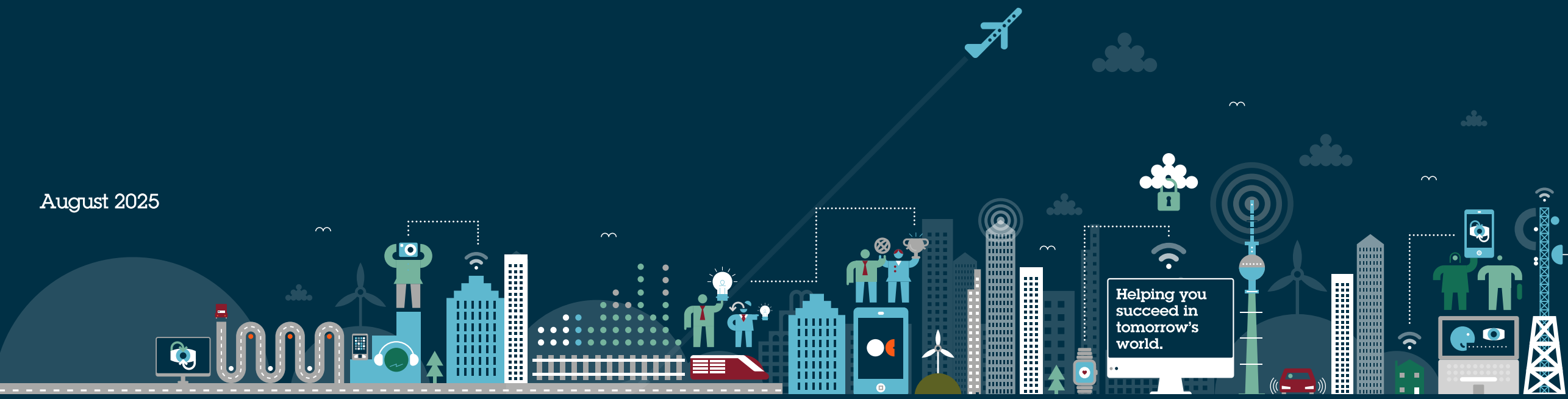
Patent Litigation in Germany FAQ

Osborne Clarke

Start

August 2025



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What are the benefits of Germany as a jurisdiction for commencing patent infringement proceedings?

Germany is the largest consumer market in the European Union. The country is also an important venue for patent litigation. This is due to the fact that new technical products often launch early in Germany and because German patent courts enjoy strong reputation for time and cost effective proceedings. Some consider Germany to be patent owner friendly.

Therefore, there are many patent infringement cases in Germany. This has given the **German courts vast experience** in patent litigation matters. Germany recurrently is the European country with the highest number of patent cases.

In first instance, a claimant may choose between 12 District Courts (Landgerichte) as designated by the federal states. The chambers are composed of three judges. The judges not only have a legal background, they also have several years of experience in patent cases and are specifically trained in patent law. The most frequently chosen District Court is the District Court Dusseldorf, followed by the District Courts Mannheim, Munich and Hamburg.

Due to the reputation and general legal system in Germany a first instance decision can already be obtained within roughly one year. This is advantageous compared to other jurisdictions such as the U.S., where the jury trial system means that litigation takes considerably longer.

Another reason for litigating in Germany is the fact that German proceedings are relatively **cost-efficient**. The costs are also foreseeable to a certain degree, because they are predetermined by law. Germany does not follow a full compensation principle such as, for example, under Dutch law. The losing party has to compensate the other party according to a statutory fee table. The statutory fee caps are comparatively moderate.

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Are there any differences between infringement proceedings and proceedings concerning the validity of a patent?

German patent enforcement is characterized by a **split of infringement and invalidity determination (known as the Dual System or Separation Principle).** The two types of proceedings are tried by different courts.

