

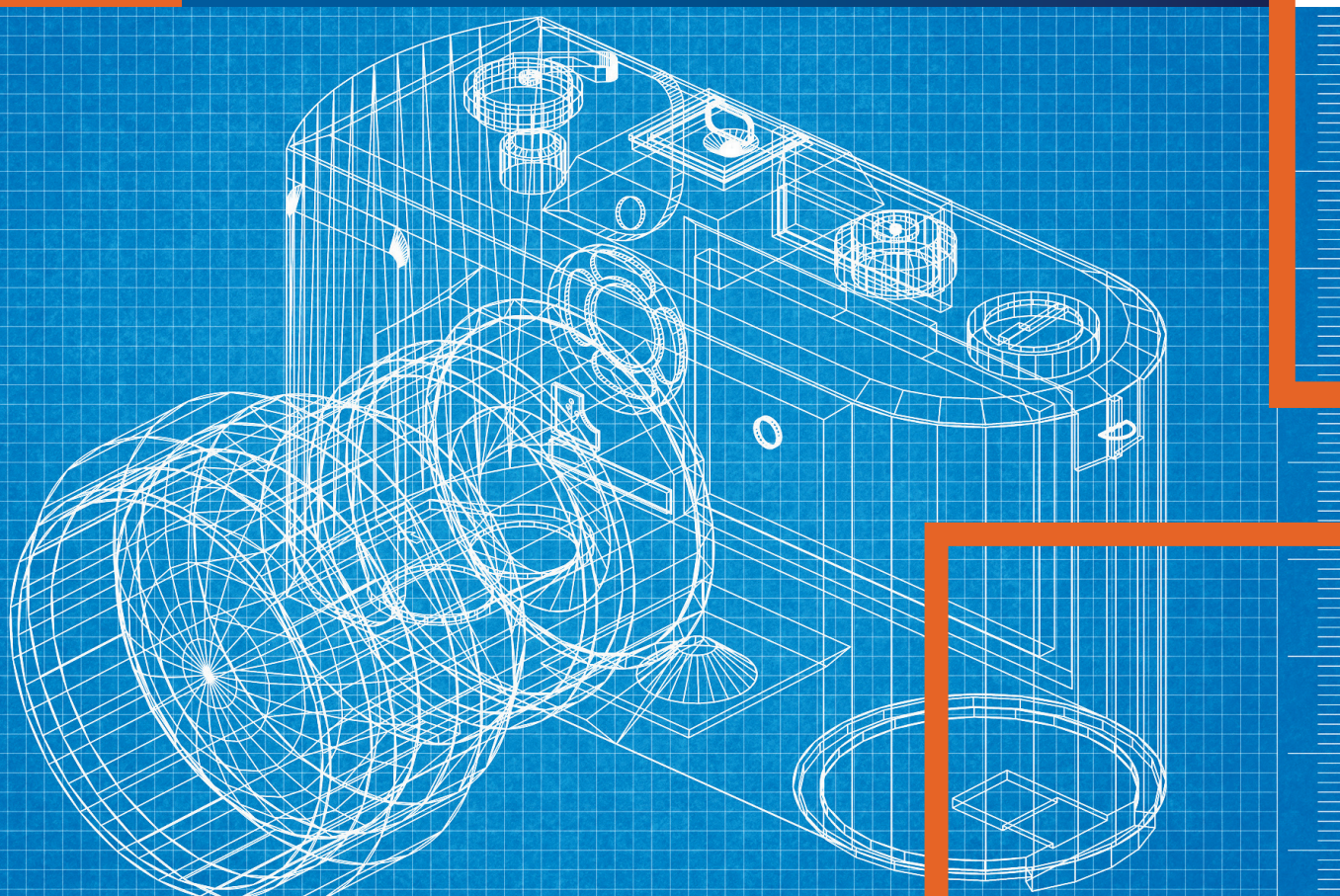
International Comparative Legal Guides

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A practical cross-border resource to inform legal minds

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1 Patent Enforcement

1.1 Before what tribunals can a patent be enforced against an infringer? Is there a choice between tribunals and what would influence a claimant's choice?

A patent infringement lawsuit for injunction or damages may be filed with one of the following six district courts by jurisdiction: Seoul Central District Court; Daejeon District Court; Daegu District Court; Busan District Court; Gwangju District Court; or Suwon District Court. However, the plaintiff may elect to have the case heard in the Seoul Central District Court, and it is often the case that the Seoul Central District Court is elected as it has expertise in patent infringement cases compared to the other district courts.

1.2 Can the parties be required to undertake alternative dispute resolution before commencing court proceedings? Is mediation or arbitration a commonly used alternative to court proceedings?

Mediation or any other alternative dispute resolution procedure is not required before commencing court proceedings. It is very rare that disputes over patent infringement are resolved through a mediation or arbitration procedure without any court proceedings.

1.3 Who is permitted to represent parties to a patent dispute in court?

In patent infringement lawsuits, only attorneys at law may represent the parties. However, in other lawsuits over patent validity or appeals of the Intellectual Property Trial and Appeal Board's (IPTAB) decisions, patent attorneys, as well as attorneys at law, can represent the parties.

1.4 What has to be done to commence proceedings, what court fees have to be paid and how long does it generally take for proceedings to reach trial from commencement?

Court proceedings begin with a complaint stating the relief requested, arguments and supporting legal basis, along with evidence filed by a petitioner. The court fees in a patent infringement action are calculated based on the number of claims in the patent at issue and the amount of damages sought to be awarded in accordance with the related regulations. For

instance, when a lawsuit for damages amounting to KRW 100 million (i.e., USD 76,200) and injunction based on patent infringement of one patent claim is filed, the court fees would be approximately KRW 820,000 (i.e., USD 625).

