

PATENTS

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Patents 2017

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A practical cross-border insight into patents law

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Chile

Cristóbal Porzio



PORZIO · RIOS · GARCIA

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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?

When it is necessary to enforce patent rights which are the subject of infringement, the Chilean Industrial Property Law (Law 19,039, "the Law") provides for civil actions and criminal actions. The claimant's choice will typically be influenced by the kind of goods/processes/methods protected by the patent, and which are being "copied", by the place (region of Chile) where the infringement is taking place, by the possible cross-border implications of the case, by the existing case law, if any, and by the internal codes of conduct of the claimant. The latter considers cases where some companies simply refrain from suing criminally.

1.2 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?

No court fees are to be paid. The civil action will commence by means of a "formal legal action" or by means of a "pre-trial measure" or by a "preliminary injunction". In this last case, a bond will normally be requested by the Court.

The criminal actions will usually commence by means of a claim before the Office of the Criminal Prosecutor. Strictly speaking, a criminal action could also start by means of a "complaint made at the Police Station", since such authority will have to send the complaint to the Prosecutor for further investigation.

1.3 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 answer is yes, provided that the claimant has filed a pre-trial measure or claim called "*medida prejudicial probatoria*" requesting the Court to summon the defendant (future defendant) to show the documents of evidence that are in his possession, and that are, or could be, evidence for a "complete civil action" which the claimant is willing to bring before the Court, provided that the evidence is made available, and with the understanding that the claimant does not have this required evidence.

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

The pre-trial claim will start by means of a brief filed before the Civil Court. The mentioned brief will be as complete as possible and, in any case, very similar to what is to be claimed in the legal action, if the latter is filed after the exhibition of documents.

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

The arguments are presented in writing. In addition, the evidence will be presented according to the rules of the Civil Procedural Code, which regulates what kind of evidence is allowed and how the evidence is to be brought to the Court.

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

There is no concrete answer to this question. In addition, local practice indicates that several cases finish by means of a settlement.

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

The Civil Courts and the Criminal Courts called to hear patent infringement cases in Chile are the Ordinary Courts of Justice. The judges within the Courts and the Appeals Court (Chambers) are all lawyers, and do not have a technical background. However, in most of the procedures, the Court will call for an expert with the necessary background in the technology in discussion. In addition, the parties will have the opportunity, during the procedure, to file technical opinions regarding the case.

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

The Industrial Property Law is rather broad regarding this question. In fact, it is to be said that the rights granted on a patent in Chile are exclusive to the owner of the patent. Such exclusivity allows the owner to use his patent exclusively, to make it part of any commercial and legal act, to transfer the same by means of succession and,

finally, to prevent any third party from using the invention protected by the patent, without his prior consent.

In addition, the Law states that [note of the authors: the following texts are unofficial translations of parts of the Law]: **a)** any interested party will be entitled to file an opposition against [...] a patent application [...]; **b)** any interested party will be entitled to request the cancellation of an industrial property right [note of the authors: namely a patent]; **c)** the owner of an industrial property right [note of the authors: namely a patent] that is being infringed will be entitled to bring a civil action; and **d)** the owner of a patent will have to mark the patented objects with the letters P.I. [note of the authors: this acronym stands for “patente de invención”], followed by the number of the granted patent. The patented processes are excluded from this obligation, and the omission of this obligation will preclude the patent owner from using the criminal actions provided by the Law [note of the authors: the civil actions are still available].

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

This is not applicable.

1.10 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?

In principle, yes, since the articles of the Law that establish the criminal conducts are very broad. The same can be said in the case of the articles providing for civil actions.

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

Yes, parties can be liable.

1.12 Does the scope of protection of a patent claim extend to non-literal equivalents?

This situation would need to be analysed on a case-by-case basis. The subject matter of the patent, the disclosure made in the specifications, and the final contents of the claims at the end of the prosecution of the application will determine the precise scope of protection and therefore the answer to this question.

1.13 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?