The jurisdiction for individual infringement proceedings lies with the civil courts, namely the **District Courts (Landgericht)** in the first instance. On the other hand, for appealing the validity of a patent, any person may object to such patent within nine months following the patent grant publication. In case of a European Patent, the patent has to be objected at the **European Patent Office (EPO)** and in case of a separate German patent at the **German Patent and Trade Mark Office (DPMA)**. Regarding a European Patent, the opponent has the opportunity to invalidate the patent with respect to all of the contracting states in which that patent has effect. An opposition will become inadmissible after the expiration of nine months and the European Patent can only be declared invalid by bringing separate nullity actions to court in every single contracting state. In general, nullity proceedings are subsidiary to opposition proceedings. In Germany the exclusive jurisdiction for nullity proceedings lies with the **Federal Patent Court (Bundespatentgericht)** located in Munich.

In infringement proceedings, the first instance decision of the District Court can be appealed to the **Higher Regional Court (Oberlandesgericht)**, which has the local jurisdiction concerning the respective District Court. Most proceedings end at the level of the Higher Regional Court unless settled already after the first instance judgment. A further appeal can in certain narrow constellations be filed with the **Federal Court of Justice (Bundesgerichtshof)** located in Karlsruhe.

In case of a nullity action the decision of the Federal Patent Court can also be appealed to the Federal Court of Justice. Both the jurisdiction for infringement appeal proceedings (in third instance) and nullity appeal proceedings (in second instance) lies with the **10th Senate of the Federal Court of Justice**.

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Does an opposition or a nullity action have an impact on an infringement proceeding relating to the same patent?

One consequence of the Dual System / Separation Principle in Germany is the fact that **invalidity may not be raised as a defence or counterclaim in a pending infringement proceeding**, and the other way round. But of course, both proceedings are not completely independent and disconnected. To reach a fair balance of interests, the court with jurisdiction for infringement actions may order the **suspension of the proceedings**.

The **requirements for a stay of proceedings** upon request are as follows:

1. The **opposition or nullity action** against the affected patent must already be pending (or have already been successful in first instance) or must be filed immediately before the oral hearing.
2. There is a high likelihood of success of the proceeding regarding the invalidity of the patent. As a rule of thumb that requires new novelty destroying **prior art** documents (compared to the grant procedure) and/or a lack of inventive step as a result of the new documents.

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Is the patentee able to litigate everywhere in Germany in case of a patent infringement?

Principally the patentee has the freedom of choice between the **12 specialised district courts** for patent infringements in Germany. The right **place of jurisdiction** is determined by **(1)** the place of residence or registered seat of the defendant or **(2)** the place in which the infringement was committed. In case of an infringing sale offer on the website of the defendant, the jurisdiction can be established in any district court in Germany.

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What types of patent infringement exist in Germany and what are the basic legal prerequisites and consequences?

The use of the patented invention by the alleged infringer is a legal prerequisite for patent infringement. Depending on the respective product or method, that might be within the scope of protection conferred by the patent, the patent may be infringed either directly or indirectly in Germany.

For a **direct patent infringement**, as a rule of thumb, all features of the affected patent claim must be fulfilled. If so, any third party (the alleged infringer) shall be prohibited from manufacturing, offering, putting on the market or using the **product** which is the subject-matter of the patent, or from either importing or possessing such a product for the purposes referred to.

If the patent claim refers to a **method,** any third party (the alleged infringer) shall be prohibited from using the method which is the subject-matter of the patent or, if the third party knows or if it is obvious from the circumstances that use of the process is prohibited in the absence of the consent of the patent owner, from offering the method for use within Germany.

If the method claim refers to a **method for manufacturing a product**, any third party (the alleged infringer) shall also be prohibited from offering, placing on the market or using a product which is manufactured directly by the method which is the subject-matter of the patent, or from either importing or possessing such a product for the purposes referred to.

In special cases, it may be sufficient to establish direct infringement where products have been sold without fulfilment of all features of the affected patent claim, namely in cases where it is obvious that the buyer will complete the invention by using a trivial common addition.

If the alleged infringer solely provides means relating to an essential element of the invention, they may nonetheless commit an **indirect patent infringement**. According to the German Patent Act any third party (the alleged infringer) shall be prohibited, in the absence of the consent of the patent owner, from supplying or offering to supply, within Germany, persons other than those entitled to exploit the patented invention with **means relating to an essential element of the invention** for use within Germany, if the third party knows or if it is obvious from the circumstances that those means are suitable and intended for using that invention. Such an indirect patent infringement is irrespective of whether a direct patent infringement ever takes place. Typical cases of application for an indirect patent infringement refer to spare parts or consumer goods for more complex patent protected products such as a coffee maker or a printer.

