

Strategies For Litigating In The Unified Patent Court

By **Henrik Holzapfel and Chuck Larsen** (June 5, 2025)

Since opening its gates in June 2023, the new European Unified Patent Court has already transformed the patent litigation landscape and global litigation strategies.

An increasing number of high-impact patent cases are now being heard before the UPC rather than national courts. This article aims to shed light on the experience of litigating before the UPC, and to provide a comprehensive outlook on what you need to know to be successful before the UPC.

The UPC

The UPC system concentrates European patent litigation in a single court with jurisdiction over multiple European countries. Thus, separate national litigation in each country is no longer necessary. The UPC also aims to establish a gold standard for patent litigation as the court and its judges focus on providing fast and effective patent enforcement and validity proceedings without compromising on the quality of decisions.

In practice, this means that the oral hearing will take place approximately one year after filing the statement of claim, and a reasoned written decision will be issued within six weeks after the oral hearing.

An innovative feature of the UPC is the option to add a technical judge to the multinational panel of legally qualified judges. In our experience, the technical judge significantly contributes to the proceedings and decision-making, and therefore plays a key role in shaping UPC litigation.

For example, a technical judge, building on their own professional knowledge, may be the one asking most critical questions at an oral hearing about the technical aspects of the asserted patent or the prior art.

In addition, the technical judge may convince the panel to override the findings of party-appointed experts based on their own professional experience, thereby reducing the relevance of court-appointed experts and thus expediting the proceedings.

Given such benefits, the addition of a technical judge to the panel has become the standard, although only optional according to the UPC Rules of Procedure.

What to Know

Front-Loaded Character

The opportunity for fast and efficient patent enforcement or revocation does not come for free: The UPC Rules of Procedure impose a strict and fast-paced timetable on the parties and intend the proceeding to be front-loaded.



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This means that the parties must meet the challenging expectation to present their case including all facts, arguments and evidence as early and in as detailed a fashion as reasonably possible.

In practical terms, a claimant in an infringement proceeding must prepare its case strategy, gather evidence of infringement including possibly a technical examination of infringing products, and develop substantiated legal arguments even before the statement of claim is filed, as all the above must be identified in the statement of claim.

If a party does not present its case as fully and as early as reasonably possible the UPC may consider facts, arguments and evidence as late pleading and exclude them from consideration.

In other words, the parties will not be able to present these arguments later in the proceedings. Exceptionally, new pleading is admissible at a later stage only if it was impossible to file earlier or if it is responsive to something the other party submitted in its preceding writ.

When reviewing responsiveness, the judges will carefully consider whether the new pleading is actually responsive, or whether it is the result of the filing party's negligence.

This front-loaded feature dramatically contrasts with U.S. district court litigation — where initial pleadings are based on notice, and facts and evidence are developed through the discovery process and presented ultimately at trial — years after the case is filed.

The challenge of dealing with the front-loaded character is compounded by the fact that litigators must work against short deadlines, especially when representing the defendant.

While the claimant theoretically has ample time to prepare its case, the defendant is expected to present its full defense after only a few months. In infringement proceedings, the defendant has three months to review the statement of claim, develop a defense strategy, gather facts, arguments and evidence, and draft its substantiated statement of defense, including a possible counterclaim for revocation of the asserted patent.

In revocation proceedings, the defendant has only two months to prepare its strategy, substantiated statement of defense and auxiliary requests for the patent to be maintained in amended form. To keep up the pace of the proceedings, judges do not generously extend deadlines, which adds to the challenge of UPC litigation.

The fast pace of the proceedings has particular relevance to the litigation of standard essential patents: The UPC should not usually be expected to define fair, reasonable and nondiscriminatory terms of license agreements.

The tight time frame of UPC proceedings and the court's high workload will typically not allow judges to hear economic experts to determine FRAND terms, as U.K. courts have done in extensive proceedings with multiple days of oral hearings.

Therefore, it is very likely that the UPC will limit itself to reviewing the parties' compliance with obligations they have in negotiations under the FRAND guidelines provided by the Court of Justice of the European Union in the Huawei v. ZTE case in 2015.[1]

