the suit is not entitled to withhold non-infringement arguments until the court has ruled on the admissibility. The goal is to have all relevant facts on the court file well before the first hearing on the substance so that the court can rule on all issues at once and after one hearing.

c) Minimum number of hearings: There is mostly only one hearing, sometimes preceded by a very short hearing on formalities. A hearing on the substance often lasts not much longer than one hour. Based on the written procedure, the judges are well-prepared and expect the discussion to be focused on the critical issues. Further submissions of facts after conclusion of this hearing are generally not admissible. If the court finds that taking of evidence is unnecessary, it will normally proclaim its judgment some weeks after the hearing on the substance. This happens in most cases as they circle around claim construction which is treated as a question of law.

These principles force each party to patent infringement proceedings to prepare its case at a very early stage. It is crucial to substantiate all arguments in the submissions preceding the hearing on the substance. A need for further preparation is not accepted as a ground for a suspension. So it is highly advisable to fully analyze the case before the first step is made.

2. Complaint

The plaintiff institutes the patent lawsuit by filing a written complaint. It follows from the aforementioned principles that the complaint should set out in detail the relevant properties of the attacked product or process and why the plaintiff believes that it is covered by a patent claim. This usually requires argumentation for each element of the patent claim. It should be clearly indicated whether literal or, primarily or alternatively, equivalent infringement is asserted. In the latter case, the plaintiff must establish:

(1) that the respective element used in the attacked product or process has the same effect as the corresponding element of the claim,

(2) that it is obvious to the skilled person that the element of the claim may be replaced with the element actually used to achieve the same effect, and

(3) that the result of such extension of the scope of protection is oriented by the meaning of the claimed teaching. This third precondition shall ensure, for instance, that the patent does not cover the opposite from what is claimed (e.g. „perpendicular“ instead of „parallel“). Moreover, subject-matter disclosed in the patent specification but not covered by the claims does usually not qualify for protection as an equivalent.

The patentee may enforce a restricted version of the patent-in-suit by adding further elements to the enforced main claim. This is sometimes advisable to counteract attacks on validities or prior use rights. Unlike in other jurisdictions, such additional elements may not only be taken from sub-claims. Rather, the plaintiff may also pick them from the description and even from the drawings.

3. Further Procedure

After receipt of the complaint and payment of the court fees, the presiding judge decides whether to fix a date for a hearing right away or to invite the parties to make submissions first, so that there is enough time for them to prepare a hearing later on. If the judge opts for a hearing, it may either be a hearing on formalities only, which usually takes place about one to three months after filing of the complaint, or a hearing on the substance later on. The court may also set time limits for filing submissions. The question how to proceed is left to the court's discretion and each court follows its own practice. The main hearing usually takes place after six to 18 months from the filing of the complaint, largely depending on the court's current workload.

The court then serves the complaint together with the presiding judge's orders on the defendant. The plaintiff is notified accordingly. Up to the main hearing, the parties exchange submissions. It is, of course, highly advisable to submit all facts and offers of evidence within the time limits set by the court to avoid a risk of rejection for late filing. Legal comments may be submitted at any time up to the proclamation of the judgment.

If a decisive question of fact remains disputed between the parties in the hearing on the substance, the court will have to take evidence, provided the party bearing the burden of proof has timely made an offer of evidence and pays a retainer for the costs. This taking of evidence requires another hearing, unless the evidence such as a witness, is already present in

the hearing on the substance. If evidence is to be taken in the form of an expert opinion, the expert will be appointed by the court, sometimes upon proposals from the parties. Expert opinions submitted by the parties only are not accepted as formal evidence, but only as arguments. As such, they may be helpful in some cases to substantiate a point.

The parties themselves and their legal representatives cannot serve as witnesses. Their testimonies can be used as evidence under special conditions only. This should be considered when collecting evidence, e.g. by inspecting a competitor's product on an exhibition.