1.5 Can a party be compelled to disclose relevant documents or materials to its adversary either before or after commencing proceedings, and if so, how?

The court may, upon request of either party, conduct a pre-trial investigation of the evidence, pursuant to the Korean Code of Civil Procedure, if the court determines the need for conducting a pre-trial investigation as the relevant evidence may be lost or destroyed if the time is delayed.

After commencement of the proceedings, the court may, upon request of either party, order the other party to submit necessary evidentiary materials. If the requested party refuses, the court will deem the facts that the requesting party intends to prove with the requested materials as true.

In principle, all arguments and evidence submitted by each party should be provided to the opposing party. However, if there is a justifiable reason, for example, trade secrets in materials submitted by a party, the court may only allow the trial board to review the materials while restricting the other party's access to the materials upon request of the submitting party.

1.6 What are the steps each party must take pre-trial? Is any technical evidence produced, and if so, how?

During the pre-trial phase, the parties exchange briefs and requests for evidence. Collecting evidence is the responsibility of the parties, in principle. If a third party controls the evidence, a party to the case may file a motion for a court order for submission of evidence by the third party. A list of technical experts or written evidence prepared by a technical expert should also be prepared pre-trial.

1.7 How are arguments and evidence presented at the trial? Can a party change its pleaded arguments before and/or at trial?

Under the Korean Code of Civil Procedure, if deemed necessary, the court may conduct a pre-trial investigation of evidence. In actuality, however, it is rare that a pre-trial investigation of evidence is requested. Instead, to prove patent infringement, patentees usually rely on publicly available evidence at the time of filing complaints. If a party convinces the court that

the opposing party or a third party controls relevant information, the court may issue, upon a motion of the party or *ex officio*, a court order to the party that controls the evidence to submit the relevant information.

The parties present their arguments when they exchange briefs before the trial. However, the parties may change their pleaded arguments before the deliberation.

1.8 How long does the trial generally last and how long is it before a judgment is made available?

The average duration of the trial period for a patent infringement suit before a district court is between 12 and 24 months, although this varies depending on the complexity of the case and the court in which the case is filed.

All patent cases can be appealed to the Intellectual Property High Court (IPHC). Typically, one year will be taken for the IPHC to render a decision in a patent case.

1.9 Is there any alternative shorter, flexible or streamlined procedure available? If so, what are the criteria for eligibility and what is the impact on procedure and overall timing to trial?

The parties may seek a swift resolution of patent disputes through mediation or arbitration, instead of court proceedings. However, such alternative dispute resolutions are not commonly used to resolve disputes over patent infringement.

When potentially infringing goods are being imported into, or exported from, Korea, a patentee may elect to request that the Korea Trade Commission (KTC) institute an investigation of the infringement case. Available remedies of KTC proceedings are different from district court proceedings in the event that infringement is proven. A prevailing patentee in court proceedings may be entitled to both monetary damages and an injunction, whereas in KTC proceedings, the available remedy is an order banning future importation and/or exportation of the infringing goods, and monetary damages are not available. Compared to district court proceedings that include a determination of damages, KTC proceedings do not determine the amount of damages and take a shorter time to conclude (generally within one year).

Alternatively, a declaratory judgment of infringement is available at the IPTAB, which is an independent administrative agency under the Korean Intellectual Property Office (KIPO). Since the IPTAB does not determine the amount of damages, it can issue a decision on infringement within six to 12 months. However, since the IPTAB's decision does not have binding authority, in order for the patentee who has received a declaratory judgment of infringement from the IPTAB to enforce its patent rights, the patentee would need to resolve patent disputes through additional district court proceedings or KTC proceedings by submitting the IPTAB decision as evidence.

1.10 Are judgments made available to the public? If not as a matter of course, can third parties request copies of the judgment?

Judgments are only available to the parties of the case, in principle. However, if a third party knows the court and case number of a particular judgment, he/she can request a copy of the judgment. In the copy provided to the third party, confidential information, including the names of the parties, is generally redacted.

1.11 Are courts obliged to follow precedents from previous similar cases as a matter of binding or persuasive authority? Are decisions of any other jurisdictions considered persuasive?

In Korean law, precedents from higher courts, such as the Supreme Court, serve as persuasive authority rather than binding authority. Lower courts often follow these precedents to ensure consistency and uniformity in legal decisions, but they are not legally obligated to do so. Instead, these precedents are influential and guide lower courts in their rulings.

Korean courts may refer to decisions from foreign courts, but it is very rare for them to actively consider these decisions or use them as the basis for their own rulings. Practically, foreign precedents are submitted only in exceptional cases where there is no applicable Korean precedent for the litigation at hand.

1.12 Are there specialist judges or hearing officers, and if so, do they have a technical background?

Judges at the district court and the IPHC that hear patent cases are reshuffled every two to three years and may be moved to trial boards that hear non-patent cases. Thus, not every judge has expertise in patent cases. Further, judges are not required to have a technical background, and even those having no technical background may be assigned to a trial board hearing patent cases. However, the proportion of judges having a science or engineering degree or having experience or expertise in technical matters is relatively high in trial boards hearing patent cases, compared to the other trial boards.

The trial boards hearing patent cases also have technical examiners or investigators who are experts in various technical fields to assist judges who lack a technical background in hearing patent infringement cases.

1.13 What interest must a party have to bring (i) infringement, (ii) revocation, and (iii) declaratory proceedings?

A patentee or an exclusive licensee can bring an action for injunction or compensation for monetary damages against an alleged infringer.