If two parties are fighting on several fronts, namely before a Civil Court, a Criminal Court and/or the Chilean Patent and Trademark Office (INAPI) (in this last case, opposition lodged against a pending patent application or cancellation action filed against a granted patent), each case will be prosecuted independently of one another. However, the case law indicates that in many cases, the defendant in a civil and/or criminal action will file a cancellation action as a strategic means to try to defeat the claimant and the owner of the granted patent on which such claimant has based its

civil and/or criminal action. The practice indicates that in spite of the independence of the procedures for each action, an action in one of the cases will, in all probability, have influence or at least slow down the procedure of one of the other actions.

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

The cancellation of a patent will be declared [note of the authors: after a legal action, which is to be initiated and prosecuted by any interested party] under one of the following circumstances: **a)** when the individual who obtained the patent was not the inventor nor the assignee; **b)** when the granting of the patent was based on official actions [note of the authors: examination reports] that were wrong or frankly deficient; and **c)** when the patent was granted in contradiction or against the provisions of the Law on patentability.

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

This is not applicable.

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

This is not applicable.

1.17 Are (i) preliminary, and (ii) final injunctions available, and if so, on what basis in each case? Is there a requirement for a bond?

Preliminary injunction is available. However, the granting of the same is not mandatory for the Court. In addition, the Court may decide to grant the injunction without prior hearing of the defendant or, in some cases, accept to grant an injunction prior to the hearing of the defendant. Normally, a bond is required. Final injunctions are also available.

1.18 On what basis are damages or an account of profits assessed?

The Chilean Intellectual Property Law states very clearly that “the claimant will have the right to choose the normal general rules (i.e. the Civil Procedural Code) or use the following rules: **a)** the profits that the owner of the intellectual property (IP) rights [note of the authors: namely a patent right] did not receive as a consequence of the infringement suffered; **b)** the profits obtained by the infringer as a consequence of the infringement; and **c)** the price that the infringer would have paid to the owner of the right [note of the authors: namely a patent right] in cases where he (the infringer) would have been granted a licence, taking into account the commercial price of the right infringed and the price of the licences in force”.

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

Cross-border relief is normally not claimed or granted.

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

The settlement of infringement proceedings prior to trial is rather common.

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

The statute of limitations for cancellation action of a granted patent is five years from the granting of the patent.

The statute of limitations for civil and criminal actions in the case of patent infringement is five years counted in principle from the beginning of the infringement. However, in the case of “continuous infringement”, counting is made from the conclusion of the infringement.

1.22 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?

In the case of patent oppositions and patent cancellation actions [*note of the authors: these are filed and prosecuted before the INAPI*], the parties will be entitled to file an appeal before the Industrial Property Appeals Court. The decision of the Industrial Property Appeals Court could, thereafter, be the object of an annulment recourse before the Supreme Court.

In the case of patent infringement cases, these are to be filed before a Civil Court and/or a Criminal Court. The decisions of these First Instance Courts can be appealed before the Ordinary Courts of Appeals. The decision of the Industrial Property Appeals Court could, thereafter, be the object of an annulment recourse before the Supreme Court.

1.23 What are the typical costs of proceedings to first instance judgment on (i) infringement, and (ii) validity? How much of such costs are recoverable from the losing party?

Costs are very different from one case to the other. The Court may summon the losing party to pay for the trial. It is to be noted that such costs are normally symbolic.

1.24 For jurisdictions within the European Union: What steps are being taken in your jurisdiction towards ratifying the Agreement on a Unified Patent Court, implementing the Unitary Patent Regulation (EU Regulation No. 1257/2012) and preparing for the unitary patent package? For jurisdictions outside of the European Union: Are there any mutual recognition of judgments arrangements relating to patents, whether formal or informal, that apply in your jurisdiction?

This is not applicable.

2 Patent Amendment

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

Once granted, a patent cannot be amended *ex parte*. In addition, since

our law does not provide for the “continuations in part”, in cases where the owner of a patent were to file a new patent application for an improvement of the technology, the new application will need to comply with the patentability requirements provided by law.

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

The cancellation action filed by a party against a granted patent can result in the complete cancellation of the patent or in a partial cancellation of same. Therefore, if we consider the partial cancellation as an amendment of the granted patent, the answer to this question would be yes.

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

As discussed above, this does not apply to pending applications; therefore, the answer would be no.

