



# The Legal 500 Country Comparative Guides

## Hungary

# PATENT LITIGATION

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This country-specific Q&A provides an overview of patent litigation laws and regulations applicable in Hungary.

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# HUNGARY

## PATENT LITIGATION



### 1. What is the forum for the conduct of patent litigation?

The first instance forum is the Metropolitan Court of Budapest. The court decides in a panel which contains two judges with technical qualifications.

### 2. What is the typical timeline and form of first instance patent litigation proceedings?

The Metropolitan Court usually decides within 1.5-2 years. Main steps in the litigation are the following:

- statement of claims;
- defense statement;
- 2nd round of the written preparatory phase;
- court hearing closing the preparatory phase of the litigation; re: defining the scope of the litigation, and the fact finding;
- fact finding, questions to the experts,
- comments to the expert opinion;
- trial(s), hearing of the expert(s).

If there is a pending invalidity procedure, the court stays the infringement procedure.

In case of pending opposition procedures before EPO, the court usually stays the litigation until EPO's final and binding decision has been rendered.

In the main infringement litigation, the defendant can file a counterclaim for invalidity (relaxation of bifurcation) provided that there is no pending cancellation procedure before HIPO. If the defendant files a counterclaim for revocation, the court shall hear the patent infringement case as a matter of priority. The expert appointed by the court to give an expert opinion on the counterclaim for revocation shall have 30 days to

prepare his expert opinion (strict deadline).

### 3. Can interim and final decisions in patent cases be appealed?

The appellate forum is the Metropolitan Court of Appeals. A specified panel handles the IP matters. The judges have no technical qualification.

It is possible to file an extraordinary juridical review to the Supreme Court (Curia) based on infringement of law

### 4. Which acts constitute direct patent infringement?

On the basis of the exclusive right of exploitation, the patentee shall be entitled to prevent any person not having his consent

(a) from making, using, putting on the market or offering for sale a product which is the subject matter of the invention, or stocking or importing the product for such purposes;

(b) from using a process which is the subject matter of the invention or, where such other person knows, or it is obvious from the circumstances, that the process cannot be used without the consent of the patentee, from offering the process for use;

(c) from making, using, putting on the market, offering for sale or stocking or importing for such purposes a product obtained directly by a process which is the subject matter of the invention.

According to the Supreme Court, the list is regarded as an exhaustive list of restricted acts.

### 5. Do the concepts of indirect patent infringement or contributory infringement exist? If, so what are the elements of such

## forms of infringement?

The patentee shall also be entitled to prevent any person not having his consent from supplying or offering to supply a person, other than a person entitled to exploit the invention, with means (instruments, appliances) relating to an essential element of the invention, for carrying out the invention, when such person knows, or it is obvious from the circumstances, that those means are suitable and/or intended for carrying out the invention. These provisions shall not apply when the supplied or offered means are staple commercial products, except when the supplier or offeror deliberately induces his client to commit the infringing acts.

Further, the patentee may also submit an injunction claim against any person whose services were used in the infringing activities, and a data provision (information) claim against any person who

- was found in possession of the infringing goods on a commercial scale;
- was found to be using the infringing services on a commercial scale;
- was found to be providing services used in infringing activities on a commercial scale;
- was indicated by the person referred to above as being involved in the production or distribution of the infringing goods or the provision of the infringing services (indirect contribution). Acts are carried out on a commercial scale if it is obvious from the nature and quantity of the infringing goods or services that these acts are carried out for direct or indirect economic or commercial advantage. Usually acts carried out by consumers in good faith shall not be regarded as acts carried out on a commercial scale.

## 6. How is the scope of protection of patent claims construed?

The scope of protection conferred by a patent shall be determined by the claims. The claims shall be interpreted on the basis of the description and the drawings. Patent protection shall cover any product or process in which all the features of the claim are embodied. The contents of the claims shall not be confined to their strict literal wording; neither shall the claims be considered mere guidelines for a person skilled in the art to determine the claimed invention.

Technical solutions covered by the scope of the patent are defined by the independent claim. Patent protection

covers products in which all the features of said independent claim are embodied.

A claim is only justifiable when it includes a feature the meaning of which is not unambiguous, and its broader technical meaning defines a certain domain (range) of interpretation. It is only in such cases that the meaning of a feature needs to be specified, which means carrying out a contextual interpretation in comparison with the description and the drawings.

As to whether patent protection applies to a product or technology, it shall be determined taking into account the equivalent attributes of the product or technology in question, as laid down in the respective claim.

