



The Legal 500 Country Comparative Guides

Greece: Patent Litigation

This country-specific Q&A provides an overview of patent litigation laws and regulations applicable in Greece.

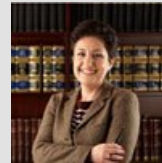
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1. What is the forum for the conduct of patent litigation?

Greece has two specialised EU trademark and patent courts based in Athens and Thessaloniki. As forum selection is of key importance so that court proceedings take place before a court with sufficient expertise in patent law, patent owners may wish to initiate court proceedings before specialised courts and not the local courts. Legal theory and case law agree in that the competence of the specialised courts in Athens and Thessaloniki is reserved for main patent actions (ie, main infringement actions and nullity actions against a patent), but not for temporary restraining orders or injunctions. Consequently, the competent courts for preliminary proceedings are the local courts. Due to the fact that the local courts' lack of expertise in patent law could have a negative impact on the protection of patent owners' rights, patent owners tend to try to file preliminary proceedings before the specialised courts in Athens or Thessaloniki.

2. What is the typical timeline and form of first instance patent litigation proceedings?

According to recent amendments to the Civil Procedure Rules (January 1, 2016), strict timeframes for proceedings have been introduced, where both parties are obliged to file their written arguments and all respective evidence within 100 days of the action being filed. The timeframe is 130 days in case the defendant is a non-Greek resident. Both parties must then file their rebuttal arguments within 15 days. Each party has the right to submit up to five sworn affidavits in support of its own arguments and up to three sworn affidavits to rebut adverse party's arguments. As a rule, the court will then hear the case without witnesses. If the court deems it absolutely necessary, it has the option of summoning one of the affiants to testify in court. Therefore, the hearing in a main infringement proceeding takes place approximately five months after the filing of the action and a decision may be expected after approximately six months. According to the Greek law there are separate procedures before the competent civil courts for patent validity challenges and infringement actions. Consequently, full or partial nullity actions can be made in the form of an independent legal action or a counterclaim within the framework of the infringement proceedings. In practice, invalidity objections and nullity actions are the most common defences for infringers.

3. Can interim and final decisions in patent cases be appealed?

Only decisions in main infringement action proceedings and not preliminary injunction decisions may be subject to appeal. All final decisions of the first-instance courts are open to appeal within 30 days of notification to the losing party in case of Greek nationals or within 60 days of notification in case of foreign nationals. If no official notification takes place, the decision may be appealed within two years of its publication. The losing party may contest all aspects of the judgment in connection with legal issues or incorrect findings regarding the facts of the case.

4. Which acts constitute direct patent infringement?

Direct patent infringement is the unauthorised manufacture, offering for sale and selling of

the product protected by the patent, as well as holding and using it for the same purposes. Further, direct infringement is applying, offering for sale or distributing in the market the method protected by the patent, as well as manufacturing, offering for sale or distributing, holding and using for the same purposes the product the manufacturing of which is the result of the method protected by the patent. Finally as direct infringement is considered the unauthorised productive exploitation of the invention as well as importation of the products protected by the patent.

5. Do the concepts of indirect patent infringement or contributory infringement exist? If, so what are the elements of such forms of infringement?

The Greek law has no provisions concerning contributory infringement. Depending on the circumstances, general legal provisions may be applicable.

6. How is the scope of protection of patent claims construed?

The Greek law generally accepts the doctrine of equivalence, according to which, due account must be taken of any element which is equivalent to an element specified in the claims. It must be noted though, that there is no particularly sophisticated case law in this respect.

7. What are the key defences to patent infringement?

The quickest defence against infringement is the filing of a temporary restraining order. For the restraining order to be granted, the petitioner must prove the existence of a prima facie serious infringement and that the matter is of exceptional urgency. The request must be filed concurrently with a petition for injunction. If a temporary restraining order is granted, it remains effective until the injunction hearing takes place. For an injunction to be granted, the element of urgency must be evident. Within this framework, patent owners can request cessation of the infringement and removal of the allegedly infringing products from the market. Patent owners also have a right to information and are entitled to certain measures to preserve evidence. Patent owners can further initiate an action on the merits, which becomes statute barred either five years after the date on which the patent owner became aware of the infringement or damage and the name of the infringer, or twenty years after the date on which the infringement was committed.