3 Licensing

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

A patent licence will be agreed by the parties in total liberty, being the contract executed, “the law of the parties”. No boundaries apply, with exception of the normal limits of private law. The sole provision of the current Industrial Property Law regarding this matter makes the registration of the licence with the INAPI mandatory, in order that such a licence may produce effects against third parties.

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?

The compulsory licence is established in the Industrial Property Law for very specific cases, namely: **a)** when the owner of a granted patent has incurred into unfair competition practices [...]; **b)** public health, national security, national emergency [...]; and **c)** when the compulsory licence will permit the exploitation (use) of a later patent that cannot be exploited (used) without infringement of a prior/older patent.

The three causes are to be determined by different authorities, and are the consequence of a legal procedure. Some of the causes, namely the ones indicated under points **a)** and **c)** are still discussed from an academic point of view, since they can be considered as rather particular.

In any case, these are not common at all. We would venture so far as to state that the provisions have never been used as yet.

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?

Patents are granted for 20 years counted as from the filing date.

In addition, the term of a patent can be extended, provided that the following grounds are used and rules followed: **a)** the request of

extension of the term of the patent is made by the patent owner within six months from the date of granting; **b)** the prosecution of the application which resulted into a granted patent was the subject of a lengthy prosecution (length due to administrative reasons and/or reasons which cannot be explained or which lack justification); and **c)** the prosecution has lasted more than five years counted as from filing date or three years counted as from the request of examination of the patent.

The additional protection or extension of term, if granted, will be granted only for the term proved as administrative and unjustified delay of the authority (the INAPI).

5 Patent Prosecution and Opposition

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

A patent application must comply with the following requirements in Chile:

- a) Formal Requirements:**
- (i) Filing of a patent application composed by the chapters/parts requested by the Law and its ruling, namely application, abstract, specifications, and a set of claims and figures.
 - (ii) Prosecution of the patent application according to the procedure established by the Chilean Industrial Property Law. Filing and prosecution are to be made at the INAPI.
 - (iii) Compliance of the application with the “Unity of Invention Principle”.
- b) Requirements of Substance:**
- (i) Subject matter not included among the “non-patentable subject matters.*
 - (ii) Novelty (absolute novelty).
 - (iii) Inventive step or non-obviousness.
 - (iv) Industrial applicability.

*Examples of non-patentable subject matters as established in the Law include the following:

- discoveries, scientific theories, mathematical methods;
- plants and animals, with the exception of microorganisms which comply with patentability requirements;
- economic and financial methods, plans, principles, etc.;
- surgical, therapeutical methods and methods of diagnosis, with the exception of the products used for such methods;
- new use, new shape, new dimensions, new proportions, new materials of objects or new applications to known objects or elements. However, an invention consisting in the second use of a product, object or element is patentable, as such a new use may solve a technical problem which had no equivalent solution, and provided that such an invention (second use) will comply with the patentability requirements provided by the Law; and
- part of the living beings as found in nature and natural biological processes, in addition to the biological material that can be found in nature or which can be isolated, including genoma and germoplasma. However, the methods/processes that may use one or more of the biological materials mentioned above will be patentable if such methods/processes comply with the patentability requirements provided by Law, and provided that such biological material is described and the industrial applicability of the invention is made clear in the text of the application.

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?

The specifications of a patent application will need to refer to the prior art. In addition, the applicant will have to disclose, under his responsibility, the elements/documents that may affect the novelty of his invention.

In addition, the applicant of a patent application which has been filed (and is prosecuted) abroad (outside of Chile) will have to file with the INAPI the search reports issued by the foreign Patent Offices before which an application is being prosecuted for the same invention.

The failure to comply with such a duty may result in a cancellation action filed by a third party on the grounds that the examiner, at the time of reviewing the application, lacked elements for an appropriate examination of the 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?

A patent application can be opposed by third parties. In fact, in the early stages of the prosecution of a patent application, the Patent Office will submit the application to a formal examination. If the application complies with the basic formal requirements provided by Law, the application will be admitted to ordinary proceedings and, in consequence, the applicant will be entitled to publish the application in the Official Gazette. The publication will open a special term (45 working days) for third parties to file in writing possible oppositions.