In Hungary the doctrine of equivalents is usually assessed by way of the triple identity test. Equivalence is established if the given feature performs:

- (a) essentially the same function;
- (b) in essentially the same way; and
- (c) with essentially the same result (the so-called "triple identity test").

## 7. What are the key defences to patent infringement?

In patent dispute, the defendant's defence is usually based on the following elements:

- invalidity defence (see Q8 below);
- interpretation of the claim and the scope of protection;
- lack of infringement (the product does not fall under the scope of protection), or
- the behaviour falls within the scope of an exception or limitation of the patent protection (i.e., prior user right, Bolar exemption, etc.)

## 8. What are the key grounds of patent invalidity?

The defence of invalidity is usually based on a lack of novelty, lack of an inventive step and/or lack of sufficient disclosure.

## 9. How is prior art considered in the context of an invalidity action?

A document will call into question the novelty of a

claimed solution if it can be directly and unambiguously deduced from the document, including those features which, although not explicitly stated, are self-evident to the person skilled in the art.

**10. Can a patentee seek to amend a patent that is in the midst of patent litigation?**

The patentee can amend (limit) the patent in the midst of patent litigation. This might also be the result of the pending revocation / opposition procedure.

**11. Is some form of patent term extension available?**

In addition to a supplementary protection certificate (SPC), medicinal products may also be protected by a paediatric extension, which extends the lifetime of an SPC by a further six months.

**12. How are technical matters considered in patent litigation proceedings?**

As the Metropolitan Court decides in a panel which contains two judges with technical qualifications, an expert is appointed if no member of the panel has the required expertise.

The court may appoint the Body of Experts on Industrial Property attached to HIPO, an expert from the list of the Ministry of Justice or, in lack of any person with the required expertise on the list, any other person or institution (i.e., university department) which has the knowledge to act as an expert.

**13. Is some form of discovery/disclosure and/or court-mandated evidence seizure/protection (e.g. saisie-contrefaçon) available, either before the commencement of or during patent litigation proceedings?**

There is no saisie-contrefaçon<sup>1</sup> as such in Hungary. The patentee may commence preliminary collection of evidence proceedings before the Metropolitan Court of Budapest, even before starting the litigation (hereafter: the pre-trial collection of evidence).

The court shall decide on the preliminary taking of evidence by an order and out of turn, but not later than within fifteen days from the filing of a request to this effect. An appeal shall lie against orders rejecting the

preliminary taking of evidence; On the request for a preliminary taking of evidence, the court may decide ex parte, if the delay caused thereby would cause irreparable harm or if there is a significant risk of the destruction of evidence.

See footnote after question 34.

**14. Are there procedures available which would assist a patentee to determine infringement of a process patent?**

In the absence of proof to the contrary, a product shall be deemed to have been obtained by a patented process if the product is new and a substantial likelihood exists that the product was made by the patented process and the patentee has been unable, despite reasonable efforts, to determine the process actually used. A substantial likelihood that the product was made by the patented process shall exist, in particular, when the patented process is the only known process.

**15. Are there established mechanisms to protect confidential information required to be disclosed/exchanged in the course of patent litigation (e.g. confidentiality clubs)?**

The judge may order the parties and their representatives to make a written declaration of their obligation to keep business secrecy and the judge shall determine the rules under which they may exercise the right of access to the case folder and making copies/notes. In light of the principle of due process, all parties shall have access to the pieces of evidence on which the court bases the judgement and have the possibility to make comments on them. In addition, the judge may exclude the presence of an audience at the trial and may draft decisions in a form where business secrets are blanked out.

**16. Is there a system of post-grant opposition proceedings? If so, how does this system interact with the patent litigation system?**

In the case of Hungarian patents, there is no system of post-grant opposition proceedings.

**17. To what extent are decisions from other fora/jurisdictions relevant or**

### **influential, and if so, are there any particularly influential fora/jurisdictions?**

It is possible to make reference to favourable foreign judgements, however, they are not binding on the Hungarian court.

When the court reviews whether the PI is necessary “to protect the claimant’s rights requiring special protection”, the court must consider all evidences, including whether a European patent effective in Hungary has been revoked, or whether it has been revoked in another member state of the EPC.

### **18. How does a court determine whether it has jurisdiction to hear a patent action?**

The general ground for jurisdiction is that the place of residence of the defendant and/or the place of infringement is located in Hungary. Further, the patentee can enforce claims in the same procedure against the Hungarian distributor and the foreign supplier, because the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Hungarian courts do not have jurisdiction concerning the validity of foreign patents.