8. What are the key grounds of patent invalidity?

According to the law, a patent can be declared null by court decision for the following reasons: - The owner of the patent is not the inventor or his assignee or beneficiary - The invention is not patentable in accordance with the provisions of the law - The description attached to the patent is insufficient for the invention to be carried out by a person skilled in the art. - The subject matter of the granted patent extends beyond the content of the protection as requested in the application.

9. How is prior art considered in the context of an invalidity action?

In accordance with the Greek law, an invention is considered new if it does not form part of the state of the art, which is considered to comprise anything which is available to the public anywhere in the world (universality principle) by means of a written or oral description or in any other way, before the filing date of the patent application or the date of priority. In this respect, the novelty element is considered to exist, in the case of the manufacturing of a product, if this product significantly differs from products similar thereto, possessing substantially new elements. In the case of the production of a result, the novelty element is considered to exist if there is a significant improvement of an already known result, irrespective of whether the improvement consists only in the way of manufacture, or only in the result, or in the reduction of the costs of manufacture, or in all the above and is not a mere adaptation of elements of methods that are already known without resulting in a significant improvement or a simple use of a means which is known in different environments than the ones it had been used in the past, but in the same way in which it had always been used for obtaining the same result (Supreme Court 545/1996, Supreme Court 1588/1991). The element of novelty, according to the theory, is connected to the object of the invention, which derives from the claims. In case of infringement by an equivalent technical standard, the specification and drawings are used for the interpretation of the claims but do not extend the scope of protection to material that has not been included therein. Further, an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. Consequently, it must be presented as something that exceeds the normal technological progress, resulting in an achievement that goes beyond the skills of the average person skilled in the art, namely if the solution to the technical problem was not foreseeable. Moreover, the combination of several technical means or processes for the solution of a technical problem in a unitary way is considered to be an invention only if the combination is not obvious to the average person skilled in the art. The application of equivalent means of an already resolved technical problem is considered to form an invention only if the equivalent is not known to the average person skilled in the art.

10. Can a patentee seek to amend a patent that is in the midst of patent litigation?

There is no legal provision allowing for the amendment of a patent in the midst of patent litigation. As a rule, under the Greek law no post-grant amendment of a patent is possible. Only within the frame of a nullification proceeding, where the nullification action is directed against a part of a patent, the patent can be restricted to that extent.

11. Is some form of patent term extension available?

Patent term extensions are allowable only by means of Supplementary Protection Certificates for medicinal and plant protection products to a maximum of 5 years in accordance with the provisions of Regulations (EC) 469/2009 and (EC) 1610/1996 respectively. Another 6-month extension of medicinal SPCs is available for pediatrics, in accordance with Regulation 1901/2006 on medicinal products for paediatric use.

12. How are technical matters considered in patent litigation proceedings?

As the judges serving in Greek specialized patent courts have excellent legal knowledge but no technical background, in patent cases involving complex technical issues expert opinions are indispensable. Expert witnesses may testify before the court either orally or by affidavit. Expert opinions may often prove to be pivotal to the outcome of proceedings, particularly in complex cases. Therefore, experts play a key role in the outcome of proceedings. It must be noted that judges tend to give the opinion of a distinguished expert more weight than that of a non-technical person.

13. Is some form of discovery/disclosure and/or court-mandated evidence seizure/protection (e.g. saisie-contrefaçon) available, either before the commencement of or during patent litigation proceedings?

By virtue of article 17B of Law 1733/1987, the Patent owner has the right of information if he shows that the infringement is likely. This right of information transposed article 7 of EU Directive 2004/48 into Greek law. In light of these provisions, if the patent owner presents reasonably available evidence to support that the patent has been infringed or is about to be infringed, the court may order the defendant to provide documents concerning the infringing act.

14. Are there procedures available which would assist a patentee to determine infringement of a process patent?

Pursuant to article 17(6) of law 1733/1987, if the invention relates to a process for the manufacture of a product, each product of the same nature is presumed to have been manufactured according to the protected process.

15. Are there established mechanisms to protect confidential information required to be disclosed/exchanged in the course of patent litigation (e.g. confidentiality clubs)?

