

WITTEWELLER NEWS II/2022

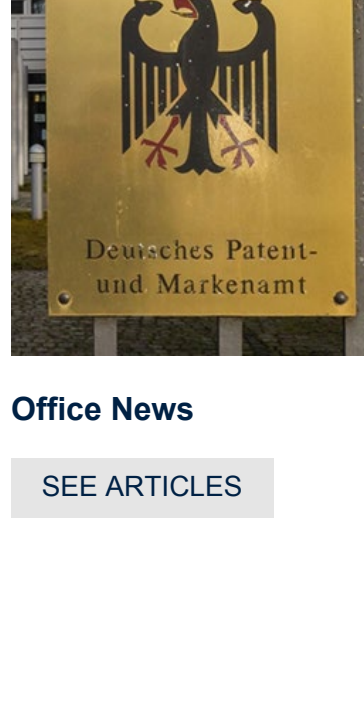
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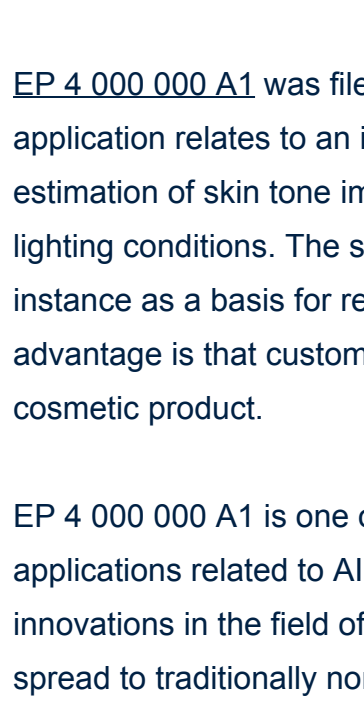
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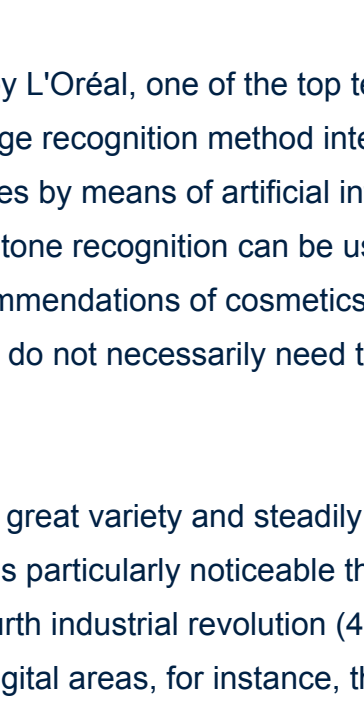
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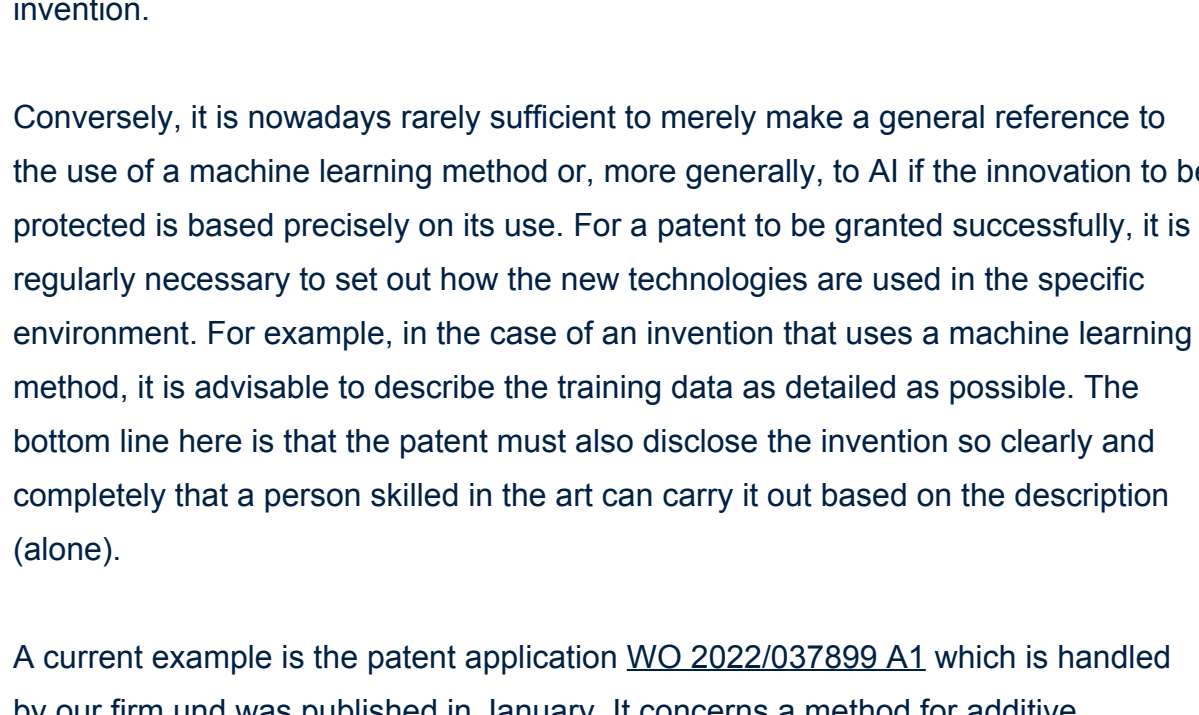
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Record filings at EPO – Four millionth patent application deals with artificial intelligence (AI)