International jurisdiction within the European Union is governed by the Brussels I Regulation.

### **19. What are the options for alternative dispute resolution (ADR) in patent cases? Are they commonly used? Are there any mandatory ADR provisions in patent cases?**

The parties are free to choose arbitration or mediation, however, these options are not used.

### **20. What are the key procedural steps that must be satisfied before a patent action can be commenced? Are there any limitation periods for commencing an action?**

The patentee is not obliged to take any action (i.e., sending a C&D letter) before commencing a PI procedure or the main litigation.

The limitation period is 5 years, calculated from the due date of the claim.

### **21. Which parties have standing to bring a patent infringement action? Under which circumstances will a patent licensee have standing to bring an action?**

In addition to the patentee, the licensee can take action in its own name for infringement of a licensed patent. In the case of patent infringement, the holder of a contractual license may invite the patentee to take appropriate action in order to stop the infringement. If the patentee fails to take action within thirty days from the invitation, the licensee recorded in the Patent Register may institute proceedings for patent infringement in his own name.

The law does not exclude that the patentee declares earlier that it does not start the action and the licensee is entitled to start action before the expiry of the 30 days.

The licensee will act in its own name against the infringer and not on behalf of the patentee. The licensee can enforce all claims based on infringement against the infringer, limited to claims related to the license it holds, and also request PI.

The court practice has confirmed that the patentee and the licensee (the Hungarian affiliate) can jointly start the court action.<sup>2</sup>

See footnote after question 34.

### **22. Who has standing to bring an invalidity action against a patent? Is any particular connection to the patentee or patent required?**

Anybody can commence a cancellation action at HIPO.

### **23. Are interim injunctions available in patent litigation proceedings?**

PI can be requested in conjunction with or before filing the statement of claims. The facts relating to the reasoning of the request for a PI must be of a probable nature (substantiation).

The court examines (i) whether there is any infringement, and (ii) if the procedural conditions are met.

The court will **first** examine whether the infringement is appropriately substantiated by the patentee.

A court may issue a PI in order (i) to maintain the status quo during a legal dispute; (ii) to prevent imminent damage; (iii) to protect the claimant's rights requiring special protection, or (iv) to prevent the failure of any future enforcement of rights.

In patent litigation, the grounds under (ii) and (iii) are usually relevant.

With regard to requirement "(iii) to protect the claimant's rights requiring special protection", the Patent Act sets forth a **rebuttable statutory presumption in favour of the patentee**: a PI must be considered necessary for the special protection of the claimant's rights if the claimant can prove that the patent is protected and that it is the patent holder or a user/licensee which is authorized to institute court proceedings in its own name due to an infringement. 60 days after the patent holder learns about the infringement (subjective period), but in any event 6 months after the commencement of the infringement (objective period), the presumption fails. A PI can still be requested and adjudicated but the motion is not supported by the statutory presumption.

When the court decides on a PI, it is not excluded to make assumptions concerning the outcome of the invalidity proceeding.

Nevertheless, even if the defendant may rebut that the PI is necessary for the special protection of the claimant's rights, PI can be based on the **alternative ground that PI is necessary to avoid the imminent threat of damages on the plaintiff's side**. In connection with this requirement, the court usually accepts that the sale of infringing products results in a loss of turnover and market share.

The court weighs the potential benefits and disadvantages of the PI (**proportionality**), and also takes into account whether the injunction is manifestly and substantially contrary to the public interest or the interests of third parties.

#### Security (bond), or a cross-undertaking as to damages in PI proceedings

The court may oblige the patentee requesting the PI to provide appropriate security, which is the prerequisite for awarding a PI. The security serves as a deposit ("lump sum compensation") to satisfy compensation claims to recover losses suffered by the opposing party where it is subsequently found that there has been no infringement.

The security must be provided in the form of a transfer of payment to the court's escrow account; or as a bank

guarantee.

If the court dismisses the action brought by the plaintiff for infringement, that is the PI proves to be unfounded, the court in its judgment shall provide for the **transferring of the security deposited to the alleged infringer**. If the amount of loss is higher than the security, it is possible to demand compensation for losses not covered by the security under the tort liability rules of the Civil Code which are based on culpability<sup>3</sup> (and not on strict liability). On the other hand, if the amount of loss is lower than the amount of the security, the refund of the difference may not be demanded by the patentee.

#### Timeline for PI procedure

The Metropolitan Court shall render its decision on PI in principle within 15 days after filing the petition for PI. In practice, it might usually take 1-1.5 months.

