

IP Litigation in the Courts of Düsseldorf

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Introduction/Outline

- Basic facts of IP litigation in Düsseldorf
- Focus on Patent Litigation
 1. Generally: German court system and how patent litigation fits into it
 2. Some statistics establishing significance of Düsseldorf on the European stage

Introduction/Outline

3. Identify factors for high regard and effectiveness of Düsseldorf patent litigation
4. Basic facts on litigation concerning other IP rights in Düsseldorf (copyrights, trademarks, designs as well as unfair competition)

1. Patent matters inside the German court system

- Understanding of system is a precondition for understanding the effectiveness of the Düsseldorf procedure

1. Patent matters inside the German court system

- Patent matters are dealt with by German ordinary civil courts
- Almost all German states have created specialised Patent Chambers with exclusive jurisdiction in the state
- 12 German Patent Chambers exist nationwide

1. Patent matters inside the German court system

- Düsseldorf District Court accomodates one of these specialised patent courts (actually two independent chambers)
- Ratio of exclusive jurisdiction: Concentration of knowledge and experience
- Jurisdiction for the respective state

1. Patent matters inside the German court system

- Patent Chamber Düsseldorf (4a and 4b Chambers) has statewide exclusive jurisdiction in (i.a.)
 - a) Patent and utility model matters,
 - b) Employee's invention cases,
 - c) Plant protection cases,
 - d) Unfair competition (technical products)

1. Patent matters inside the German court system

- e) Antitrust cases, as far as they originate from license agreements over these IP rights or from trademark license agreements

1. Patent matters inside the German court system

- Infringement cases are technically civil cases
- Both parties have to be represented by a German attorney at law (mostly specialised with experience)
- Participation of patent attorney highly recommended
- Judges are lawyers, no technical experts

1. Patent matters inside the German court system

- Task of attorneys is to „translate“ the technical problems to the judges
- One reason for specialisation:
Judges become „trained“ to understand technical sets of facts

1. Patent matters inside the German court system

- Patent chambers only have jurisdiction to decide infringement, not validity, of IP rights, in particular patents
- Two-column or „dual“ system essential for the German patent litigation system

1. Patent matters inside the German court system

- Infringement matters dealt with by ordinary civil courts like Düsseldorf
- Questions of validity are domain of the Federal Patent Court and the opposition boards at the granting authorities

1. Patent matters inside the German court system

- Split in competences has grave consequences (substantive patent law *and* litigation procedure)
- Ensures, in effect, concentration on infringement

1. Patent matters inside the German court system

- Dual system essentially differs from treatment of patent litigation in other jurisdictions
- E.g. London High Court (Chancery Division, Patents Court) – counterclaims for declaration of nullity

2. Facts on the significance of Düsseldorf in patent litigation

- *Düsseldorf Patent Chambers: incoming cases*
 1. 2001-2003 on average approx. 600 new cases
 2. 2003: absolute official figure 545 cases
 3. Not all of them infringement actions

2. Facts on the significance of Düsseldorf in patent litigation

4. Estimate: 250 to 300 patent infringement actions per year (including utility models and specified damages claims)
 - *London High Court/Patents County Court: incoming cases*
1. Düsseldorf figure three times higher

2. Facts on the significance of Düsseldorf in patent litigation

2. Report EPLA Nov. 2001 (based on cases 1990-1999 on average): 100 patent cases per year (not all of them infringement actions)
 - *Paris Court: incoming cases*
 1. Report Veron Nov. 2001 (1990-1999 average)
 2. 118 infringement actions per year

2. Facts on the significance of Düsseldorf in patent litigation

- *Düsseldorf Patent Chambers: cases heard and decided*
 1. Between $\frac{1}{2}$ and $\frac{3}{4}$ of incoming cases heard and decided each year
 2. Ranging on average between 180 and 225 hearings and decisions p.a.

2. Facts on the significance of Düsseldorf in patent litigation

- *London High Court: cases heard and decided*
 1. Cases heard in 2003: approx. 30
 2. Cases scheduled for hearing in 2004: 14 (status: March 18, 2004)
 3. Number of judgments below these figures
 4. Nov. 2001 EPLA report: 2/3 of cases settled

2. Facts on the significance of Düsseldorf in patent litigation

- *Paris Court: cases heard and decided*
 1. Veron report Nov. 2001: 108 judgments on average in years 1990 to 1999

2. Facts on the significance of Düsseldorf in patent litigation

- Düsseldorf, London, Paris ranging before Italian, Spanish and other European venues
- Not yet sufficient information on Eastern European patent litigation figures

2. Facts on the significance of Düsseldorf in patent litigation

- Two Chambers deciding patent matters in Düsseldorf, 2nd Chamber added in 2001
- still number of heard and decided cases per year impressive
- Approx. two to three oral extensive oral hearings per week per Chamber

2. Facts on the significance of Düsseldorf in patent litigation

- Willingness of Düsseldorf judges to adhere to self-imposed rigid time schedule important factor

3. Main Factors for high international regard of Düsseldorf patent litigation

- a) General character of civil procedure in Germany
 - Starting point: civil procedure essentially relies on written preparation
 - Written briefs shaped and guided by statutory rules
 - Rules promote concentration and comprehensiveness of presentation

3. Main Factors for high international regard of Düsseldorf patent litigation

- Concentration promotes effectiveness in oral hearings
- Comparison: London (UK) procedure mainly relies on oral presentation (patent cases between two to ten days, sometimes more)

3. Main Factors for high international regard of Düsseldorf patent litigation

- Statutory procedural rules ensure that
 - All arguments are presented in written form (comprehensive briefs)
 - To be submitted within tight court-fixed deadlines, non-submittance sanctioned by risk of preclusion