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May a patent only be infringed literally or even equivalently?

The extent of the protection conferred by a patent shall be determined by the patent claims. The description and drawings will be used to interpret the claims.

The principle of **literal use** is the most common type of patent infringement. For this, all features of a patent claim must be fulfilled by the alleged infringing product or method. For determining the meaning of a term used in a patent claim, the entire patent or patent application respectively can be used for interpretation. In this context, the patent specification is deemed to be its "own dictionary".

However, a patent's scope also includes the **equivalent use** of the patent. Equivalent use may be argued if a product or method is not within the literal use of a patent claim, but is very similar to it. German courts have established **three requirements** that must be met in order for a patent to be infringed in an equivalent way:

1. The embodiment must solve the problem underlying the invention with means that, while being modified, have objectively the **same effect**.
2. The skills of the person skilled in the art must **enable them to determine** that the modified embodiment with its different means has the same effect.
3. The considerations to be applied here by the person skilled in the art must be **based on the semantic content** of the teaching protected in the patent claim.

The assessment of equivalent use always depends on the individual case. The entire patent specification as well as the already existing prior art must be taken into consideration.

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What options are available for a patentee in relation to an alleged patent infringement?

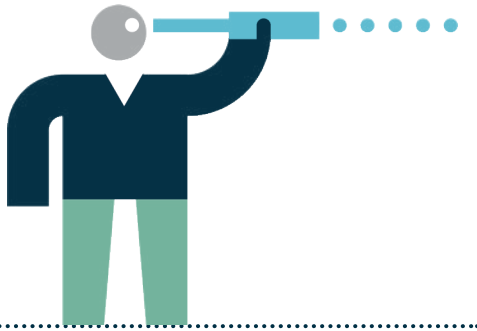
There are several remedies for a patentee, both in and out of court.

Before filing a suit against the alleged infringer, both parties usually try to settle the dispute amicably. The patentee may inform the alleged infringer about their patent right with a **proprietary notice**, possibly combined with a license offer in suitable competition cases. Another option is an **authorisation enquiry** to inform the alleged infringer about the patent right and asking the alleged infringer why they consider they are entitled to use the patent. An authorisation enquiry is still an informal letter without any request to cease and desist.

The next step, which is more formal and often a necessary requirement before court proceedings, is a **warning letter**. In addition to the mere patent right information, a warning letter contains a complaint, such as a specific allegation about the patent infringement in the form that has reached the knowledge of the patentee. Usually the warning letter is combined with a pre-formulated **cease and desist declaration**. This declaration is required to be signed and returned by the infringer within a set time limit.

If the alleged infringer does not sign and return a cease and desist declaration within the defined time limit or such a declaration is exceptionally deemed obsolete, filing a **lawsuit** is the next step to enforce the patent right.

In urgent cases, the patentee can also apply for a **preliminary injunction**. Compared to the ordinary lawsuit, the patentee does not have the opportunity to claim damages or destruction of allegedly infringing products, but if granted, the alleged infringer will be ordered by the court to stop using the patent.



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Which requirements must be fulfilled for a preliminary injunction in patent matters?

Although patent infringement proceedings are more complex than many other proceedings, such as proceedings in unfair competition law, it is possible in certain circumstances to obtain a preliminary injunction. German courts always emphasize the availability of preliminary injunctions in appropriate cases. The major challenge for the patent owner in obtaining an injunction concerns the substantiation of validity of the asserted patent.

In general, there are **two requirements** to obtain a preliminary injunction:

1. The plaintiff has to substantiate a **"claim for injunction" ("Verfügungsanspruch")**. It must be clearly more likely that there is **more evidence for the claimed fact than against it**.
2. The plaintiff must also substantiate a **"reason for injunction" ("Verfügungsgrund")**. For that, the matter must be urgent (approximately four to six weeks after getting knowledge of the alleged patent infringement) and – especially in patent cases – the **validity of the asserted patent must be sufficiently ensured**. In that respect, as a rule of thumb the plaintiff has the best chances to succeed if the patent has already "survived" a contradictory opposition or nullity proceeding. In some exceptional cases German courts have accepted lower requirements for substantiating a patent is valid (for example, regarding generic products).