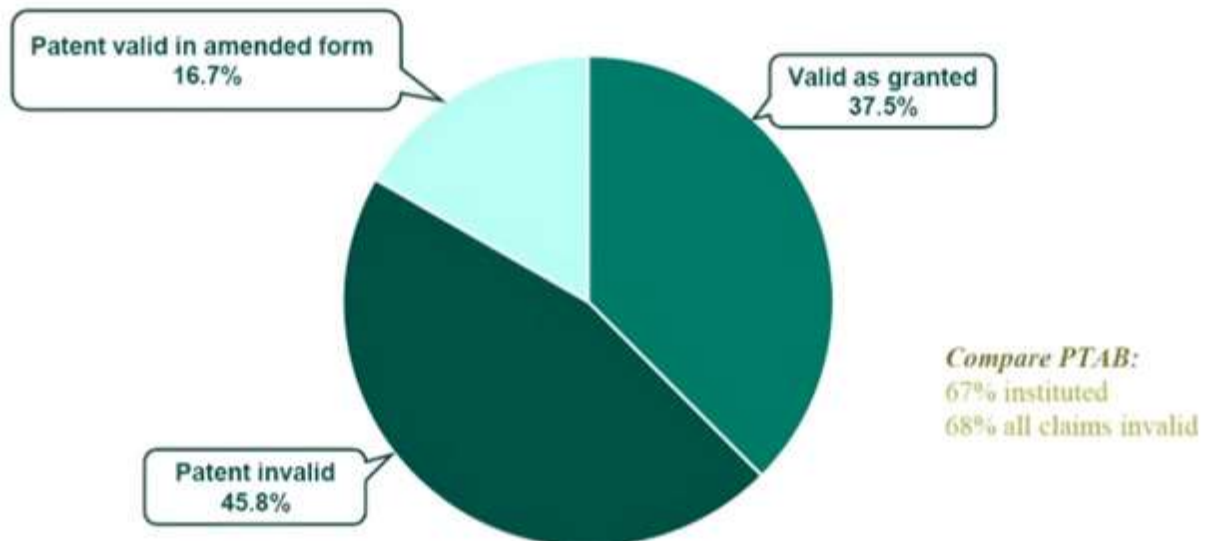
The UPC confirmed this expectation in its first standard essential patents case,[2] as judges only reviewed whether the parties' conduct during license negotiations was FRAND and

granted an injunction without actually defining what would have been FRAND terms in the specific case.

A Patentee-Friendly Court

Although the UPC's approach to handling the day-to-day questions of patent litigation is still evolving, the initial cases show that the court seems to be rather patentee-friendly.

Figure 1: Statistics of Decisions on Patent Validity



As indicated in Figure 1, the risk of losing a patent in UPC litigation is less than 50% as the court revoked 45.8% of the patents challenged by revocation. This is a much better starting position than in comparable U.S. validity proceedings, where about two-thirds of the challenged patents are found to be invalid.[3]

This is partly due to the patentee's option to defend its patent by amending it during the proceedings as 16.7% of patents are maintained in amended form.

Unlike U.S. courts, the UPC allows amendments as a matter of course, but may limit auxiliary requests to a number it deems reasonable. What constitutes a reasonable number is decided on a case-by-case basis, depending on the complexity and the point in time of the proceedings at which the auxiliary requests are presented. Given the front-loaded aims of the UPC, judges tend to accept more auxiliary requests the earlier they are filed.

Initial cases show a wide range of auxiliary request numbers that were found to be reasonable. For example, the Paris Central Division found in the *NJOY v. Juul* case[4] in 2023 that 12 auxiliary requests were the upper limit of what was considered reasonable in the specific case, and in another case[5] it found that 84 auxiliary requests were admissible.

Further, in their specific cases, the Nordic-Baltic Regional Division[6] held all 11 auxiliary requests as reasonable and the Munich Local Division[7] did not exclude that 55 auxiliary requests may be considered as reasonable.

The Paris Central Division also helped patentees and held that there is no requirement to motion for a specific combination of granted claims to be maintained. Upon a general

