

In association with



iam[®]

Greece

Dr Helen G Papaconstantinou and Partners
Maria Athanassiadou and Henning Voelkel

Patents in Europe **2018/2019**

*Helping business compete
in the global economy*



DR HELEN G.
PAPACONSTANTINO
& PARTNERS
LAW FIRM

95 YEARS OF SUCCESSFULLY
SERVING DOMESTIC &
INTERNATIONAL CLIENTS
ACROSS THE SPECTRUM
OF INTELLECTUAL
PROPERTY MATTERS

We believe in Excellence
We build on our History
We deliver Success

Patents
Utility Models
SPC's
Plant Breeders' Rights
Trademarks
Designs
Copyright
Anti-Counterfeiting & Anti-Piracy
Litigation
Licensing
Franchising
Commercial and Corporate Services
Internet
E-Commerce and Domain Names
Competition Law
Advertising/Consumer Protection
Foreign Jurisdictions
Consultancy

A 2 Coumbari Str., Kolonaki, 10674 Athens, Greece
T +30 210 3625757, +30 210 3626624
F +30 210 3626742, +30 210 3605873

www.hplawfirm.com

Greece



By Maria Athanassiadou and Henning Voelkel, Dr Helen G Papaconstantinou and Partners

Q: What options are open to a patent owner seeking to enforce its rights in your jurisdiction?

The first and quickest way of acting against an infringer is to request a temporary restraining order. This will be granted if the petitioner proves the existence of a *prima facie* serious infringement as a matter of exceptional urgency. Such request is filed concurrently with a petition for injunction and, if granted, is usually effective until the hearing of the injunction takes place. Within this framework, the patent owner may request cessation of the infringing act and removal of the infringing products from the market. The patent owner may also take measures to preserve evidence and has the right to information. The next step is the main infringement action, in which the patent owner may request compensation and moral damages.

For the most effective patent protection, adopting a prevention strategy by establishing an efficient watching system is key. This can be achieved by filing a general request with the local customs authorities, which will notify the rights holder or its representative on interception of suspected infringing goods.

Q: Are parties obliged to undertake mediation/arbitration before bringing a case before the courts? Is this a realistic alternative to litigation?

Parties involved in an infringement proceeding are not obliged to undertake mediation or arbitration before initiating court proceedings; the patent owner may file a preliminary or main proceeding action against the alleged infringer directly. However, it is customary to serve a warning letter on the alleged infringer before initiating legal action. Further, under the Code of Civil Procedure, parties involved in infringement cases may opt for out-of-court settlement.

Q: Are there specialist patent or IP courts in your jurisdiction? If not, what level of expertise can litigants expect from the courts?

Greece has two specialised EU trademark and patent courts based in Athens and Thessaloniki. The judges who serve in these courts received special training in IP matters during their studies at the National School of Judges before their appointment to the bench. Nonetheless, they have only legal (not technical) backgrounds, and thus

have insufficient expertise to deal with complex technical issues. For this reason, expert opinions can play a key role in the assessment of the facts and in the outcome of a case.

Q: Are validity and infringement dealt with together, or does your country have a bifurcated system?

Greek law provides for separate procedures before the competent civil courts for patent validity challenges and infringement actions. Consequently, full or partial nullity declarations can be made by means 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.

Q: Who may represent parties engaged in a dispute?

Only lawyers (ie, attorneys at law) who are members of a Greek bar association may represent parties before the Greek civil courts, without restriction. The complexity of most patent disputes makes it imperative that litigants entrust their cases to lawyers who specialise in IP protection. Greece has no qualification system for patent attorneys.

Q: To what extent is pre-trial discovery permitted?

Greek law does not provide for pre-trial discovery. However, it gives the patent owner the right to take measures to preserve evidence and request the defendant to provide information (eg, invoices or the amount of products that have been distributed) within the framework of a trial.

Q: Is cross-examination of witnesses allowed? If so, what form does this take?

Witnesses can play a key role in infringement cases where complex technical matters must be analysed and clarified. The new Civil Procedure Rules, effective as of January 1 2016, have introduced important changes regarding the involvement of witnesses in procedures. Specifically, each party may present five sworn affidavits to prove its own argumentation and three sworn affidavits in rebuttal. After the judge has assessed the submitted affidavits, a formal court hearing takes place and the judge decides the case based on

the provided evidence. If the judge deems it absolutely necessary, he or she may select one of the persons who provided a sworn affidavit to provide oral testimony before the court. In such cases, cross-examination of witnesses is permitted. Each party's witness is expected to testify on all facts of the case. Each party's counsel may cross-examine the other party's witness; the court may also address questions to the witnesses.