Nevertheless, the granting of a preliminary injunction in patent law always depends on **particular circumstances**. If the plaintiff does not succeed in substantiating both an imminent "claim for injunction" and a "reason for injunction", filing an ordinary lawsuit is the sole option to enforce the patent in court.

A legal risk which a patent owner should always consider is a **potential claim for damages** of the defendant. Should the order of a preliminary injunction prove to have been unfounded from the beginning, the party that has enforced the order is obliged to compensate the other party for the damages that they have suffered because of the measure directed having been enforced.

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What remedies are available for a patentee for patent infringement?

In patent law the major remedy is the **injunctive relief**. In addition the patentee may claim **damages**, the **destruction** of products held or owned by the infringer which are the subject-matter of the patent, or the **recall** of the products which are the subject-matter of the patent from the distribution channels. They can also claim rights to **information and accounting** and to **presentation / inspection** (often prior to a specific lawsuit).

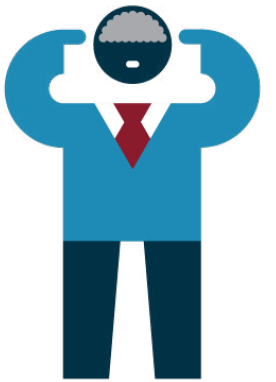
When it comes to **calculating damages**, the patentee has three options, based on either:

(1) the **profit** which the infringer has obtained by infringing the right;

(2) a **fictitious licence fee** (reasonable royalties); or

(3) the **loss of profit**.

Patent damages are broadly harmonised across the EU through the European Enforcement Directive.



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Are there discovery proceedings in Germany?

There are **no pre-trial discovery proceedings in German patent law**. This is one reason why costs for infringement proceedings are not as high as some other jurisdictions, such as the U.S. But the patentee has other options to get information about an alleged patent infringement. Before initiating infringement proceedings, the claimant is entitled to claim a **presentation of documents or an inspection of items** under certain circumstances, especially a sufficient likelihood of a patent infringement and the need for the purpose of establishing the claims.

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Can the management be held personally liable for patent infringements committed by the company?

Under German law, employees can be personally liable as direct infringers. Furthermore, parallel liability of the employer, i.e. the company itself, is also affirmed. In the past, questions often arose about the direct personal liability of senior management or directors, such as a CEO. Especially for patent law the **10th Senate of the Federal Court of Justice** (Bundesgerichtshof) held that there is a broad liability owed by a legal representative of a company. In regards to patent infringements, senior management and directors are presumed to have a so-called "guarantor" position.

Due to the numerous active patents in nearly every single technical field, a company has the obligation to check potentially conflicting third party patent rights. Therefore, it is the **legal representatives' obligation to organise the company in a way that patent infringements are reasonably avoided**. However, the **specific position** of the respective representing person in the company is decisive as to whether or not they can be held personally liable. This means, for example, that a CFO will not be liable for patent infringements that takes place under the responsibility of the CEO – at least as long as the CFO is not aware of the potential patent infringement.

The managing director who is responsible for the manufacturing of the affected product, has full responsibility for the handling of risk situations. However, if a managing director who is generally not responsible in relation to the relevant product has been informed or become aware of the risk situation, they are then also obliged to avoid the danger of patent infringements by acting as a "guarantor". Nevertheless, the practical relevance of the personal liability of senior management or directors is rather low, at least as long as the company ensures that the senior management or director is indemnified internally and/or a D&O insurance covers the liability.

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What options are available for an alleged infringer as a defence?

To avoid further legal proceedings after receiving a warning letter it may be advisable to sign a **cease and desist declaration** or at least a modified version thereof if the warning letter is justified. In contrast, if the warning letter is unjustified it can be advisable to deliver a **counter-warning** and/or to file an action for **negative declaratory judgment**. But it has to borne in mind that an according judgement will not have an impact on the possibility of the patentee to bring proceedings for infringement. Once the patentee files a suit, a declaratory action would become inadmissible.