Recently, the European Patent Office (EPO) announced that it has published its 4 millionth patent application on 25 May 2022, reaching again a new record milestone.

EP 4 000 000 A1 was filed by L'Oréal, one of the top ten French applicants. The application relates to an image recognition method intended to achieve accurate estimation of skin tone images by means of artificial intelligence (AI), regardless of lighting conditions. The skin tone recognition can be used in various fields, for instance as a basis for recommendations of cosmetics matching the skin tone. One advantage is that customers do not necessarily need to visit shops in order to test a cosmetic product.

EP 4 000 000 A1 is one of a great variety and steadily increasing number of patent applications related to AI. It is particularly noticeable that in the past years, innovations in the field of fourth industrial revolution (4IR) and AI have increasingly spread to traditionally non-digital areas, for instance, the cosmetics sector.

Technologies related to 4IR and AI are also of interest to many of our clients so that we have to deal with them repeatedly in our daily work. Although some of these technologies offer revolutionary new possibilities and applications, from a patent law perspective, questions often arise when we have been dealing with for a long time, namely under what conditions is a computer-implemented invention patentable. The EPO examines such inventions on the basis of the [COMVIK approach](#) developed by case law, putting the central question of whether or not a technical problem is solved by technical means in a new way. These technical means may readily include machine learning methods, neural networks, simulations, or modeling. However, these methods must not be claimed abstractly on their own, but need to be integrated into the technical application "in the real" world, i.e. they must provide something that can be seen, measured, or felt, so to speak, in order to establish a patentable invention.

Conversely, it is nowadays rarely sufficient to merely make a general reference to the use of a machine learning method or, more generally, to AI if the innovation to be protected is based precisely on its use. For a patent to be granted successfully, it is regularly necessary to set out how the new technologies are used in the specific environment. For example, in the case of an invention that uses a machine learning method, it is advisable to describe the training data as detailed as possible. The bottom line here is that the patent must also disclose the invention so clearly and completely that a person skilled in the art can carry it out based on the description (alone).

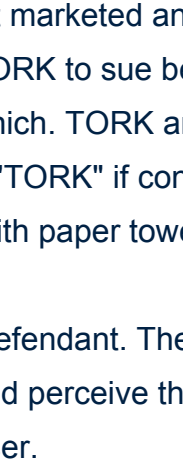
A current example is the patent application [WO 2022/037899 A1](#) which is handled by our firm and was published in January. It concerns a method for additive manufacturing of a workpiece using a statistical learning model from the field of machine learning.

