

Comparative Patent Litigation

Germany versus the United States

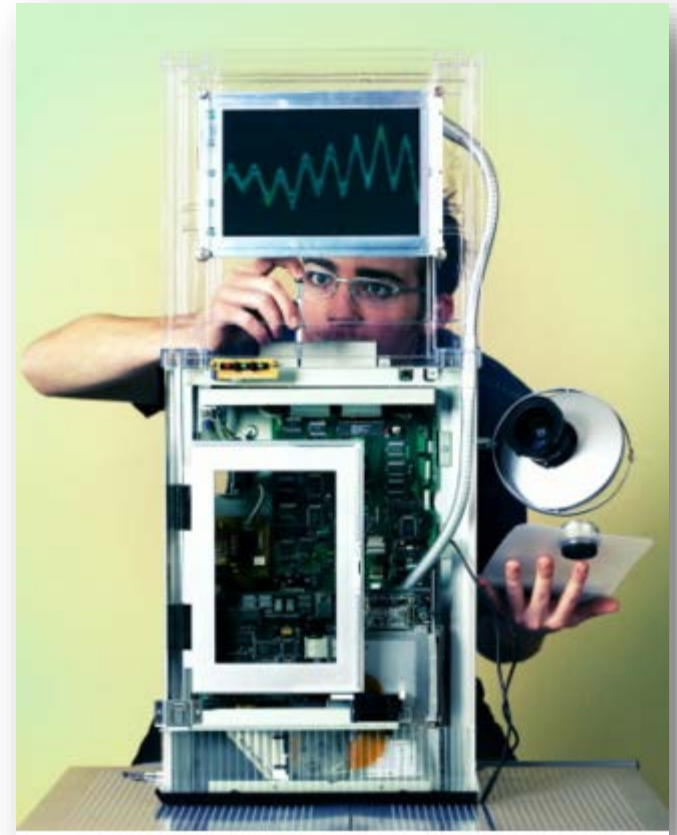
Why Germany?

- New patent legislation in the United States
- German patent courts historically busier than those of other European countries
- Strong German economy, large addressable market



Why Germany?

- Other features also attractive to patentees, who oftentimes choose the venue
- Limited discovery reduces costs
- Procedural rules like bifurcation may create leverage

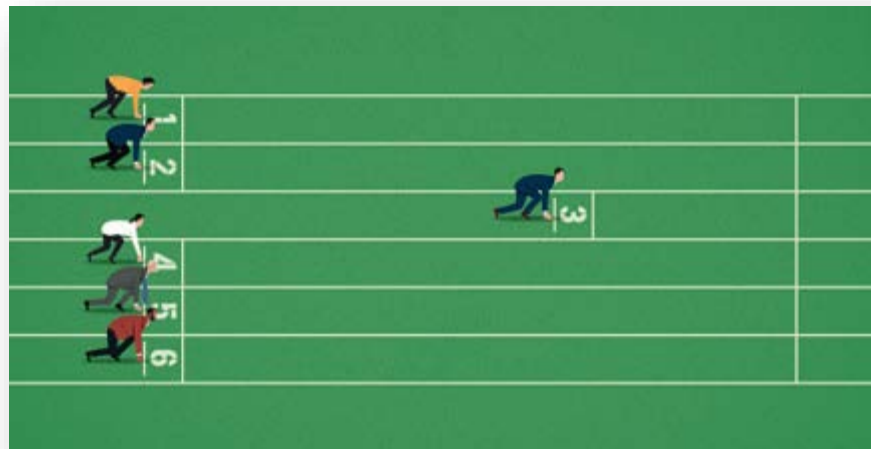


Notable differences between the United States courts and the German system

- 1. Infringement and invalidity actions are bifurcated into separate proceedings in separate courts**
2. American-style pleading and discovery is not available in German courts
3. Jury trials do not exist; judges decide cases
4. German bench trials follow different procedures
5. Injunctive relief is still a presumptive remedy for infringement
6. The loser in litigation pays costs and legal fees

Bifurcation of infringement actions/nullity actions

- Patent infringement claims often trigger invalidity counterclaims
- No such counterclaims allowed in Germany
- Accused infringers instead must file a separate action in another court



Bifurcation of infringement actions/nullity actions

- Federal Patent Court hears nullity actions
- It is a single venue, located in Munich
- Backgrounds of the judges vary; not just legal training



Bifurcation of infringement actions/nullity actions

- Oppositions to patents can also be filed with German PTO or EPO
- Appeals of rulings by the German PTO go to the Federal Patent Court as well



Deutsches
Patent- und Markenamt



Europäisches
Patentamt

European
Patent Office

Office européen
des brevets

Bifurcation of infringement actions/nullity actions

- Bifurcation leads to greater speed
- Infringement actions may be complete in a year, nullity actions can take two years
- Infringement court can, but does not need to, suspend proceedings in light of validity concerns



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Pretrial proceedings – discovery and pleadings

- No notice pleading in Germany
- Fact pleading requires infringement case to be laid out in complaint
- Responsive pleadings must meet the facts pleaded in the complaint with facts



Pretrial proceedings – discovery and pleadings

- May be difficult to obtain facts to plead in some circumstances
- Discovery could be gathered to help with facts for pleading in other European countries



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Pretrial proceedings – forum selection

- Patentee can decide where to file an infringement case
- Use of judges rather than juries may give more information about likely views of decision maker
- More cases means more court fees; may lead to competition among courts

Landgericht
Düsseldorf



Landgericht Mannheim

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Trials in Germany

- Decisions in German courts made by judges based on written briefs
- Four part briefing, two briefs per side, is standard



Trials in Germany

- Handling of evidence very different than in the United States
- Trials last from an hour to a day, not days or weeks



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Relief accorded following a finding of infringement

- An injunction is the standard remedy in Germany
- Makes damages law, and determination of damages, less of an issue
- Much greater injunctive risk, but smaller likelihood of runaway damages award

Relief accorded following a finding of infringement

- If patent later found invalid, patentee may owe money to enjoined defendant
- But defendant may not be in a position to continue nullity challenge with product taken off market



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Financial aspects of German patent judgments

- In Germany, the loser pays
- Court costs controlled by amount in controversy and are fronted by the plaintiff
- Need to balance amount in controversy to show importance with increased court costs

Financial aspects of German patent judgments

- Germany has statutory fees for litigation that are also based on amount in controversy
- Litigants often pay more than statutory fees



Things that surprise Germans about the United States litigation system

- 1. The use of juries is very different from their judge-based system**
2. The availability and amount of pre-trial discovery is very different than what can be obtained in Germany
3. They are surprised by witnesses being prepared and put on by attorneys rather than questioned by judges
4. The reduced availability of injunctive relief is thought to be inimical to the nature of patent rights

Patent jury trials are foreign to them

- Lay juries deciding patent cases is surprising
- Not only do judges decide in Germany, but oftentimes judges in specialized chambers



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Pretrial discovery seems excessive

- German courts believe in efficient, inexpensive, quick decisions
- Massive and lengthy discovery on many issues runs counter to those goals
- There are greater privacy concerns, especially with email, in Germany as well



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Having counsel put on witnesses is different

- Trials used to answer questions left from briefing
- American-style trials with attorneys presenting prepared witnesses not found in their system



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They view patent rights as the right to exclude

- Injunctive relief seen as the essence of patent rights
- United States rulings that limit injunctive relief on valid and infringed patents contrary to that idea



Thank you!