If the alleged infringer is aware of the patentee's intention to apply for a preliminary injunction or is worried about it, a so called **protective brief (Schutzschrift)** can be submitted to the courts that are likely receive a request for a preliminary injunction. Another option is to file the protective brief electronically in a central register for protective briefs, which has existed since the beginning of 2016. Such a protective brief should contain all the defendant's arguments, to ensure the court will take the defendant's view into account before it decides about an ex parte injunction.

If a lawsuit has already been filed, the alleged infringer can file a **statement of defence** to present their arguments and point of view. Due to the Dual System / Separation Principle in Germany, the invalidity may not be raised as a defence or counterclaim in a pending infringement proceeding.

Therefore, it is a strategic consideration to bring a **nullity action** before the Federal Patent Court (or an opposition proceeding with the German Patent and Trade Mark Office). If there is a high likelihood of success of the proceeding regarding the invalidity of the patent, the infringement court will stay proceedings. As a result, the patentee loses the infringement proceeding, if the patent would be declared invalid completely. In any event the nullity action buys time, for example, for a product workaround.

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What is the typical procedure for an infringement action?

A court trial commonly starts with a **complaint** to the competent District Court. Since there are no general discovery proceedings (unlike in the U.S.), the plaintiff has to state as many facts and details as possible to produce a "conclusive action".

In order to be able to serve the complaint on the defendant, the plaintiff has to pay an **advance on the court fee**. After the formal service, the defendant must appoint an **attorney of record** within two weeks if they intend to defend against the complaint. Thereafter the defendant usually files a **statement of defence** to present their arguments and point of view in a following time period which is set by the respective court (**preliminary written proceedings**). Alternatively, the presiding judge can make arrangements for an early first hearing at which oral arguments are to be heard (**early first hearing**). In case of preliminary written proceedings the statement of defence is followed by a **plaintiff's reply** and a **defendant's rejoinder**.

After approximately one year, the **oral hearing** takes place (depending on the respective court and the technical complexity of the case) and lasts between one and two hours. Generally the topics in this oral hearing are, for example, the scope of protection, the features of the alleged patent infringing product, the parties' main arguments and aspects of civil procedure.

Decisions of the District Court in first instance can be appealed. The **appeal** can be filed with the Higher Regional Court, which has the jurisdiction regarding the respective District Court. In certain circumstances, a **second appeal** can be filed with the Federal Court of Justice located in Karlsruhe.

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How long does it take approximately to obtain a first court decision?

The German courts are extremely efficient in patent cases due to their experience even though there are many infringement proceedings.

Obtaining a decision in the main lawsuit in first instance takes **approximately one year**, possibly a few months more or less depending on the complexity of the case and the respective court. A judgment can be expected about one month after the oral hearing. The oral hearing lasts approximately one or two hours. A subsequent hearing is rather rare.

Obtaining a preliminary injunction in patent cases in Germany is very quick. Depending on the respective court and the complexity of the case it is possible to obtain a preliminary injunction **within one day**. If the court orders an oral hearing it might last a bit longer, up to three months. Generally, it should be kept in mind that the legal hurdles to obtain a preliminary injunction in patent law are higher than in many other fields of law since the economic consequences for the alleged infringer can be more drastic.

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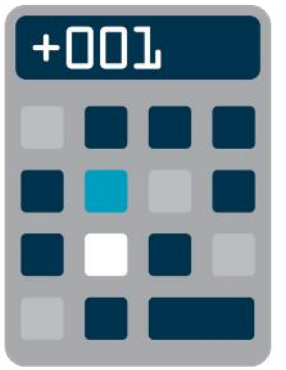
What are the approximate legal costs for infringement proceedings in first instance?

Patent litigation in Germany is **cost-effective** compared to other countries. The costs are **foreseeable** to a certain degree, because the court fees and the recoverable fees for a lawyer and patent-attorney are legally determined. These fees depend on the **amount in dispute**, which is determined by the economic interest of the plaintiff. Depending on the complexity and scope of the case an average amount in dispute for patent infringements is between EUR 250.000,00 and EUR 5.000.000,00.