Further information

[EPO NEWS](#)

[PATENTS AND THE FOURTH INDUSTRIAL REVOLUTION](#) (Newsletter III/2021)

[ARTIFICIAL INTELLIGENCE AND PATENT PROTECTION](#) (Newsletter II/2021)



Dr. Torsten Duhme, Partner

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Federal Court of Justice rules – Trademark-protected paper towel dispensers can be refilled with no-name products

The German Federal Court of Justice (Bundesgerichtshof: "BGH") recently took a new and fundamental decision on this case and, as a result, waved goodbye to the judicial practice that has already lasted for more than 30 years. According to the judges in Karlsruhe, refilling a trademark-protected paper-towel dispenser in public washrooms with no-name paper towels is permitted under trademark law.

What does this decision actually mean?

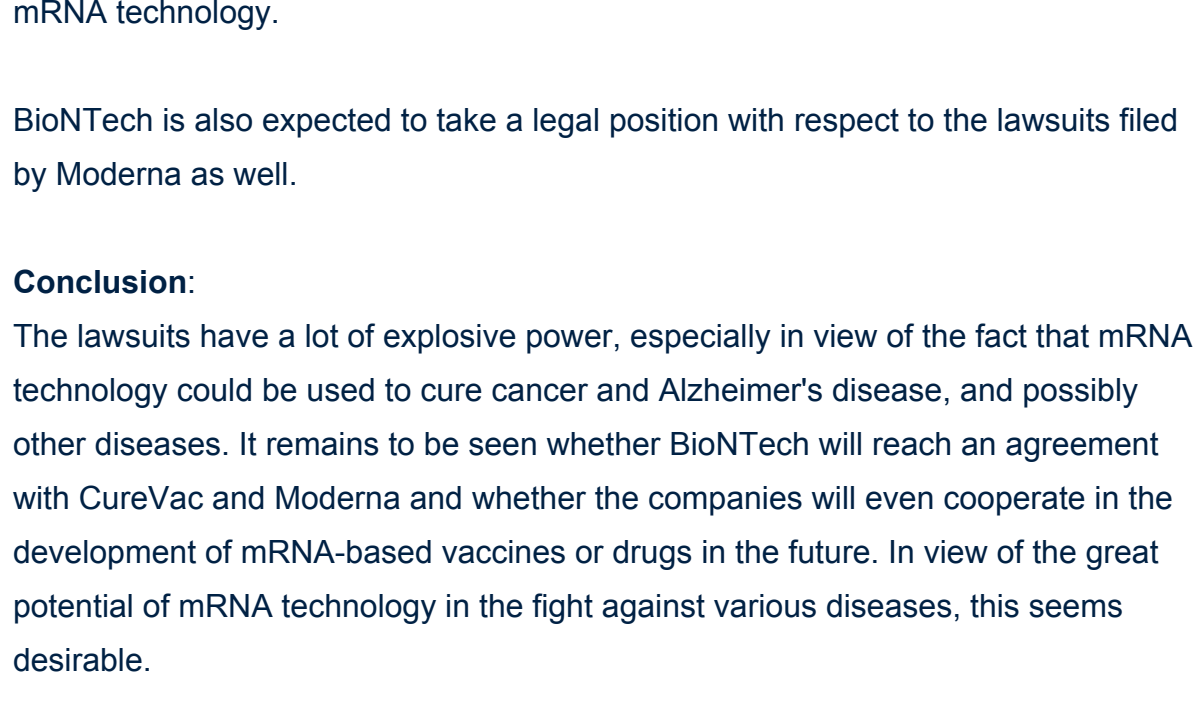
The defendant is a wholesale trader distributing various paper products, for instance, no-name paper towels which are compatible with paper towel dispensers of the trademark "TORK". The defendant marketed and advertised its products, respectively, which encouraged TORK to sue before the Higher Regional Court (Oberlandesgericht: "OLG") in Munich. TORK argued that it would constitute an infringement of the EU trademark "TORK" if consumers of the defendant refill TORK's paper-towel dispensers with paper towels from other manufacturers.

The OLG decided in favor of the defendant. The reasonably well informed and observant average consumer would perceive the paper towels independently from the trademark of the towel dispenser.

It should be particularly taken into account that trademarks in the away-from-home (AFH) field are considered to be less important than for other products. The OLG stated that consumers do not pay attention to the trademark of the paper towel dispensers in public washrooms, which would also apply to the consumables. Refilling the TORK paper towel dispenser would consequently not constitute an infringement of the trademark "TORK". TORK appealed against this ruling to the BGH.