A patentee or an exclusive licensee may also bring an action for declaratory judgment of infringement before the IPTAB. On the other hand, an accused infringer can bring an action before the IPTAB for a declaratory judgment of non-infringement without having to wait for the patentee to bring an infringement action. The requirement for a declaratory judgment action for non-infringement or revocation is rather lenient. The complainant for non-infringement or revocation could simply show that the complaining party is in the same business area as the patent and has a plan to make, use or sell the related product. That party does not need to have been engaged in activity that could constitute infringement or have made meaningful preparations to engage in such activity. An "actual controversy" between the parties at the time of the action need not have been commenced. The requirement for a declaratory judgment for infringement is stricter than the case of non-infringement declaration. The petitioner must specify the alleged infringing product or process to an extent that could be compared to the patent claims and that the alleged infringer has a plan to exploit it.

1.14 If declarations are available, can they (i) address non-infringement, and/or (ii) claim coverage over a technical standard or hypothetical activity?

The declaration judgment is rendered with respect to the specified product or process of the alleged infringer. Thus, if the petitioner seeks a declaratory judgment of infringement with respect to a technical standard or hypothetical activity without clearly specifying the alleged infringer's product or process, the IPTAB may dismiss the action and discontinue further proceedings.

1.15 Can a party be liable for infringement as a secondary (as opposed to primary) infringer? Can a party infringe by supplying part of, but not all of, the infringing product or process?

A patent could be infringed not only when one person performs activities satisfying all the elements required as defined in a patent claim ("all elements rule"), but also when the patented invention is performed by two (or more) persons where one performs activities satisfying some elements defined in a patent claim and the remaining elements of the patent claim are performed by another. In this case, two infringers may be liable as a joint tortfeasor. The Civil Code provides a specific example of inducement as a form of joint liability.

The Patent Act prescribes that one is liable for contributory infringement when making, offering for sale, selling or importing a product that may be used solely for manufacturing a patented device. When a patent claim defines a process or method, the same rule applies to a product that may be used solely for exploiting the patented process or method.

The above provisions of the Patent Act are understood to exclude supplying staple products from contributory infringement by limiting the product as being "used solely" for manufacturing the patented device.

1.16 Can a party be liable for infringement of a process patent by importing the product when the process is carried on outside the jurisdiction?

In Korea, the scope of protection of process claims extends to the product manufactured by the process. Importation of a product manufactured by the process outside the jurisdiction falls under infringement of the process claim.

1.17 Does the scope of protection of a patent claim extend to non-literal equivalents (a) in the context of challenges to validity, and (b) in relation to infringement?

Korean courts recognise a rule that a product or process that does not literally include the exact same elements as defined in a patented invention may still be found to infringe if the difference between the elements of the patented invention and the accused product or process are not substantial under the Doctrine of Equivalents (DOE).

Korean infringement under the DOE requires that each element of a claimed invention be found in the accused product or process, either literally or by a substantial equivalent. A traditional approach adopted in Korea to understand and evaluate a patented invention is based on three aspects of the invention: structure; function; and effect of the claimed invention. Since the DOE is invoked when the two elements,

one as defined in the patented claim and the other as found in the accused product or process, are not identical (in structure), the comparison of the two elements tends to focus on the function and the effect, rather than the structure.

Finding infringement by equivalents is limited by some rules. First, the DOE is not applicable to a product that was known in the prior art or that is easily conceivable therefrom by a person skilled in the art. Second, the DOE is not allowed to recapture a device that has been intentionally excluded from the scope of patent claims during the patent prosecution process.

1.18 Can a defence of patent invalidity be raised, and if so, how? Are there restrictions on such a defence, e.g. where there is a pending opposition? Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?

A registered patent can only be invalidated by a decision of the IPTAB. However, even before the IPTAB renders a decision invalidating a patent, an alleged infringer may raise a defence of abuse of right to avoid enforcement of the patent based on the likely invalidity of the patent. If the district court hearing the patent infringement case determines that the petitioner's patent is invalid, it may render a decision dismissing the pending infringement action. However, since this court decision does not declare the patent to be invalid, the patent is still enforceable against a third party other than the parties of the case.

There is no particular restriction in raising a defence of abuse of right to avoid enforcement of the patent in patent infringement proceedings.

1.19 Is it a defence to infringement by equivalence that the equivalent would have lacked novelty or inventive step over the prior art at the priority date of the patent (the "Formstein defence")?

Korean courts accept a defence of free-to-work technology. If an alleged infringer's product or process ensnares the prior art or is easily conceivable by a skilled person from the prior art, the Korean courts may determine non-infringement without comparing the equivalents in the alleged infringer's product or process to the claim elements.

1.20 Other than lack of novelty and inventive step, what are the grounds for invalidity of a patent?

A patent claim can be invalidated on any of the following grounds, other than lack of novelty and inventive step:

- where the claimed invention does not comply with the definition of an invention, i.e., a highly advanced creation of a technical idea using the laws of nature, lacks industrial applicability or is not patentable under the first-to-file rule;
- where the claimed invention is liable to contravene public order or morality, or to injure public health;
- where the specification does not describe the invention in a manner sufficiently clear and complete to enable a skilled person to readily carry it out;
- where the claim is not supported by the specification;
- where the claim does not clearly and concisely define the invention;
- where the patent application was filed by a person who is not the inventor or his or her successor;
- where the patent application was not jointly filed by co-owners, in case the patent is jointly owned;

- where the patent was acquired by an employee of the KIPO or the IPTAB during employment at the office or tribunal, other than cases of inheritance or bequest;
- where the patent was granted in violation of the rules of the Treaty;
- where amendments were made to the specification or drawings beyond the scope disclosed in the originally filed specification and drawings; or
- where a divisional application or a converted application was filed beyond the scope disclosed in the originally filed specification and drawings.