4. Decision

If taking of evidence is either unnecessary or finally concluded, the court will proclaim its decision, usually within two to eight weeks from the final hearing. The decision may be either a judgment or a suspension order. The latter may be issued if, firstly, an attack against the patent-in-suit is pending, secondly, the infringement court believes that it has high chances of success (the infringement courts tend to follow the preliminary opinion of the Federal Patent Court, cf. box „Revocation Actions“, but this opinion is usually not issued in time if the revocation action was launched after the infringement action), and, thirdly, the court would otherwise award the plaintiff's claims, i.e. the infringement proceedings will not be suspended if the plaintiff's claims are to be rejected anyway.

A first instance judgment is normally provisionally enforceable upon provision of a security, usually in the form of a deposit with a German court or as a bank guarantee. The amount is usually the same as the value of the proceedings. A plaintiff contemplating to provisionally enforce only one or more of several awarded claims, e.g. a claim for information only, may ask the court, in its complaint or in a submission prior to the final hearing, to fix specific values for the several claims. If the judgment is reversed later on, the party who launched provisional enforcement measures will become liable to any damages caused by such measures to the counterparty.

5. Appeals

Within one month of service of the written judgment with reasons, the losing party may appeal to the second instance

court (Court of Appeals). The second instance proceedings are similar to the first instance as described above with the important exception that new facts may only be submitted under special circumstances, e.g. if it was not possible to obtain the respective information earlier. A further appeal to the Federal Court of Justice is possible under certain circumstances, e.g. if legal issues of fundamental relevance are involved. In this third instance, the court only rules on points of law. Factual issues only become relevant if a procedural violation by the lower court is attacked.

To avoid a final adverse infringement judgment while opposition or revocation proceedings against the patent-in-suit are still pending, it is advisable for the defendant to file this further appeal, even if no other ground than potential invalidity is at hand. Failure to appeal at this stage may result in a bar to retrial proceedings later on, i.e. the final verdict would remain valid despite of revocation of the patent on which it is based.

III. COMPUTATION OF DAMAGES AND COMPENSATION

An infringer sentenced by a judgment has to provide the plaintiff with all the information, as awarded by the judgment, for enabling the plaintiff to compute the monetary amount of damages and compensation to be claimed. For computing the amount of damages the plaintiff may choose between one of the following three standard methods:

- **Lost profit:** If the plaintiff can prove that without the infringement it would have made a certain profit with an own product or process falling under the patent-in-suit, such lost profit may be claimed as actual damages. In practice, this method is rarely applied for it is extremely difficult to prove causation and it requires disclosure of trade secrets such as internal calculations of profits.

- **Infringer's profit:** The plaintiff can ask for the profit the defendant made with the infringement. For this calculation, the defendant can deduct only such cost items from its turnover for which it can prove that they are solely attributable to the infringement, i.e. it is not allowed to bring in general expenses. On the other hand, the courts rarely award the full profit thus calculated, but only a share of it which is deemed

to reflect the influence of the patented invention on the market success of the product or process. The exact share is assessed by the court taking into account the circumstance of the case as presented by the parties. For instance, if the product or process at issue involves another patented invention the relevance of this invention must be compared with that of the patent-in-suit.

• **License analogy:** The third method is computing a fictitious licence fee. It is always difficult to specify a realistic licence fee, especially if the plaintiff cannot produce other licence agreements for comparison. In the absence of such comparable agreements, it is mostly difficult to obtain a licence rate of more than five per cent from a court.

The patentee's claim for compensation for use of the disclosed subject-matter of the patent application is usually computed according to the third method using a reduced licence rate.

If the parties cannot agree on an amount, the plaintiff has to institute another lawsuit to obtain a judgment awarding the desired amount. The procedure follows the same lines as set out above.

D. Special Procedures

I. COLLECTING EVIDENCE

The standard procedure described above requires plaintiffs to collect all necessary facts and evidence in advance. This may pose difficulties in cases where the invention is not incorporated in a product obtainable on the market or otherwise easily accessible.