The BGH confirmed the decision of the OLG and decided not to accept the case for a further appeal in its decision of 19 May 2022 (I ZR 142/21). The decision is final and replaces the BGH's thirty-year old case law in this matter. In 1987, the BGH considered towel dispensers, from the consumers' viewpoint, as "casing of inserted paper towels" for which an affixed trademark constitutes the indication of origin on the paper towel manufacturer.

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UPC: Latest news and updates

The introduction of the European Unitary Patent (UP) and the Unified Patent Court (UPC) is expected to take place soon. As we have already discussed this topic in detail in our [Newsletter I/2022](#), we will provide a short overview of the current developments and preparations.

An overview of the participating member states, the number of signed UPC ratifications as well as the location of the UPC regional and local division you may find [here](#).

In Germany, the UPC's central division will be located in the premises of the Federal Patent Court in Munich. Four local divisions will be further established in Munich, Mannheim, Düsseldorf, and Hamburg. There is no other UPC member state providing such a large number of local divisions.

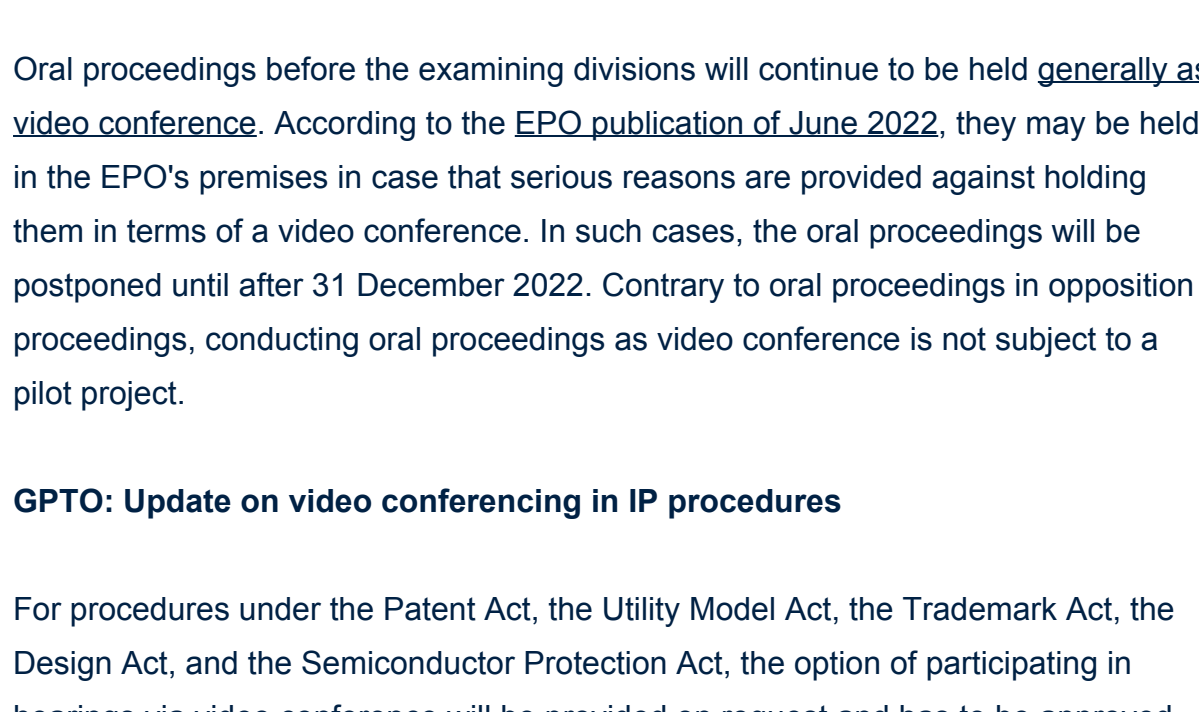
The appointment of judges was last announced for this summer. We expect the names of the UPC judges to be published in due course.

Furthermore, the management committee finally decided on the UPC agreement and the schedule of fees. The updated version of the UPC agreement came into effect on 1 September 2022. After the legal framework is completed, the way will be paved for the sunrise period, the so-called provisional application phase. The UPC is expected to start operations in spring 2023.