Q: What use of expert witnesses is permitted?

Expert witnesses may provide sworn affidavits. If the judge decides that an oral hearing is necessary, one expert witness may testify orally before the court. Given that the judges dealing with patent matters have only legal (not technical) backgrounds, the role of expert witnesses in the procedure is of paramount importance. Where complex issues are involved, such testimonies may prove to be decisive to the outcome of the case.

Q: Is the doctrine of equivalents applied by courts in your jurisdiction? If so, what form does this take?

Greek law generally accepts the doctrine of equivalents, according to which due account must be taken of any element which is equivalent to an element specified in the claims. However, the case law is not very sophisticated in this respect.

Q: Are there problems in enforcing certain types of patent relating to, for example, biotechnology, business methods or software?

Certain rights which are considered patent rights in other jurisdictions are exempt from protection under Greek patent law (eg, software and business methods). In any case, the factor that is most likely to give rise to difficulties in the enforcement of certain patent rights is the lack of technical training of Greek judges and lack of extensive case law in complicated technical fields.

Q: To what extent are courts obliged to consider previous cases that have covered issues similar to those pertaining to a dispute?

Precedential decisions are not binding on the Greek courts. However, Greek judges take the established case law into consideration and tend to stay in line with it.

Q: To what extent are courts willing to consider the way in which the same or similar cases have been dealt with in other jurisdictions? Are decisions from some jurisdictions more persuasive than those from others?

Although Greek courts are not bound by decisions from other jurisdictions, they tend to take them into consideration in similar cases – especially the case law of German, UK and French patent courts.

Q: What realistic options are available to defendants seeking to delay a case? How might a plaintiff counter these?

Until very recently, defendants had scope to cause significant delays of proceedings. The introduction of the new Civil Procedure Rules on January 1 2016 has greatly limited the opportunities for defendants to obtain postponements. However, the appointment of technical experts can cause delays of 18 months or more.

Q: Under what circumstances, if any, will a court consider granting a preliminary injunction? How often does this happen?

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

Q: How much should a litigant budget for in order to take a case through to a decision at first instance?

It is extremely difficult to estimate the costs involved in a patent case through to a first-instance decision because these can depend on multiple factors, including complexity, duration of proceedings, involvement of experts and translation costs. However, the costs of preliminary proceedings and main patent proceedings are usually between €8,000 and €12,000. Higher fees must be expected in complex cases which demand close cooperation between counsel and client for an extended period.

Q: How long should parties expect to wait for a decision to be handed down at first instance?

The main shortcoming of patent litigation in Greece used to be the considerable delays involved.

With the amendment to the Civil Procedure Rules, delays in court proceedings have been seriously reduced, since cases are now heard within approximately six months and a decision is issued after another period of around four to six months.

Q: To what extent are the winning party's costs recoverable from the losing party?

According to the Civil Procedure Rules, the losing party must pay the winning party's legal fees, as determined by the court. This amount has historically often been calculated on a very conservative basis, not covering all attorneys' fees. However, since EU Directive 48/2004/EC was implemented into Greek law, the courts are obliged to determine the actual legal fees. If the plaintiff seeks compensation, the related court costs will be much higher, depending on the amount requested.

Q: What remedies are available to a successful plaintiff?

The typical remedies granted to a successful plaintiff are:

- a temporary or permanent injunction;
- compensation for damages; and
- seizure and/or destruction of the infringing goods.

In many cases the courts may threaten the losing party with a monetary penalty for every breach of the judgment. They may also permit publication of a summary of the decision in the Greek daily press.

Q: How are damages awards calculated? Are punitive damages available?

The patent owner may request compensation (ie, based on reasonable licensing fees) and moral damages, but not punitive damages. To obtain compensation or moral damages, the plaintiff must prove the negligence of the infringer. In Greece, three factors determine the compensation claim:

- the actual loss;
- the defendant's unfair profits; and
- reasonable licensing fees.