3. Main Factors for high international regard of Düsseldorf patent litigation

- Meticulous written preparation is one pre-condition for Düsseldorf practice to usually decide without expert

3. Main Factors for high international regard of Düsseldorf patent litigation

- b) Two-column, or „dual“ system in Germany
 - Several consequences in terms of procedure and substantive patent law:
 - No direct defense of invalidity of patent

3. Main Factors for high international regard of Düsseldorf patent litigation

- Implicit examination by infringement court can only be made through a motion to suspend due to pending nullity action/opposition
- Reluctance to suspend in Düsseldorf
- Rationale: Grant of patent, and the rights conferred on owner, would in effect be defeated if suspension regular procedure, no jurisdiction of civil courts

3. Main Factors for high international regard of Düsseldorf patent litigation

- Another consequence of split in competences: „Formstein-defense“ limited to cases of alleged equivalent infringement
- Literal infringements must not be defended by allegation that attacked product was obvious from prior art
- Otherwise *de facto* decision on patentability (outside of jurisdiction)

3. Main Factors for high international regard of Düsseldorf patent litigation

- Exception: utility models and designs can be evaluated by Civil Courts like Düsseldorf
- No systematic contradiction with split in competences as these IP rights have not been examined prior to registration

3. Main Factors for high international regard of Düsseldorf patent litigation

- c) Cost-friendly patent litigation in Germany
 - Special statutory remuneration system for attorneys (BRAGO)
 - Fees fixed in relation to value of dispute
 - Fees comparatively moderate

3. Main Factors for high international regard of Düsseldorf patent litigation

- Also: Statutory reimbursement claim for winning party in civil lawsuits
- Reimbursement limited to moderate BRAGO fees
- Risk of losing a lawsuit can be calculated beforehand
- Own attorneys' costs can be higher

3. Main Factors for high international regard of Düsseldorf patent litigation

- Example for *comparatively* moderate fees:
 - A great part of patent cases in Düsseldorf are filed with a value of EUR 500,000.-
 - Cost risk involving attorneys and patent attorneys fees as well as court fees: *approx.* EUR 35,000.--

3. Main Factors for high international regard of Düsseldorf patent litigation

- Remuneration system advantageous even for huge companies with necessity to plan litigation budgets
- Costs moderate especially in comparison to US and UK litigation

3. Main Factors for high international regard of Düsseldorf patent litigation

- d) Education of Düsseldorf judges in patent matters
 - Unique training of Düsseldorf judges
 - Service in the first instance
 - Service on the Patents Senate of Court of Appeal
 - Many judges have served in Federal Supreme Court (judicial clerks)

3. Main Factors for high international regard of Düsseldorf patent litigation

- Many Düsseldorf judges having served in the Patent Chamber have become Federal Supreme Court judges and are still serving today
- Exceptional training „within the system“ adds to reliability and quality of Düsseldorf decisions

3. Main Factors for high international regard of Düsseldorf patent litigation

- e) Düsseldorf procedure – Speed
 - All judges subordinate themselves to a self-imposed rigid time schedule unique on the European patent litigation stage

3. Main Factors for high international regard of Düsseldorf patent litigation

- Approx. six weeks after filing written complaint or service respectively:
First oral hearing
- First hearing only a formal one, no discussion on merits of case
- Only the motions are submitted, a date for extensive hearing is fixed and deadlines of three months are set

3. Main Factors for high international regard of Düsseldorf patent litigation

- Extensive hearing roughly 6-9 months after first hearing
- First Instance decision in Düsseldorf patent infringement actions after approx. 9-12 months (without expert's appointment)
- Written preparation
- All cases internally debated in the week prior to extensive hearing

3. Main Factors for high international regard of Düsseldorf patent litigation

- „Votum“ is prepared forming the preliminary basis for the decision
- Hearing serves to identify the crucial aspects on which both attorneys' attention should be focussed in pleadings
- Mostly: contested features of the patent claim

3. Main Factors for high international regard of Düsseldorf patent litigation

- Decision granted approx. three weeks after extensive oral hearing, written decision served four weeks after that (seven weeks after oral hearing)
- Mostly: Judgments, not orders to take evidence
- Reluctance in the first instance to hear expert's opinion

3. Main Factors for high international regard of Düsseldorf patent litigation

- Court of Appeal in second instance not as reluctant to hear experts
- Either plaintiff secured by first instance judgment, or plaintiff actually seeks expert's opinion after losing the first instance

3. Main Factors for high international regard of Düsseldorf patent litigation

- f) Willingness of Düsseldorf judges to help enforcing patents
 - Within legal boundaries of statute-conforming construction of patent claims
 - Equivalence: Perhaps a preparedness to construe patent claims so as to cover as much „deviations“ as can possibly be brought in accordance with claim

4. Preliminary injunctions in patent matters

- Preliminary Injunction is sharpest sword of patent owner
- Still not numerous injunctions in patent matters, but recently more often granted

4. Preliminary injunctions in patent matters

- Long standing pre-conditions that
 - a) both infringement and validity without reasonable doubt
 - b) technology not too difficult
 - c) Infringement must be easily established
 - d) Balancing of parties' interests in favour of plaintiff/applicant

4. Preliminary injunctions in patent matters

- e) case must be urgent („special interest to be granted an injunction“)
 - Recent experience shows: In principle Düsseldorf court grants injunctions if infringement and validity of patent can be established, and urgency can be shown
 - Standards maybe higher if the value is high

5. Other Intellectual Property Rights

- Four specialised Chambers for trademark, design and unfair competition cases
- Judges with years of experience in these matters
- 12th Civil Chamber: Exclusive statewide jurisdiction on copyright infringement matters