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CureVac and Moderna sue BioNTech for infringement of their mRNA patents

Biotech company CureVac, based in Tübingen (50 km away from our Stuttgart Office), announced in early July that it had filed suit with the Düsseldorf Regional Court against BioNTech and two subsidiaries for alleged infringement of various patents by BioNTech's "Comirnaty" vaccine. These patents relate to the design and manufacture of the mRNA sequence, which is critical to the vaccine's efficacy.

CureVac is considered a pioneer in the development and production of mRNA sequences with a large patent portfolio in this field. Therefore, COVID-19 has been pinned on CureVac for the development of an mRNA-based, high-hopes vaccine. After the vaccine "CVnCoV" developed by CureVac did not show the desired efficacy level after passing the last test phase, CureVac withdrew its vaccine from the approval procedures at the European Medicines Agency (EMA) and in Switzerland. Currently, CureVac is conducting research in collaboration with GlaxoSmithKline on a second-generation vaccine to be used for various Corona variants and other infectious diseases.

According to CureVac, the lawsuits is not about BioNTech vaccines being taken off the market, but about "fair compensation" for infringement of its patents.

BioNTech has responded to the lawsuits and, together with its U.S. partner Pfizer, has filed a so-called declaratory judgment action in the U.S. District Court of Massachusetts. The companies are seeking a declaratory judgment that three of CureVac's corresponding U.S. patents are not infringed by BioNTech's vaccine, which they claim is based on their own, non-independent inventions.

In late August, the dispute over patents on mRNA corona vaccines expanded: Moderna also filed suit against BioNTech and Pfizer for patent infringement at the Düsseldorf Regional Court, claiming damages. In addition, Moderna has filed a patent infringement suit against BioNTech and Pfizer in the United States. Moderna also says it is not seeking to prevent the sale of the BioNTech vaccine, but to obtain appropriate compensation for the alleged infringement of two patents relating to mRNA technology.

BioNTech is also expected to take a legal position with respect to the lawsuits filed by Moderna as well.

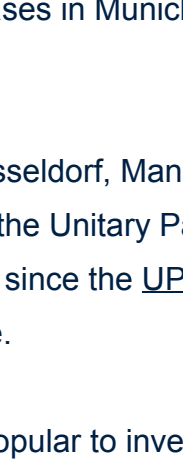
Conclusion:

The lawsuits have a lot of explosive power, especially in view of the fact that mRNA technology could be used to cure cancer and Alzheimer's disease, and possibly other diseases. It remains to be seen whether BioNTech will reach an agreement with CureVac and Moderna and whether the companies will even cooperate in the development of mRNA-based vaccines or drugs in the future. In view of the great potential of mRNA technology in the fight against various diseases, this seems desirable.

Further information

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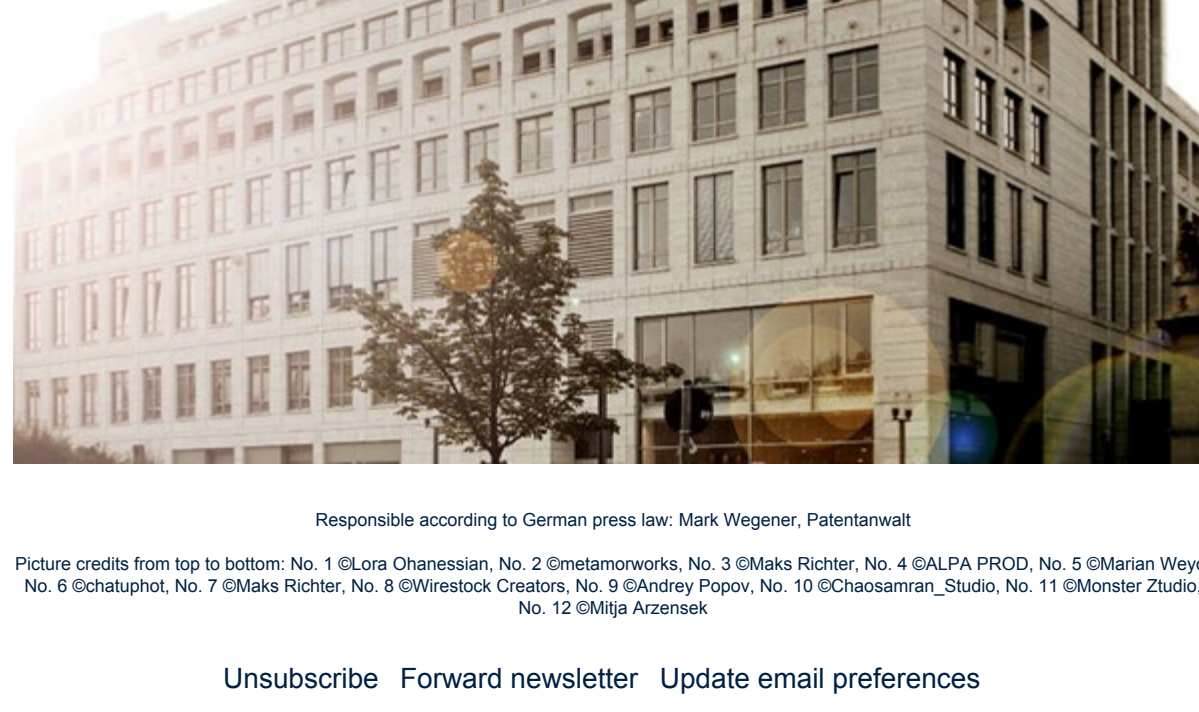