In complex patent litigation cases the court does not decide in ex parte proceedings, and the court usually requests the alleged infringer to respond to the petition (usually within 5-8 days).

The first instance decision on PI is enforceable after delivery to the defendant, irrespective of the filing of an appeal against the decision. If the court orders the applicant to provide security, the PI is effective after evidencing the security.

In case of an appeal against the PI, the Metropolitan Court of Appeals shall render its decision in principle within 15 days after filing the appeal. In practice, it usually takes 1-1.5 months.

See footnote after question 34.

### **24. What final remedies, both monetary and non-monetary, are available for patent infringement? Of these, which are most commonly sought and which are typically ordered?**

In the event of an infringement, or an imminent threat of infringement, the patentee may – in accordance with the circumstances of the case – have the following civil law claims:

- a) establishment of the fact that patent infringement has occurred;
- b) cessation of the infringement or threat of infringement and an **injunction** from further infringement;



c) **provision of data** on parties taking part in the manufacture of and trade in goods or performance of services which infringe on the patent, as well as on business relationships established for the use of the infringer;

d) **making amendments to the infringement** – by declaration or in some other appropriate manner – and, if necessary, that such amendments should be made public by and at the expense of the infringer;

e) appropriate measures for the dissemination of the information concerning the decision, at the expense of the infringer, in a way as decided at the discretion of the court;

f) in relation to those assets and materials used exclusively or primarily in the infringement – seizure, the delivery thereof to a particular person, the **recall** and the definite **withdrawal thereof from commercial circulation, or destruction**;

g) **recovery of economic profits** achieved through the infringement (**enrichment**); and

h) **compensation for damages** other than the financial profit achieved by the infringer in the case of culpable infringement (under the Civil Code).

Sanctions set forth under a)-g) shall be applied on an objective basis (strict liability), even where there is no actual fault (culpability) of the infringing party.

## 25. On what basis are damages for patent infringement calculated? Is it possible to obtain additional or exemplary damages?

In the event of infringement, the patent holder may claim, inter alia

(i) **recovery of economic profits (enrichment)** achieved through the infringement (infringer's profit), with the minimum of a reasonable royalty without any culpability; and

(ii) **compensation for damages** (other than the financial profit achieved by the infringer) in case of culpable infringement under the Civil Code: this is primarily the patentee's lost profit (minimum: reasonable royalty).

Recovery of profit can be claimed with no regard to the eventual culpability of the infringer (objective claim).

In the event that the plaintiff (patentholder) enforces both a claim for damages and a claim for the recovery of

profit jointly, from the amount of the damages the amount of the recovered profit shall be deducted. This means that these both claims cannot be cumulated.

### The recovery of economic profits (enrichment)

In determining the amount of the profit, the **net revenue achieved by the infringer** as a result of the infringement shall serve as a basis. The costs which were incurred by the infringer directly in connection with the sales may be deducted from the above sum. The occurrence and amount of such costs shall be proven by the infringer.

Alternatively, in determining the amount of the profit to be recovered, the (fictitious) **license fee** may be regarded as an important starting point which the infringer would have had to pay to the patentee if the infringer had obtained a license. This license fee may be claimed even if the infringer has not realized any profit as a result of the infringement.

For the patent holder, it may be very helpful to enforce the claim for **obtaining data** on commercial relations<sup>4</sup> because the information so acquired may serve as evidence of the amount of revenues achieved by the infringer.

The plaintiff may request the court to appoint an auditor expert to review the books and registers of the infringer.

### Compensation of damages other than financial profit achieved by the infringer

This claim can only be enforced if the infringer committed the infringement with culpability (negligence). The burden of proof to the contrary lies with the infringer.

The infringer shall pay *full compensation*. The elements of the loss:

(i) loss of value in the assets of the patentholder (*damnum emergens*);

(ii) loss of profit sustained as a consequence of the infringement (*lucrum cessans*), and

(iii) indemnification for expenses which were necessary for the mitigation of the losses.

Alternatively, the court may order the defendant to pay **general (estimated) compensation** for damages if the extent of damage (usually the lost profit element of the damage) cannot be precisely – even if only in part – calculated.

### Late payment interest

Further, the infringer shall pay interest relating to the amount of damages / recovery of profit (license fee).

Interest rate: base rate set by the Hungarian National Bank in effect on the first day of the relevant calendar half-year to which it pertains.

See footnote after question 34.