1.21 Are infringement proceedings stayed pending resolution of validity in another court or the Patent Office?

Korea has a bifurcated system of patent litigation. Namely, patent infringement actions are under the jurisdiction of a civil court. The IPTAB has an exclusive jurisdiction over patent validity. Where a patent infringement action and a patent invalidation action are concurrently pending before the district court and the IPTAB, respectively, whether to stay the proceedings at the district court until the IPTAB issues a decision on patent validity is at the court's discretion. In the past, the district court has often suspended infringement proceedings until the IPTAB renders a decision on the validity of the patent. Recently, it appears that the district court usually continues with the infringement proceedings while the invalidity proceedings at the IPTAB are concurrently pending. However, since IPTAB proceedings are relatively faster than district court proceedings, it is uncommon for the district court to issue a decision on patent invalidity before the IPTAB.

1.22 What other grounds of defence can be raised in addition to non-infringement or invalidity?

In Korea, a valid patent will be unenforceable, under the good faith principle of the Civil Act, if the enforcement of the patent is deemed as abuse of the patent right. However, such cases are rare.

If an act of working a patent falls under any of the unfair trade practices prescribed in the Fair Trade Act, the patent enforcement will be restricted under the Fair Trade Act and the patentee will be liable to pay a fine levied by the Fair Trade Commission.

1.23 Are preliminary injunctions available on (i) an *ex parte* basis, or (ii) an *inter partes* basis? In each case, what is the basis on which they are granted and is there a requirement for a bond? Is it possible to file protective letters with the court to protect against *ex parte* injunctions?

Preliminary injunctions are available on an *inter partes* basis. The court issues a decision on preliminary injunctions after reviewing briefs filed by both parties and arguments made at hearings. If a patent infringement and the necessity for a preliminary injunction are found, the court may issue a decision granting a preliminary injunction. In deciding whether to grant a preliminary injunction, the court takes into consideration the balance of hardships between the parties, the prospects of irreparable harm to either party and public interest. The preliminary injunction decision includes an order that requires the party seeking an injunction to post a security or cash bond.

1.24 Are final injunctions available and what is the basis on which they are granted?

Permanent injunctions can be granted in the main infringement actions brought before the court. If patent infringement is established, the court will issue an injunction to stop the infringement.

1.25 Is a public interest defence available to prevent the grant of injunctions where the infringed patent is for a life-saving drug or medical device?

The court considers public interest in deciding whether to grant a preliminary injunction. Thus, if the infringed patent relates to a drug or medical device, the alleged infringer may claim that the motion for preliminary injunction should be dismissed for public interest. However, since the court generally grants a preliminary injunction if a patent infringement is found, a public interest defence can only be accepted in an exceptional case where the public interest impact is very significant. In a main infringement action seeking a permanent injunction, the court grants an injunction if a patent infringement is found, without considering other factors, such as public interest. Thus, the likelihood of accepting a public interest defence in the main action is very low. If the infringed patent relates to a drug, the KIPO may grant a compulsory non-exclusive licence upon request of a person who wishes to work the patented invention (see question 3.2). However, the court hearing the infringement case would not separately consider the possibility of a compulsory non-exclusive licence in deciding whether to grant an injunction.

1.26 Are damages or an account of profits assessed with the issues of infringement/validity or separately? On what basis are damages or an account of profits assessed? Are punitive/flagrancy damages available?

Monetary damages can be awarded to a patentee (or exclusive licensee) if its patent is found to be valid and infringed and if the patentee incurred lost profits as a result of the infringement. The damages are intended to fairly compensate the patentee for losses suffered from the infringement. A patentee is entitled to its lost profits on all lost sales resulting from the infringement if the patentee can show that, but for the infringement, the patentee would have made the sales of the infringer. Since the actual lost profits cannot be easily proven, there are statutory methods under the Patent Act for calculating damages as follows:

- (i) patentee's lost profits of (a) and (b) below, if the infringer has assigned infringing products to a third party in a quantity exceeding the patentee's production capacity:
 - (a) patentee's production capacity × profit per unit product; and
 - (b) quantity exceeding the capacity × reasonable royalty rate;
- (ii) infringer's profits gained as a result of the infringement;
- (iii) reasonable royalties that the patentee would usually be entitled to receive; and
- (iv) damages determined by the court based on all of the circumstances and the investigation of evidence.

For wilful infringement, the court may award punitive damages of up to five times the amount of actual damages calculated by the above methods.

1.27 How are orders of the court enforced (whether they be for an injunction, an award of damages or for any other relief)?

When an infringer does not comply with an injunction order, the court may indirectly enforce the injunction by imposing a fine on the infringer depending on the frequency and duration of violations.

The court may order the destruction of the infringing products or the removal of facilities provided for the infringing activity.

A decision to award damages for infringement is enforced by seizing and auctioning the infringer's property and paying the proceeds from the sale to the patentee.

1.28 What other form of relief can be obtained for patent infringement? Would the tribunal consider granting cross-border relief?

In addition to an injunction and monetary relief for damages, a preventive relief for infringement, e.g., to preserve the articles that have fostered the infringing activity (including articles generated by the infringing activity if the infringed patent relates to a process for production) and facilities provided for the infringing activity, may be ordered.

The import activities may be effectively prevented by an injunction that prohibits the importation of infringing products. It is also possible to ban the exportation of infringing products by the KTC's injunction order.