By virtue of the Enforcement Directive 2004/48 which has been incorporated into the Greek patent law, the competent national court has the right to order the defendant to present evidence which is under his control, subject to the protection of confidential information.

16. Is there a system of post-grant opposition proceedings? If so, how does this system interact with the patent litigation system?

Opposition proceedings before the Greek Patent Office are not provided for by the law. A patent can only be challenged before the competent civil courts.

17. To what extent are decisions from other fora/jurisdictions relevant or influential,

and if so, are there any particularly influential fora/jurisdictions?

Greek courts are not bound by court decisions from other jurisdictions. However, a clear tendency of the courts is observed to take into consideration decisions in similar cases or relevant issues where there is no national precedent. The case-law that is more often taken into consideration is that of the Court of Justice of the EU, as well as of the German, French and UK patent courts.

18. How does a court determine whether it has jurisdiction to hear a patent action?

According to the law, competent courts to hear preliminary injunctions in patent cases are Single Member Courts of First Instance, of the place of residence of the defendant, or of the place where the infringing action takes place. The Full Member Courts of First Instance are competent to hear main infringement actions. In this case, the suit can be brought before the specialized IP courts based in Athens and Thessaloniki.

19. What are the options for alternative dispute resolution (ADR) in patent cases? Are they commonly used? Are there any mandatory ADR provisions in patent cases?

Under the Greek Code of Civil Procedure, parties involved in infringement cases have the option of seeking an out-of-court settlement. Mediation and arbitration are also available means for resolving Intellectual Property rights disputes. Rules on arbitrations are provided for by arts. 867 et seq. of the Greek Code of Civil Procedure. Recently enacted law 4512/2018, made compulsory an initial mediation session before the hearing of the case in disputes arising from patent, trademark and industrial design infringements. This session, along with proof of the lawyer's compliance with the obligation to inform the client in writing about this option, are now a prerequisite for the admissibility of the lawsuit.

20. What are the key procedural steps that must be satisfied before a patent action can be commenced? Are there any limitation periods for commencing an action?

Parties in infringement cases have no legal obligation to undertake mediation or arbitration before initiating court proceedings. The patent owner may directly file a preliminary or main proceeding action against the alleged infringer. According to practice the patent owner used to serve a warning letter on the alleged infringer before initiating legal action. Pursuant to the provisions of the Code of Civil Procedure, parties involved in infringement cases had the option of reaching an out-of-court settlement. In practice, serving a strong warning letter could prove sufficient to make infringers cease the infringing actions. As mentioned above, Law 4512/2018 initiated compulsory use of mediation in legal disputes arising from patent, trademark and industrial design infringements.

21. Which parties have standing to bring a patent infringement action? Under which circumstances will a patent licensee have standing to bring an action?

Entitled to bring a patent infringement action is the patent owner, the exclusive licensee, whoever has a right on the invention, as well as the owner of a pending patent application. In the latter case the court may postpone the trial until the grant of the patent. According to the leading opinion, in order for the exclusive licensee to have standing to bring an action, the licence must have been recorded at the Greek Patent Office.

22. Who has standing to bring an invalidity action against a patent? Is any particular connection to the patentee or patent required?

Any party having legitimate interest is entitled to request nullification of a patent. If a nullity action against a patent has already been filed, it will be much more difficult for the patent owner to succeed in preliminary proceedings. There is no assumption that the patent is valid and protected. Further, the party can rely on the argumentation already included in the nullity action. If the patent owner subsequently files a main infringement action, both nullity and infringement actions will likely be heard together. If the patent owner has already filed a main infringement action, the defendant has the right to dispute the validity of the patent and to file prior art documents and other evidence, such as expert opinions).

23. Are interim injunctions available in patent litigation proceedings?

Two preliminary proceedings are available: temporary restraining orders and injunctions. The first and quickest defence against infringement is filing for a temporary restraining order. For the court to grant a restraining order, the petitioner must prove the existence of a prima facie serious infringement and that the matter is of exceptional urgency. The request must be filed concurrently with a petition for injunction. If a temporary restraining order is granted, it remains effective until the injunction hearing takes place. For an injunction to be granted, the element of urgency must be evident. Within this framework, patent owners can request cessation of the infringement and removal of the allegedly infringing products from the market. Patent owners also have a right to information and are entitled to certain measures to preserve evidence. The Greek Civil Procedure provides for an ex parte Temporary Restraining Order. However, this practically does not apply in patent infringement cases. In practice, the Defendant must be informed 24-48 hours prior to the hearing of the Temporary Restraining Order.