## 26. How readily are final injunctions granted in patent litigation proceedings?

In the judgement the court shall order the cessation of the infringement or threat of infringement and grant a final injunction. While in a PI procedure the court may consider proportionality (including public interest), whereas in the judgement there is no room for such assessment.

## 27. Are there provisions for obtaining declaratory relief, and if so, what are the legal and procedural requirements for obtaining such relief?

In the patent litigation, first the court may establish in the judgement whether there was any infringement, should the plaintiff file such a claim.

## 28. What are the costs typically incurred by each party to patent litigation proceedings at first instance? What are the typical costs of an appeal at each appellate level?

In lack of enforcing monetary claims, the official duty to request a PI amounts to HUF 21.000 (approx. 60 EUR), the duty for litigation amounts to HUF 42.000 (approx. 100 EUR).

The parties' costs consist of the fees of the attorney and patent attorney. In Hungarian legal practice, the representation requires the cooperation of both an attorney and a patent attorney who has the technical knowledge.

## 29. Can the successful party to a patent litigation action recover its costs?

The losing party shall reimburse to the winning party its legal costs (attorney's fees, patent attorney's fees, translation costs, etc). The costs shall be evidenced with the invoices.

Nevertheless, the court has competence to reduce the legal fees if the court considers the fees to be disproportionate to the value of the matter and the activities of the legal representatives.

## 30. What are the biggest patent litigation growth areas in your jurisdiction in terms of industry sector?

The number of patent litigation cases is very low in Hungary. The majority of the cases are in the pharma industry.

## 31. How has or will the Unified Patent Court impact patent litigation in your jurisdiction?

Hungary has not ratified UPC yet, and we are not aware of any plan for its ratification in the near future. Therefore, we do not expect that the UPC will dramatically impact patent litigations in Hungary.

## 32. What do you predict will be the most contentious patent litigation issues in your jurisdiction over the next twelve months?

Due to potential branded generic activities, we expect that the patent litigation cases in the pharma industry will remain the most contentious in Hungary.

## 33. Which aspects of patent litigation, either substantive or procedural, are most in need of reform in your jurisdiction?

The Patent Act seems to be up to date, with the relaxation of the strict bifurcation system.

## 34. What are the biggest challenges and opportunities confronting the international patent system?

In Europe, the launch of UCP will rearrange cross-border litigation practice. The speed and the costs of such procedures will be the most important factors for the industry players.

On an international level: due to the Covid, several legislators have introduced new forms of compulsory licencing, in compliance with TRIPS. As one of the activities under WIPO's COVID-19 Response Package, WIPO is examining the interplay between patents and



trade secrets in medical technologies throughout the innovation process and product value chain.

### 35. Footnotes

<sup>1</sup> In our understanding, the saisie is a way to gather evidence of infringement, not a preliminary injunction. Upon authorization granted ex-parte, a bailiff assisted by experts chosen by the claimant may enter any premises where proof of infringement might be found to perform the authorized investigations. The report handed to the claimant is later exhibited to the Court.

<sup>2</sup> Metropolitan Court of Appeals, 8.Pf.20.214/2019/7.

<sup>3</sup> On 12 September 2019, the CJEU handed down its ruling whether a “launch at risk” excludes the right to appropriate (full) compensation for a wrongfully-issued PI (C-688/17). On 5 February 2020 the Metropolitan Court of Budapest rendered its judgement in Bayer/Richter, applying and following word by word the CJEU’s interpretation. In the view of the Metropolitan Court, the generic company cannot claim full compensation based on objective (strict) liability, but the court shall evaluate the conditions of the claim for damages, including the culpability of the generic

company which launched its product before the decision in the patent cancellation proceedings was rendered. Under the general principle of civil law, the generic company has not acted in conformity with “what can generally be expected of a reasonable person in the same circumstances”. The court emphasized that all market participants shall respect the patents granted after examination by the patent authority, and granting full compensation, based on the plaintiff’s strict liability would encourage aggressive market entry strategies and jeopardize that a high level of protection of IP rights are ensured. In light of the parties’ actions and interests in connection with the PI proceedings (Bayer taking the risk of requesting PI, and Richter’s launch in spite of the patent protection), the Metropolitan Court of Budapest held that Bayer is liable for 50% of the loss of profit arising as a consequence of the PI based on all specific circumstances of that case. The Supreme Court amended the ratio so that Bayer should cover 30% of the loss.

<sup>4</sup> The plaintiff may request the provision of all “data on parties taking part in the manufacture of and trade in goods or performance of services which infringe on the patent, as well as on business relationships established for the use of the infringer.”

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