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

The decisions of the INAPI acting as the Court of First Instance can be appealed before the Industrial Property Appeals Court (*Tribunal de Propiedad Industrial*).

Thereafter, the decision of the Appeals Court can be the subject of an annulment recourse before the Supreme Court of Chile.

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

The final answer will mainly depend on a response (at least) to the following questions: **a)** is this a criminal case, and was the invention stolen by one person from another?; **b)** when will the discussion take place, namely before the filing of the application, during the prosecution of a patent application, or once the patent has already been granted?; **c)** is there also a question of co-ownership?; and **d)** is there a dispute between employer and former employee?, etc.

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

The Industrial Property Law provides for a special “grace period” of 12 months. The Law refers to a possible innocuous disclosure – which occurred in the 12 months prior to the filing of the application – that will not be taken into account at the time of reviewing the

novelty of the application. Some requirements are to be complied with and informed to the Patent Office at the time of the filing of the application.

5.7 What is the term of a patent?

The patents are granted for a term of 20 years counted from the filing date.

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?

Chilean Customs are very effective, especially in the case of trademark infringements. In addition, Customs are entitled to temporarily seize or freeze products that could be infringing IP rights. In that case, Customs will contact the owner of the rights or its representative in Chile. It will take five days to initiate criminal actions.

7 Antitrust Law and Inequitable Conduct

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

In principle, the answer is no. However, a case which is currently pending before the antitrust authorities may amend this reply in the future.

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

In principle, none, in the sense that the antitrust law does not specifically provide for this situation. However, since the drafting of the antitrust law is rather broad and the antitrust authorities have ample powers, it is possible to imagine, at least theoretically, of a case, where antitrust law could be put forward, if a licensor and licensee (exclusive licence) were to allegedly agree on a licence in order to “block” a competitor, “constitute a monopoly”, “abuse a position”, or “reach agreement on prices”, etc.

8 Current Developments

8.1 What have been the significant developments in relation to patents in the last year?

- At this time, there is a Bill in Congress for a “new Industrial Property Law”. The discussion is on hold and could restart during the next year.
- Chile was one of the signatories of the Trans-Pacific Partnership Treaty. Implementation of said Treaty is on hold, and will depend upon several factors of international politics.
- Chile is a founder country of the Pacific Alliance (comprising Chile, Colombia, Mexico and Peru).
- Another significant development is the execution of a Patent Prosecution Highway (PPH) with the countries of the Pacific Alliance.
- Back in 2012, the Chilean Patent Office was designated by the World Intellectual Property Organization as an International Searching Authority/International Preliminary Examining Authority. In October 2014, the Chilean Patent Office started fulfilling their duties in these roles.

8.2 Are there any significant developments expected in the next year?

- Possible re-opening of the discussion of the Bill that is in Congress, and this is mentioned under question 8.1 above.
- There may be possible discussion of other PPH agreements with other countries.

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

General comments: new public funds for development of innovation and assistance for patenting; important increase of the number of patent applications filed by universities in Chile and under the PCT system; and reduction of the patent applications filed by foreign companies in the pharmaceutical field and in the mining field.

Enforcement trends: in the case of enforcement of rights, civil actions are more common than criminal actions.



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PORZIO · RIOS · GARCIA
ABOGADOS

The law firm of PORZIO · RIOS · GARCIA was founded, in 1993, as Porzio, Ríos & Asociados, beginning its activities mainly in the Intellectual Property field.

Its specialised professional services, together with the command of several languages, led its clients, both Chilean and foreign, to entrust the firm with other legal matters in different fields of law, motivating the firm to develop also other areas of the legal profession in order to provide its clients with a full legal service, in addition to its traditional leading IP Services.

PORZIO · RIOS · GARCIA consists of a team of lawyers who graduated from the most prestigious universities in the country, many of whom have completed graduate degrees in foreign universities with a comprehensive command of different languages. Many of them also act as arbitrators in domestic and international procedures, and are academics at the main law schools in the country.

The team is completed by an entrenched group of paralegal and administrative staff with extensive experience. In order to deal with patent applications and patent litigation, a team of scientists in the fields of chemistry, pharmaceuticals, biochemistry and drawings works alongside our team of lawyers.

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