The losing party usually bears the costs of the lawsuit up to the statutory fees. Where each of the parties has prevailed for a part of its claim, but has not been able to enforce another part of its claim in the dispute, the costs are to be shared proportionately. Costs which exceed the legally fixed fees, for example as a result of being charged on an hourly basis, have to be borne by each party on their own.

Examples



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What are the approximate legal costs for infringement proceedings in first instance?

The following **two examples** illustrate this, on basis of an amount in dispute of EUR 500.000,00 and EUR 1.000.000,00

a) The plaintiff wins the infringement proceeding – What does the defendant have to refund?

EUR 500.000,00 (amount in dispute)

Lawyer (statutory fees, incl. VAT):	EUR 11.186
Patent attorney (statutory fees, incl. VAT):	EUR 11.186
Court (statutory fees, already been paid by the plaintiff in advance):	EUR 12.414
= **Reimbursement for the benefit of the plaintiff**	**EUR 34.786**

EUR 1.000.000,00 (amount in dispute)

Lawyer (statutory fees, incl. VAT):	EUR 16.392
Patent attorney (statutory fees, incl. VAT):	EUR 16.392
Court (statutory fees, already been paid by the plaintiff in advance):	EUR 18.714
= **Reimbursement for the benefit of the plaintiff**	**EUR 51.498**

b) The plaintiff loses the infringement proceeding – What does the plaintiff have to refund?

EUR 500.000,00 (amount in dispute)

Lawyer (statutory fees, incl. VAT):	EUR 11.186
Patent attorney (statutory fees, incl. VAT):	EUR 11.186
= **Reimbursement for the benefit of the defendant**	**EUR 22.372**

EUR 1.000.000,00 (amount in dispute)

Lawyer (statutory fees, incl. VAT):	EUR 16.392
Patent attorney (statutory fees, incl. VAT):	EUR 16.392
= **Reimbursement for the benefit of the defendant**	**EUR 32.784**

Court fees of EUR 12.414,00 (amount in dispute: EUR 500.000,00) / EUR 18.714,00 (amount in dispute: EUR 1.000.000,00) will have already been paid by the plaintiff in advance.

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Does a patentee have the legal right to seize patent infringing products at a trade fair?

A premeditated patent infringement is a **crime** in Germany. If the right holder suspects that a company is intending to show patent-infringing products at a trade fair, this could constitute an initial suspicion of a crime. In that case, the **prosecution** may be obliged to initiate a criminal investigation. Where the suspected person acts on a commercial scale, an investigation must be initiated. Otherwise the offence shall be prosecuted upon motion only, unless the prosecution authorities consider ex officio intervention imperative on account of the particular public interest in criminal prosecution.

However, in each case the **customs authority** is competent in their capacity as auxiliary officers of the Public Prosecutor's Office – preventive as well as repressive. Therefore the customs authority is entitled to **seize patent infringing products at a trade fair for evidential purposes**. While doing so, the customs officers are usually attended by the right holder, who will have applied for a tour of the trade fair. If the customs authority becomes aware of alleged patent infringing products, the exhibitor will usually be re-quested to remove the products. If the exhibitor refuses, the alleged infringing product will be seized for the purposes of criminal proceedings that may follow. Where there is a presumption of other infringing products, the customs officers may also search the fair stand in exigent circumstances.

This proceeding based on criminal law is an **effective alternative to a preliminary injunction** based on civil law. The **deterrence of patent infringer** is another positive impact of the opportunity of product seizures or even the attendance of customs officers at a trade fair.

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Your experts

Dr. Johannes Graf Ballestrem, LL.M.
Partner, Cologne
T +49 221 5108 4394
johannes.ballestrem@osborneclarke.com

Dr. Stephan Reisner
Counsel, Cologne
T +49 221 5108 4334
stephan.reisner@osborneclarke.com

Dr. Tim Reinhard
Partner, Munich
T +49 89 5434 8024
tim.reinhard@osborneclarke.com

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