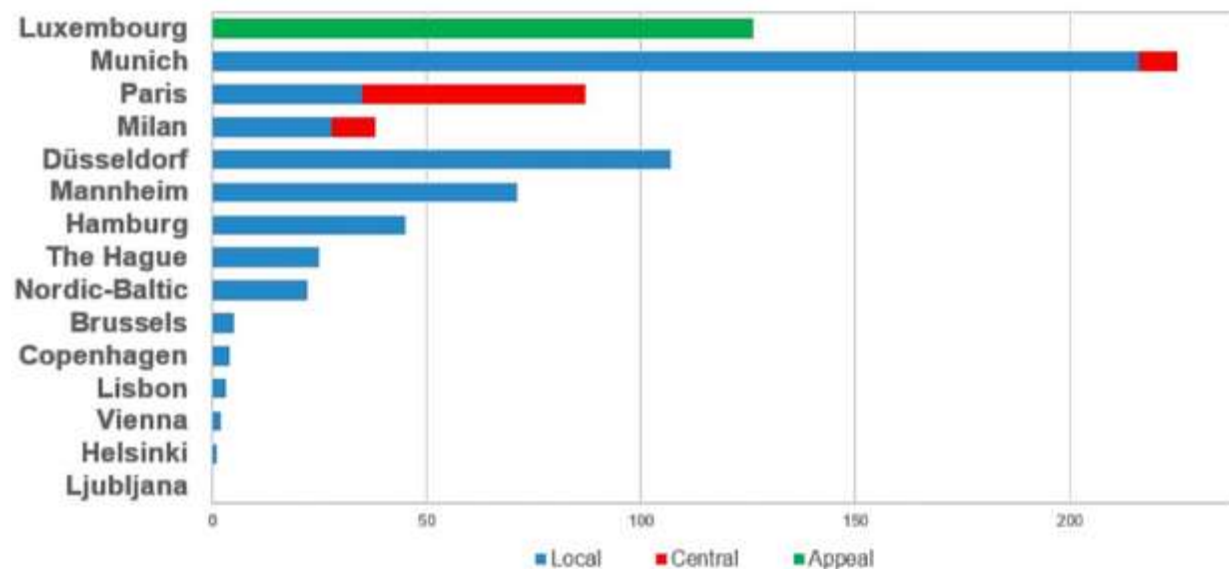
request by the patentee, the UPC will still examine all granted claims and their possible combinations and determine any claim combination with which the patent can be maintained.[8]

Therefore, the possibilities to defend a patent by amendments may be more limited before the UPC than in opposition proceedings before the European Patent Office, that allows an unlimited number of auxiliary request, but far more liberal than in comparable U.S. proceedings, and judges seem to be more inclined to maintain patents as valid, at least in amended form.

If the UPC finds a patent invalid, the judges typically give an opinion on the ground of invalidity that is most likely to lead to revocation, unlike the EPO proceedings where a decision is given on all grounds of invalidity raised.

The UPC's limited approach results in less clarity for the public as to the scope of patentable subject matter, which benefits the patentee because a clearer view of patentable subject matter as provided by the EPO potentially makes it easier to design products around a given patent and avoid the risk of infringing that patent.

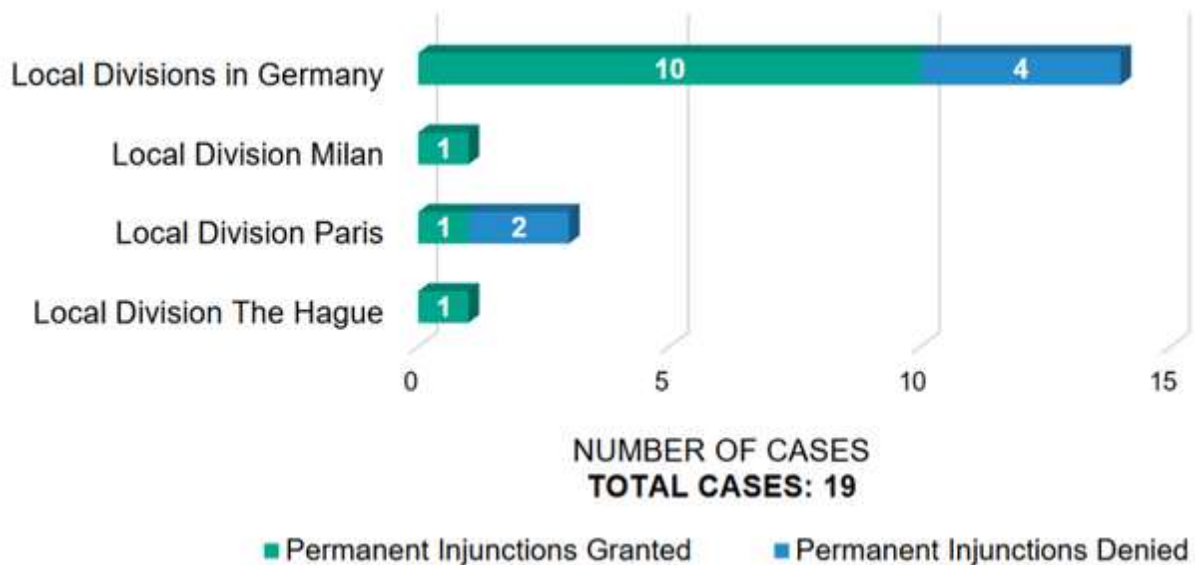
Figure 2: Numbers of Initiated Cases Before UPC Central and Local and Regional Divisions



The opportunity to obtain an injunction within a year, potentially across the vast majority of EU countries, is one of the most attractive aspects of the UPC for patentees.