1.29 How common is settlement of infringement proceedings prior to trial?

Unless a patent infringement is clear, it is not common that disputes over patent infringement are settled by agreement between the parties prior to proceeding to a trial. About 30% of patent infringement disputes are known to have been settled or terminated by arbitration after a trial is commenced.

1.30 After what period is a claim for patent infringement time-barred?

There is no limit on the time period for bringing a claim for injunction. Such claim can be brought at any time during which the patent is valid and infringed.

Damages for patent infringement can be claimed within three years from the date a patentee becomes aware of the damages based on infringement and the identity of the infringer, or 10 years from the time when the infringing act was conducted, whichever comes first. The right to claim damages will lapse once the three- or 10-year statute of limitation has elapsed.

1.31 Is there a right of appeal from a first-instance judgment, and if so, is it a right to contest all aspects of the judgment?

All district court or IPTAB decisions can be appealed to the IPHC. In the appeal to the IPHC, the appellant can contest all aspects of the judgment including fact findings and the application of law. The IPHC decision can be appealed to the Supreme Court. The Supreme Court may review the appeal of the IPHC decision to determine whether the laws are correctly applied to the fact findings by the IPHC.

1.32 What effect does an appeal have on the award of: (i) an injunction; (ii) an enquiry as to damages or an account of profits; or (iii) an order that a patent be revoked?

A decision to grant a preliminary injunction may be enforced even before it becomes final and conclusive. The Supreme Court does not permit a request to suspend the effect of a preliminary injunction prohibiting patent infringement, on the grounds that such an injunction is not subject to a stay of execution. Therefore, in order to prevent the enforcement of a preliminary injunction against patent infringement, one must either obtain a ruling that overturns the preliminary injunction through an appeal, or secure a judgment in the main action denying patent infringement.

On the other hand, a decision to grant a permanent injunction, damages or patent revocation can only be enforced after the infringement decision becomes final and conclusive. The court may issue a provisional enforcement order together with a decision to award damages. In such case, the defendant may appeal the decision and request a stay of provisional enforcement by posting a security or cash bond.

1.33 Is an appeal by way of a review or a rehearing? Can new evidence be adduced on appeal?

In the appeal proceedings before the IPHC, the parties may submit new arguments or new evidence. However, in the proceedings before the Supreme Court, the parties are not allowed to submit new arguments or new evidence.

1.34 How long does it usually take for an appeal to be heard?

If a district court or IPTAB decision is appealed, the IPHC generally schedules a hearing date within six months after the appeal date. The hearing may be delayed depending on the case and the circumstances at the trial board.

1.35 How many levels of appeal are there? Is there a right to a second level of appeal? How often in practice is there a second level of appeal in patent cases?

A decision of the district court or the IPTAB can be appealed to the IPHC, and a decision of the IPHC can be appealed to the Supreme Court without any restriction. Although it is rare for the Supreme Court to overturn a decision of the IPHC, if there is a legal dispute over the IPHC's decision, it is often appealed to the Supreme Court.

1.36 What are the typical costs of proceedings to a first-instance judgment on: (i) infringement; and (ii) validity? How much of such costs are recoverable from the losing party? What are the typical costs of an appeal and are they recoverable?

The costs associated with patent infringement litigation widely vary depending on many different factors, including the complexity of the technology, the parties, litigation strategy and the court to which the case is brought. For an infringement case with usual complexity, the estimated cost before

the trial is USD 10,000 to 50,000 and the total estimated cost inclusive of the trial is USD 50,000 to 150,000. These amounts are only a rough estimation, and many lawsuits naturally involve a greater cost. This is especially true for cases involving multiple patents, or cases involving very complex technology.

Although the prevailing party in a patent infringement suit can ordinarily recover costs for the proceedings, including court fees and attorneys' fees from the losing party, the recoverable attorneys' fees are limited to the amount calculated based on a statutory fee schedule, which is usually much less than the actual amount. The recoverable cost is determined in a separate proceeding.

2 Patent Amendment

2.1 Can a patent be amended *ex parte* after grant, and if so, how?

The patentee may request a trial to correct the specification, claims and/or drawings of a patent at any time after the issuance of a patent. A trial for correction of a patent may also be requested while a lawsuit involving the patent is pending. In such case, the lawsuit may be suspended at the discretion of the court until the trial for correction is completed. It should be noted that a trial for correction of a patent cannot be separately requested while an invalidation action or a request for cancellation is ongoing before the IPTAB.

In addition, the patentee may file a request for correction of the specification, claims and/or drawings of a patent in response to the office action issued by the trial judge in cancellation proceedings before the IPTAB.

2.2 Can a patent be amended in *inter partes* revocation/invalidity proceedings?

A request for correction of the specification, claims and/or drawings may be filed within a time period designated by the trial judge during invalidation proceedings before the IPTAB.

2.3 Are there any constraints upon the amendments that may be made?

The scope permitted in a trial for correction or a request for correction is restricted to (i) narrowing the scope of the claims, (ii) correcting clerical errors, and (iii) clarifying unclear descriptions. Furthermore, corrections should be limited to the scope of the subject matter described in the specification or drawings of the patent and should not substantially expand or modify the scope of the claims. In a trial for correction (but not in a request for correction, in a request for cancellation or a trial for invalidation), the subject matter sought to be protected in the claims after correction should be deemed to have been patentable at the time the application was filed.