In such cases, the prospective plaintiff may request the court to order a special fast track procedure for collecting evidence. In such a motion, the petitioner has to establish that the product or process at issue is not easily accessible but likely incorporates all features of a patent claim. The court usually rules *ex parte* on this motion and, if granted, appoints a court expert and orders the presumed infringer to grant access to the product or process for the court expert. The expert has to inspect the product or process and to produce a written expertise about the infringement issue. The petitioner's attorneys are normally allowed to attend to the inspection and to review the expert's opinion, but only under an obligation to withhold the thus obtained information from their client.

The presumed infringer receives a copy of the expertise and may request that passages concerning its trade secrets be blackened. The court rules on this by balancing the parties' interests, thereby considering the importance of the claimed trade secrets, the relevance of the passages for the question of infringement, and in how far the infringement is confirmed or disconfirmed in the expertise.

The petitioner is then allowed to study the remainder of the expertise, and to this extent the confidentiality obligation of its attorneys is lifted. The expertise has the same effects as a court expert opinion drawn up within normal infringement proceedings, i.e. in a subsequent standard procedure the plaintiff does not have to provide further evidence for the facts established therein.

II. PRELIMINARY INJUNCTIONS

Although a claim for damages might be substantial in some cases, it often cannot redress in full the patentee's loss caused by the infringement. It is therefore desirable for many plaintiffs to obtain injunctive relief at an early stage. Such plaintiffs should consider filing a request for a preliminary injunction.

1. Urgency and other Special Requirements

One of the specialties of German intellectual property law is the urgency requirement for obtaining preliminary injunctions. Any plaintiff seeking for fast track injunctive relief must file its request within a short period of time after obtaining knowledge of the possible infringement. The actual length of this period varies from court to court. Some apply strictly a month, others follow a more flexible approach and take into account the circumstances of the case, but more than two months is rarely accepted.

The plaintiff should further be able to demonstrate that the patent's validity is well-established. This may become difficult if the patent has not yet survived opposition or revocation proceedings.

Generally, a preliminary injunction requires that the plaintiff's interests outweigh those of the defendant. This depends on the circumstances of the particular case. An outweighing interest may be negated if the plaintiff itself does not use the invention.

Enforcement of a preliminary injunction may be subject to the provision of a security by the plaintiff within one month. This is not a requirement to obtain a preliminary injunction, but one to put it into effect. So any plaintiff should make the arrangements for providing a security at a very early stage.

2. Principles of the Procedure

Preliminary injunctions may be issued extremely fast, sometimes within hours if demanded by the circumstances, e.g. on exhibition cases. But normally issuance in *ex parte* proceedings takes some days, and some weeks in *inter partes* proceedings.

As in any fast track proceedings, the court only considers evidence which is immediately accessible. This means that witness testimonies should be presented in the form of a sworn affidavit, and the court will not appoint a court expert to resolve technical issues. If the case involves such issues, the party concerned should submit an opinion from a private expert, preferably with incontrovertible credentials.

Unlike in standard proceedings, the first instance courts are not allowed to reject facts or evidence for late filing. So a party may withhold new facts or evidence until a late stage in a hearing, which requires the other party to anticipate possible surprises. In particular for this reason, preliminary injunction cases are often more challenging to prepare than standard litigation.

If a preliminary injunction is enforced but later reversed, the plaintiff is liable for any damages incurred by the defendant as a consequence of the enforcement. This liability does not depend on any negligence on the plaintiff's side, so preliminary injunctions always involve a certain liability risk.

There is no third instance in preliminary injunction proceedings, which means that the Federal Court of Justice does not get opportunity to harmonize the application of the special rules governing these proceedings. As a consequence, the practice of the courts concerning procedural issues varies to some extent, the differing urgency periods described above being one example.

3. *Ex parte* und *inter partes* procedures

The courts are allowed to issue preliminary injunctions without a hearing and without even inviting the defendant to file observations in reply. However, apart from clear cut product piracy cases, the courts normally ensure that a defendant is heard either orally or in writing before a preliminary injunction is granted. Some courts require that the defendant has received, at least orally, an out of court warning letter before court action is initiated. The defendant can also ensure to be heard by filing a „*Schutzschrift*“ in advance (see below under „*Defences*“). Especially in patent cases, preliminary injunctions are rarely granted in *ex parte* proceedings if the plaintiff does not report if and how the defendant reacted to the warning letter. Alternatively, a court may *ex officio* switch over to *inter partes* proceedings, either by asking the defendant to make written observations or by summo-

ning both parties for a hearing before the decision is issued.