However, proving the exact amount of the damage or enrichment is often very difficult. Where the patent owner cannot collect sufficient evidence, it may request the infringer to provide

information such as invoices or the quantity of distributed products. In addition to the compensation claim, a patent owner may request moral damages; however, the amount of moral damages is difficult to estimate.

Q: Under what circumstances might a court grant a permanent injunction? How often does this happen?

The court will grant a permanent injunction if the petitioner shows that its patent is new and inventive and that the defendant is infringing it. Unfortunately, no data is available regarding the outcome of compensation actions in Greece.

Q: Does the losing party at first instance have an automatic right of appeal? If not, under what circumstances might leave to appeal be granted?

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 that relate to legal issues or incorrect findings regarding the facts of the case. The right to appeal is provided only in main infringement action proceedings; preliminary injunction decisions cannot be appealed.



Maria Athanassiadou

Partner

m_athanassiadou@hplaw.biz

Maria Athanassiadou is a partner at HP&P Law Firm. She is an attorney at law with more than 20 years' experience in a broad spectrum of IP matters. She graduated from the University of Athens with a law degree and is admitted to practise before the Supreme Court and the Council of State. She joined the firm in 1994 and was admitted to the Athens Bar in 1996.

Ms Athanassiadou focuses her practice on all aspects of patents, supplementary protection certificates, utility models and industrial designs, and provides consultancy and legal representation for major companies. She is an active member of the International Trademark Association and the Pharmaceutical Trademarks Group, and regularly contributes to various trademark and patent publications. She speaks Greek, English, Spanish, French and German.



Henning Voelkel

Associate

h_voelkel@hplaw.biz

Henning Voelkel graduated from the University of Heidelberg, Germany with a law degree and holds a master's and a PhD degree from Athens University. He was admitted to the German Bar in 2004 and to the Athens Bar in 2005. He is admitted to practise before the Supreme Court and the Council of State and is a member of the German Association for the Protection of Intellectual Property.

Dr Voelkel has extensive experience in handling IP issues, including consultation and legal representation of major multinational companies. He has handled various patent litigations and patent nullity proceedings – mainly concerning pharmaceutical patents, but also in the field of electronics. Dr Voelkel is a native German speaker and is fluent in Greek and English.

Q: How long does it typically take for the appellate decision to be handed down?

The timeframe for appeal proceedings averages at 18 months but may be longer, depending on the circumstances.

Q: Is it possible to take cases beyond the second instance?

The losing party may appeal a second-instance decision before the Supreme Court 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.

Q: To what extent do the courts in your jurisdiction have a reputation for being pro-patentee?

The lack of official data does not enable a precise reply to this question. However, practice indicates a pro-patentee tendency in the Greek courts. Further, nullification of validated European patents is rare in comparison to national patents, because European patents are granted after substantial examination by the European Patent Office regarding novelty and inventive step.

Q: Have courts in your jurisdiction handled cases relating to standard-essential patents and fair, reasonable and non-discriminatory licensing since the ECJ's *Huawei v ZTE* decision? If so, what have they decided?

No decision has yet been published in which a Greek court has applied the rules established in *Huawei v ZTE*.

Q: If they have not handled such cases, how would you expect them to approach the issue?

According to *Huawei v ZTE*, the owner of a standard-essential patent may seek an injunction without abusing its dominant position only if it has followed a specific procedure. If the patent

owner does not meet this requirement, the Greek court is likely to reject an injunction filed by the patent owner.

Q: Has your jurisdiction signed the Agreement on the Unified Patent Court? If so, when do you expect it to be ratified?

Greece has signed the Agreement on the Unified Patent Court and ratification is expected in 2017 or 2018.

Q: Will your country play host to one or more divisions of the Unified Patent Court?

Greece is not expected to play host to any division of the Unified Patent Court.

Q: Are there any other issues relating to the enforcement system in your country that you would like to raise?

The new Civil Procedure Rules, in force since January 1 2016, have significantly expedited court proceedings – which is very favourable to patent owners.

Finally, it remains to be seen in which way and to what extent the new practices introduced by the Unified Patent Court will change the IP landscape in Greece. *iam*



Dr Helen G Papaconstantinou and Partners

2 Coumbari Street, Kolonaki
Athens 10674
Greece

Tel +30 210 362 6624

Fax +30 210 362 6742

Web www.hplaw.biz