As indicated in Figure 2, showing the numbers of cases handled by each UPC division, the German UPC local divisions have been the most active. For example, the Munich Local Division handled over 200 of the approximately 700 first instance proceedings followed by the Düsseldorf local division.

Figure 3: Decisions on Permanent Injunctions by German and Other UPC Local Divisions



That seems to arise in part from their willingness to grant injunctions. Figure 3, showing decisions on permanent injunctions by local divisions, indicates that the German divisions granted 10 of the 13 permanent injunctions before the UPC, six of them issued by the Munich local division, which means that German divisions granted injunctions in 71.4% of their 14 cases until January 2025.[9]

Patentees take note of these statistics and often decide to file their infringement actions before German UPC divisions. This results in more decisions being issued by German courts and, consequently, UPC case law is to a relatively large extent shaped by German divisions.

This trend continues to be reflected in the UPC's handling of proceedings for provisional measures. In a landmark decision in the *10x Genomics v. NanoString* case in 2023, the UPC Court of Appeal confirmed that the required sufficient degree of certainty for the grant of a provisional injunction is established when the validity and infringement of the patent in suit, as well as meeting all procedural requirements, are more likely than not.[10]

This means that the standard is a chance of 51% or greater that the patent will be found valid and infringed on the merits, then an injunction can be obtained even in provisional proceedings that may take only between a day and a few weeks.

Additionally, the Munich Local Division, within its case management powers, provided guidance to a patentee in its request for a provisional injunction by suggesting in the oral hearing auxiliary requests to the patentee, after the defendant had raised concerns about the patent's validity.[11]

Key Takeaways

The UPC offers patentees the chance to obtain fast and effective injunctive relief, in almost all EU member states, within about one year with better than 50% chance of retaining a patent, thus increasing the value of European patents.

Be aware of the front-loaded character of UPC proceedings. Substantiate your position well from the start, including facts, evidence and motions, to avoid the risk of having them excluded because the UPC considers them to be pleaded late.

Research prior art as early as possible.

Consider asserting your strongest patents before the UPC. They are less likely to be revoked and more likely to be maintained in amended form than other patents. Patentees can enforce other patents in national proceedings, possibly making use of the so-called injunction gap in German national enforcement which results from a combination of quicker infringement proceedings and slower, separate invalidity proceedings. National enforcement does not entail a risk of central revocation as litigation before the UPC does.

Choose your legal venue wisely. The choice between different UPC divisions may affect the practical case handling and the chances of success, as patentees seem to be most successful before German UPC divisions in obtaining injunctive relief and maintaining their patent.

The challenging nature of UPC litigation requires reacting quickly, developing a case strategy and preparing substantiated pleadings within tight deadlines.

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[1] Huawei v. ZTE, Court of Justice of the European Union, decision of 16 July 2015, case no. C-170/13.

[2] Panasonic Holdings Corporation v. OPPO, Mannheim Local Division, decision of 22 November 2024, case no. UPC_CFI_210/2023.

[3] PTAB Trial Statistics for the fiscal year 2024, available under: https://www.uspto.gov/sites/default/files/documents/ptab_aia_fy2024_roundup.pdf.

[4] NJOY v. Juul, Paris Central Division, decision of 17 January 2025, case no. ACT_571808/2023, UPC_CFI_316/2023.

[5] Meril v. Edwards, Paris Central Division, decision of 19 July 2024, case no. ACT_551308/2023, UPC_CFI_255/2023.

[6] Edwards v. Meril, Nordic-Baltic Regional Division, decision of 10 December 2024, case no. ACT_582093/2023, UPC_CFI_380/2023.

[7] 10x Genomics v. Nanostring, Munich Local Division, decision of 13 January 2025, case no. UPC_CFI_298/2023.

[8] NJOY v. Juul, Paris Central Division, decision of 22 January 2025, case no. ACT_571730/2023, UPC_CFI_310/2023.

[9] McDermott's Legal Lens on the Unified Patent Court Q1 2025, page 5, available under: <https://www.mwe.com/pdf/legal-lens-on-the-unified-patent-court-q1-2025/>.

[10] 10x Genomics v. Nanostring, UPC Court of Appeal, order of 26 February 2024, UPC_CoA_335/2023, App_576355/2023.

[11] 10x Genomics v. Nanostring, Munich Local Division, decision and orders of 19 September 2023, case no. ACT 459746/2023, UPC_CFI_2/2023.