3 Licensing

3.1 Are there any laws that limit the terms upon which parties may agree a patent licence?

In principle, the terms and conditions of licensing contracts are the responsibility of the contracting parties only and can be chosen by them. However, the terms of the contract must comply with the Korean antitrust regulations. There are some

restrictions on voluntary licences for patents. For example, the term of a patent licence cannot extend beyond the expiry dates of the licensed patents. Also, restrictions on price, restrictions on transaction of competing products, and tying of non-patented products are impermissible. A patentee is generally not allowed to prevent a licensee from contesting the validity of one or more licensed patents. Further, the Fair Trade Commission added examples of patent misuse, e.g., avoiding disclosure of related patent applications or issued patents in order to increase the likelihood of selection of a patent as a technology standard, avoiding pre-negotiation on the licensing terms/conditions of a patented invention, rejecting permission to license a patented invention widely used as a technology standard, filing a patent infringement action in order to harm another party's competitiveness, knowing that the patent is invalid, or agreeing to keep an invalid patent in force to delay a competitor's entry into the market.

3.2 Can a patent be the subject of a compulsory licence, and if so, how are the terms settled and how common is this type of licence?

A compulsory non-exclusive licence can be granted by the KIPO in the following circumstances:

- (i) when the patented invention has not been worked for more than three consecutive years in Korea, except for natural disasters, unavoidable circumstances or other justifiable reasons, and a negotiation with the patent proprietor regarding a voluntary licence under reasonable terms has been unsuccessful;
- (ii) when the patented invention has not continuously been worked commercially or industrially in Korea on a substantial scale during a period of three years or more without justification, or the domestic demand for the patented invention has not been satisfied to an appropriate extent and under reasonable conditions, and a negotiation with the patent proprietor regarding a voluntary licence under reasonable terms has been unsuccessful;
- (iii) when the patented invention is necessarily practised for the interests of the public;
- (iv) when the patented invention is necessarily practised to remedy a practice determined to be unfair after the judicial or administrative process; or
- (v) when the patented invention is necessarily practised for exporting medicines to countries intending to import the medicines to cure the diseases that threaten the health of the majority of its citizens.

There have been very few compulsory licences granted.

4 Patent Term Extension

4.1 Can the term of a patent be extended, and if so, (i) on what grounds, and (ii) for how long?

The patent term may be extended to compensate for a period during which a patented invention could not have been worked due to a regulatory approval or registration for pharmaceutical products or plant protection products within five years.

The patent term can be adjusted for a period during which the examination of a patent application is delayed by the KIPO, if the registration of the patent is delayed for more than four years from the filing of the application or more than three years after the request for examination was made.

5 Patent Prosecution and Opposition

5.1 Are all types of subject matter patentable, and if not, what types are excluded?

A method for the medical operation, treatment or diagnosis of diseases in human beings, i.e., a method relating to medical procedures, is deemed to lack industrial applicability and, therefore, is not eligible for patent protection. However, a medical instrument or medicine itself for use in the medical operation or diagnosis of diseases in human beings is deemed to be industrially applicable and patentable.

Further, claims that recite human acts, economic rules, artificial decisions, mathematical algorithms or human mental processes, are not permissible for patent protection.

Korean patent law does not explicitly prescribe whether a business method or software is patentable. Thus, a business method or software is patentable, so long as the statutory requirements for patentability (definition of an invention, i.e., a highly advanced creation of a technical idea using the laws of nature, industrial applicability, novelty, inventive step, etc.) are met. A business method or software is deemed to comply with the definition of an invention, i.e., a highly advanced creation of a technical idea using the laws of nature, if information processing by the software is implemented by hardware resources. Such implementation of information processing should be recited in the claims in order to be patent-eligible. A business method or software can be protected by claims relating to a method, an apparatus, a computer-readable recording medium or a computer program (or an application) stored in a medium. However, claims directed to a program signal, a data signal, a program product or a computer program list are not allowed on the ground that the category of the claimed invention is unclear.

5.2 Is there a duty to the Patent Office to disclose prejudicial prior disclosures or documents? If so, what are the consequences of failure to comply with the duty?

For patent applications, the background art of invention must be described in the specification. Background art of invention refers to conventional art that may be helpful to understand a claimed invention and useful to conduct a prior art search or examination. If the applicant did not describe the background art at the time of the filing, the examiner may issue an office action during the prosecution. It is possible to add the prior art references to the specification by filing an amendment. Failure to do so cannot be a basis for invalidation after registration. Unlike the Information Disclosure Statement system in the U.S., such requirement does not impose a duty on the applicant to disclose all information known to individuals associated with the filing and prosecution of the patent application.

5.3 May the grant of a patent by the Patent Office be opposed by a third party, and if so, when can this be done?

Any person can request the cancellation of a registered patent to the IPTAB by submitting prior art, which has not been cited during the examination or during the period from the registration date to six months after the publication of the patent. Since the cancellation procedure is an *ex parte* procedure

between the patentee and the IPTAB, all proceedings will be based on written arguments once a request is made by a third party. Only the patentee can appeal the cancellation decision to the IPHC and subsequently to the Supreme Court.

However, after the expiration of six months from the issuance date, only an interested party or an examiner may file an invalidation action.

5.4 Is there a right of appeal from a decision of the Patent Office, and if so, to whom?

Decisions by the examiner at the KIPO can be appealed to the IPTAB of the KIPO.

The IPHC has exclusive jurisdiction over all appeals of the decisions of the IPTAB. However, it should be noted that even if the IPTAB dismisses a request for cancellation, the petitioner cannot appeal the IPTAB decision.

If an appellant or appellee loses the appeal at the IPHC, a final appeal at the Supreme Court may be requested.

5.5 How are disputes over entitlement to priority and ownership of the invention resolved?

Disputes over entitlement to priority generally arise in the context of the validity of the invention. Thus, such disputes can be resolved during invalidation actions before the IPTAB and the courts. Furthermore, disputes over ownership of the invention may be resolved by the KIPO during prosecution, and the incorrect ownership of the invention is one of the grounds for an invalidity challenge.