If the preliminary injunction is issued without a hearing, it is done in the form of an order. The plaintiff has to serve this order on the defendant within one month. This service puts the injunction into effect, i.e. as of the service the defendant has to comply with the decision to avoid sanctions. The defendant can oppose the order by written submission, upon which the case is reconsidered in a hearing. However, for the time being the order normally remains in effect.

After a hearing, the court proclaims its decision as a judgment. This judgment is subject to appeal before the second instance court. As in standard proceedings, the appeal term is one month. The duration of the appeal stage varies largely from court to court.

4. Defences

A party anticipating a preliminary injunction request may file a „Schutzschrift“ („protection submission“) electronically via a special Internet portal. This electronic submission has effect for all courts and will be assigned to the relevant court file as soon as a request for a preliminary injunction is received. In this way, prospective defendants can ensure to be heard within ex parte proceedings.

An invalidity defence, however, is normally considered only if an attack against the patent-in-suit is pending. So if the patent-in-suit is currently not opposed or subject to revocation proceedings, such an attack must be launched right away. Only if the preliminary injunction proceedings evolve so fast that the defendant cannot reasonably be expected to mount an adequate attack, its invalidity defence may be considered without an actually pending attack.

III. ACTIONS FOR DECLARATION OF NON-INFRINGEMENT

Actions for declaration of non-infringement play a less important role on German national level as they do in cross-border cases on European level. This is because there is no torpedo problem in the national rules of procedure, i.e. an action for declaration of non-infringement cannot be a bar to a later filed infringement action. The infringement action

may be filed as a counteraction within the same proceedings or as a separate action with another competent court. So the function of an action for declaration of non-infringement is not to block or delay infringement proceedings or to limit the patentee's forum shopping options. Rather, such actions are usually only launched if the patentee hesitates with filing an infringement action, while the counterparty has a commercial interest to get the issue finally clarified. Another reason for such an action is to fulfil the conditions for an intervention to opposition proceedings if the counterparty only threatens with an infringement suit without actually bringing it (cf. Article 105(1)(b) of the European Patent Convention).

An action for declaration of non-infringement is only admissible if the patentee or exclusive licensee has given rise to an uncertainty as to the infringement question on the counterparty's side. The standard case is a formal warning letter, but such uncertainty may also be caused by other conduct by the patentee or exclusive licensee. However, the counterparty cannot force the patentee or exclusive licensee to make a statement as to whether a certain product or process is regarded as infringing or not. So as long as the patentee or exclusive licensee remains passive, it cannot successfully be dragged into court proceedings.

E. Costs

Notes

The court fees, to be paid in advance by the plaintiff upon filing of the complaint, and statutory legal fees depend on the value of the proceedings. This value is finally fixed by the court upon conclusion of the proceedings, which is one factor which renders it difficult to make predictions on costs. The value should reflect the economic relevance of the case. It can normally be assessed only roughly, so the courts practically have wide discretion when fixing the values of the proceedings. The plaintiff has to propose a value in its complaint. The defendant may ask for another value, and the court may invite both parties to provide information allowing a fairly realistic assessment.

For most patent infringement cases, the values of the proceedings range between € 500,000 and € 5,000,000. The table below gives a rough orientation as to how the value of the proceedings influences the court fees, legal fees (both for attorney-at-law and patent attorney) and typical overall costs (for the losing party) of first instance infringement proceedings:

Value of the proceeding	Court fees	Legal fees	Typical overall costs
€ 500,000	€ 10,608	€ 16,065	€ 75,000
€ 1,000,000	€ 16,008	€ 23,565	€ 100,000
€ 5,000,000	€ 59,208	€ 83,565	€ 300,000

The costs for any parallel revocation proceedings come on top of these costs and are normally higher than the costs for infringement proceedings. Moreover, higher instance costs mostly range above the values specified in the table.

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