24. What final remedies, both monetary and non-monetary, are available for patent infringement? Of these, which are most commonly sought and which are typically ordered?

The remedies that are commonly granted to successful plaintiffs are a temporary or permanent injunction compensation for damages and seizure and/or destruction of the infringing products. Moral damages may also be requested, but not punitive ones. For obtaining compensation of moral damages, the plaintiff must prove the negligence of the infringer. The winning party may also request compensation for the profits derived from infringement or the payment of an amount equivalent to the value of a licence for the

exploitation of the invention. It is also possible that the courts threaten the losing party with a monetary penalty for each breach of the judgement. Another commonly used remedy is permitting the publication of the summary of the court decision in the Greek daily press.

25. On what basis are damages for patent infringement calculated? Is it possible to obtain additional or exemplary damages?

The compensation claim is determined by the actual loss, the unfair profits of the defendant and the licensing fees. It must be noted though, that proving the exact amount of the winning party's damage or the losing party's unfair enrichment may result very difficult in practice. In case the patent holder cannot collect sufficient evidence, it may request the infringing party to provide relevant information, by way of invoices or the quantity of distributed products.

26. How readily are final injunctions granted in patent litigation proceedings?

In order for a petitioner to be granted a permanent injunction, it must prove the existence of serious infringement. The petitioner must also prove novelty and inventive step of the invention, if the defendant raises objections in this respect.

27. Are there provisions for obtaining declaratory relief, and if so, what are the legal and procedural requirements for obtaining such relief?

Parties having legitimate interest may seek a declaratory action of non-infringement. A petitioner for such an action must show that it is necessary for use as defence against the patent owner or his licensee.

28. What are the costs typically incurred by each party to patent litigation proceedings at first instance? What are the typical costs of an appeal at each appellate level?

The costs that may be involved in a patent litigation case through to a first-instance decision are quite difficult to estimate due to the involvement of a multitude of factors, such as complexity of the case, duration of the proceedings, involvement of experts and translation costs. Nevertheless, the costs of preliminary proceedings and main patent proceedings can be roughly estimated at a range between 14,000€ and 30,000€, but higher fees have to be expected in complicated cases where several technical experts must be involved and close cooperation between client and counsel is necessary for an extended period of time.

29. Can the successful party to a patent litigation action recover its costs?

Pursuant to the provisions of the Civil Procedure Code the losing party is obligated to pay the winning party's legal expenses, as these are determined by the court. In the past the courts were very reluctant in the calculation of such expenses, several times not covering all attorneys' fees. However, after the implementation of EU Directive 48/2004/EC into the Greek law the courts are obliged to make a precise calculation of the actual legal expenses.

30. What are the biggest patent litigation growth areas in your jurisdiction in terms of industry sector?

The biggest patent litigation growth areas in Greece have been over the past decade and continue to be life sciences and technology. Pharmaceutical litigation is estimated to a 70% of Greek court decisions involving patents.

31. What do you predict will be the most contentious patent litigation issues in your jurisdiction over the next twelve months?

The most contentious patent litigation issues are expected to continue in the near future to involve patent infringement cases in the pharma sector.

32. Which aspects of patent litigation, either substantive or procedural, are most in need of reform in your jurisdiction?

Despite the fact that the judges serving in Greek specialised patent courts (in Athens and Thessaloniki) are highly qualified graduates of the National School of Judges, where they received special training in IP law and possess a high level of knowledge in IP matters, their "Achilles' heel" remains their lack of technical background. This makes their expertise prove insufficient in patent cases which involve complicated technical issues. Consequently, measures should be taken to the direction of educating highly specialized judges who will be able to deal with highly demanding technical matters.

33. What are the biggest challenges and opportunities confronting the international patent system?

With the dramatic expansion of globalization and ever evolving popularity of e-commerce, it seems that one of the biggest challenges for inventors will be to protect their inventions in an international environment where potential infringers have easy access to their inventions in many countries all over the world.