5.6 Is there a "grace period" in your jurisdiction, and if so, how long is it?

Under the Korean Patent Act, a 12-month grace period is provided.

5.7 What is the term of a patent?

The patent term is 20 years from the effective filing date of a patent application. However, the patent term may be extended to compensate for a period during which a patented invention could not have been worked due to a regulatory approval or registration, or adjusted for a period during which the examination of a patent application is delayed by the KIPO.

5.8 Is double patenting allowed?

No. The Korean patent system is based on the first-to-file rule. In the cases where two or more patent applications have been filed with respect to an identical or substantially identical invention, only the application having the earliest priority date or effective filing date is eligible to obtain a patent for the invention. The first-to-file rule is applicable regardless of whether the two or more applications are filed by the same applicant or not. If two or more applications having the same priority date or effective filing date relate to the same invention, only one application that has been selected upon mutual agreement by the applicants or that has been selected by the applicant is eligible to obtain a patent for the invention. If the applicant(s) fails to select one application, none of the applications will be granted a patent.

5.9 For Member States within the European Union: Can a Unitary Patent, on grant, take effect in your jurisdiction? If your Member State has not yet signed or ratified the Unified Patent Court Agreement, is it likely to do so and, if so, when?

This is not applicable to our jurisdiction.

6 Border Control Measures

6.1 Is there any mechanism for seizing or preventing the importation of infringing products, and if so, how quickly are such measures resolved?

The KTC is a government agency that investigates unfair acts of importation, sale, exportation and manufacture for export of a product infringing on intellectual property (IP) rights and has the authority to issue temporary relief or corrective measures including seizing or preventing the importation. Patentees can file a complaint with the KTC claiming a patent infringement. The KTC will then undertake an investigation, which is generally completed within six months. In principle, the investigation is a documentary-based proceeding between the two parties, i.e., complainant or patentee and respondent or accused infringer, and a hearing for the investigation can be requested. *Ex officio* investigation is also possible.

At the conclusion of the investigation proceedings, the Director General of the Office of Investigation issues an initial determination on whether there has been a violation of an IP right and a recommended determination on what the remedy, if any, should be. These determinations are forwarded to the KTC, who issues a final decision as to whether there is a violation and imposes a remedy, if required. If a violation is found, the KTC can issue a temporary relief or corrective measure to interdict shipments of infringing products at ports of entry into Korea or destroy the infringing products and/or impose a penalty.

An order for corrective measures or penalty can be appealed to a Seoul administrative court, and is effective against third parties importing the same product as the infringing product, through a confirmation procedure.

7 Antitrust Law and Inequitable Conduct

7.1 Can antitrust law be deployed to prevent relief for patent infringement being granted?

The Monopoly Regulation and Fair Trade Act provides a general exemption of patent enforcement from competition law. A patent gives its owner the right to exclude others from exploiting the patented invention without authorisation. However, in certain cases actions taken pursuant to enforcement of a patent can expose the patentee to competition-law-based claims.

A patentee may face antitrust liability if an infringement suit is objectively baseless, such as where the patentee knows the asserted patent is invalid or unenforceable and is motivated to impose anti-competitive injury on the defendant. In relation to competition considerations of patent enforcement, the Fair Trade Commission promulgated the Guidelines for Intellectual Property Enforcement and Competition Law.

Claims of unfair competition may be raised where a patentee sends a cease-and-desist letter or other threatening notice of patent rights to the customers of a competitor. Facts tending to support the bad faith include threatening infringement suits without any intention of filing a suit, sending indiscriminate infringement notices to all members of a trade and publishing a patent without a good-faith belief in its validity or enforceability.

7.2 What limitations are put on patent licensing due to antitrust law?

The terms of the contract must comply with the Korean anti-trust law. There are some restrictions on licences for patents. The term of a patent licence beyond the expiry dates of the licensed patents is not allowed. Also, restrictions on price, restrictions on transaction of competing products, and tying of non-patented products are impermissible. A patentee is generally not allowed to prevent a licensee from contesting the validity of one or more licensed patents. An agreement to keep an invalid patent in force to delay a competitor's market entry is not permissible.

7.3 In cases involving standard essential patents, are technical trials on patent validity and infringement heard separately from proceedings relating to the assessment of fair, reasonable and non-discriminatory (FRAND) licences? Do courts set FRAND terms (or would they do so in principle)? Do courts grant FRAND injunctions, i.e. final injunctions against patent infringement unless and until defendants enter into a FRAND licence?

In cases involving standard essential patents (SEPs), the courts hear the technical trials on the validity and infringement of SEPs if the opposing party raises the issues. The validity of SEPs can also be examined through a separate invalidation trial proceeding before the IPTAB.

In interpreting FRAND terms, the courts comprehensively consider the factors including the policy of the standardisation organisation related to the involving SEPs and the patentee's FRAND declarations.

The courts can grant FRAND injunctions as the patentee's FRAND declarations are not considered as a waiver of an injunction claim. However, if the act of the patentee of SEPs is determined to be an abuse of rights in violation of the Fair Trade Act, the injunction relief for SEPs may be restricted.

8 Current Developments

8.1 What have been the significant developments, including any leading cases, in patent law and practice in your jurisdiction in the last year?

Enforcement of patent rights against exportation of infringing products

Under the previous Patent Act, the working of a patented invention related to a product was defined as acts such as manufacturing, using, assigning, leasing, importing, or offering to assign or lease the product (including displaying the product for such purposes).

Under the revised Patent Act, revised on January 21, 2025, and effective as of July 22, 2025, the act of "exporting" has been newly included as a form of working a patented invention. As a result, exporting infringing products is now subject to patent enforcement actions, including injunctions, claims for damages, and criminal penalties. This revision broadens the scope of protection for patent holders.

14-year cap on extended patent term for pharmaceuticals and limitation on the number of patents eligible for patent term extension (PTE)

Under the previous Patent Act, there was no cap on the total patent term, including the extension granted based on marketing approval for pharmaceuticals, and multiple patents could previously benefit from a PTE based on a single approval.

Under the revised Patent Act, (1) the total remaining patent term with PTE cannot exceed 14 years from the date of marketing approval, and (2) the number of patents eligible for PTE based on a single approval is limited to one.

These revisions bring Korea's approval-based PTE system more closely in line with international standards, such as those in the U.S. and Europe, and are expected to facilitate the market entry of generic drugs.

8.2 Are you looking forward to any particular developments in patent law or practice in the coming year or two and what effect might they have in your jurisdiction?

On January 23, 2025, a new bill to introduce an evidence collection procedure has been submitted to the National Assembly's Trade, Industry, Energy, SMEs and Startups Committee, initiating the legislative process. Discussions around this procedure have been ongoing since 2019 and aim to address the challenges of collecting evidence, often protected as trade secrets, in patent infringement litigation.

The finalised draft includes key provisions such as evidence inspection by court-appointed experts, orders for evidence preservation, and off-site interrogations. Additionally, it introduces enhanced penalties for breaches of confidentiality by experts, and a new criminal offence for violating an order to preserve evidence.

If implemented, the evidence collection procedure is expected to move beyond the current practice of withholding evidence under the guise of trade secret protection. The new procedure would allow for more effective evidence gathering in patent infringement lawsuits and offer greater transparency in proving infringement and calculating damages. As a result, it is anticipated to significantly enhance the enforcement of patent rights within the Korean IP landscape.

8.3 Are there any general trends in patent practice and the enforcement of patents that have become apparent in your jurisdiction over the last year or so?

Expanded eligibility and relaxed procedural requirements for accelerated examination

As of February 19, 2025, biotechnology, advanced robotics, and artificial intelligence (AI) have been newly designated as eligible technologies for accelerated examination, joining previously designated fields such as semiconductors, display technologies, and secondary batteries. The scope of secondary battery-related applications has also been broadened to include not only materials, parts, and equipment, but also manufacturing processes, performance evaluation, battery management systems, and recycling technologies.

Furthermore, the KIPO has expanded the scope of carbon-neutral green technologies covered under the programme. In addition to carbon capture and storage, the expanded list now includes national strategic technologies such as hydrogen, next-generation nuclear power (e.g., small modular reactors), advanced mobility, and various renewable energy sources.

The KIPO has also simplified the procedural requirements for requesting accelerated examination. Most notably, the previously burdensome obligation to conduct and submit a separate prior art search has been eliminated. Additionally, the requirement to demonstrate self-implementation of the invention has been eased. Applicants may now submit alternative forms of evidence, such as technology transfer agreements or business registration certificates.

These reforms are designed to promote faster patent protection for innovations in critical and emerging technology sectors.

Two-sided impact of recently revised patent practices on examination pendency

Effective from January 1, 2025, the IPTAB has implemented measures to streamline patent cases under appeal for a final rejection, aiming to prevent delays in registration. Under this change, cases will be remanded to examiners only if further examination is required due to unresolved issues or newly discovered grounds for rejection. Otherwise, trial judges can directly issue a notice of allowance through an appeal decision. This revision is expected to expedite patent registrations by one to two months.

Concurrently, the KIPO has revised its examination procedures for divisional applications, also effective from January 1, 2025, with the goal of further reducing examination pendency for applications eligible for the Patent Prosecution Highway (PPH). Specifically, examination of divisional applications will now be prioritised based on their own examination request date rather than that of the parent application. As a result, while the examination pendency for PPH-eligible applications will be further reduced, the examination pendency for divisional applications is expected to be moderately extended compared to the prior approach.

8.4 Are there any key issues in relation to patent law or practice that you feel are not addressed by the questions above which are worth mentioning here?

AI inventorship and patent eligibility in the age of generative AI

In Korea, the issue of whether AI can be recognised as an inventor remains unsettled. In the context of the *DABUS* case, both the KIPO and the Korean courts have maintained that inventorship is limited to natural persons. Patent applications listing AI as the inventor have thus far been deemed invalid.

Nonetheless, the Korean courts have acknowledged that the recognition of AI as an inventor is a matter of legislative policy and societal consensus. A related case is currently pending before the Supreme Court, and its outcome is expected to shape future legislative or institutional discussions on this issue.

In parallel, the rise of generative AI has raised new questions around the patent eligibility of AI-generated inventions. In particular, the degree of human involvement required for patentability remains unclear, as current law presumes a human-centric inventive process. As AI systems increasingly contribute to the conception and development of inventions, the Korean patent system may soon face calls for reform in areas such as inventive step assessment, inventorship attribution, and disclosure requirements.

Introduction of "Preliminary Notification of Invalidation Decision" system

The IPTAB is currently pursuing the introduction of a "Preliminary Notification of Invalidation Decision" system as part of ongoing efforts to improve the invalidation trial process.

Under this proposed system, if trial judges find merit in an invalidation claim, they will provide advance notice to the patent holder prior to issuing a final decision. This advance notice would give the patent holder an opportunity to preserve the validity of their rights by submitting a request for correction.

The system is expected to improve procedural transparency and predictability, while also expanding opportunities for patent holders to respond and protect their rights more effectively.



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