Dr. Marco Findelsen, Partner

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Office News



GPTO: Update on COVID-19 measures

The German Patent and Trade Mark Office (GPTO) dropped all COVID-19 restrictions with effect of 1 June 2022. The enquiry desk and search rooms as well as the receiving service and the cash desk re-opened for the public on 1 June 2022.

Further information

[COVID UPDATE GPTO](#)

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Update on format of oral proceedings before EPO and GPTO

EPO Oral proceedings before examining divisions continue to be held as VICO

Oral proceedings before the examining divisions will continue to be held **generally** as video conference. According to the EPO publication of June 2022, they may be held in the EPO's premises in case that serious reasons are provided against holding them in terms of a video conference. In such cases, the oral proceedings will be postponed until after 31 December 2022. Contrary to oral proceedings in opposition proceedings, conducting oral proceedings as video conference is not subject to a pilot project.

GPTO: Update on video conferencing in IP procedures

For procedures under the Patent Act, the Utility Model Act, the Trademark Act, the Design Act, and the Semiconductor Protection Act, the option of participating in hearings via video conference will be provided on request and has to be approved by the German Patent and Trademark Office (GPTO). According to the Second Patent Law Modernisation Act (2nd PatMoG) it will still be possible to participate in proceedings in person. The technical preparations required for participating in video conferences, however, have to be established in advance. The GPTO will provide further details at a later stage.

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GPTO: Annual report 2021

The German Patent and Trade Mark Office (GPTO) published its [Annual Report 2021](#) together with current statistics and reports concerning IP rights and technical trends.

Although the number of patent application decreased slightly (-5.7%) in 2021, the number of new applications remains at a high level.

The highest increase of patent application filings with the GPTO is related to applications in the field of computer technology which have risen by 6.3%. It has to be noted that Artificial Intelligence (AI) accounts for a large part of this technology sector.

Filings of utility model and design applications declined in 2021 (-14.1%/-16.3%). The number of national trademark applications, however, reached its highest peak with 87.631 filings. This constitutes an increase of 3.6% compared to 2020. Since 2018, the number of new trademark applications has increased by almost 25% (70.534 trademark applications).

The number of Chinese patent applications related to the important technology fields has increased greatly compared to 2020. About 4.308 patent application filings (+6.8%) related to digital communication technology, also comprising inventions related to the new 5G mobile phone standard, are attributed to China.

Further information

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Increasing case numbers at Germany's top three patent courts

While the number of newly filed patent cases has declined, German patent courts have experienced a significant increase in case numbers. 841 new patent infringement suits were conducted at all seven German civil courts in Düsseldorf, Munich, Mannheim, Hamburg, Frankfurt, Braunschweig, and Nuremberg, respectively, 9.6% more compared to 2020.

The German civil courts accounted for the highest number of suits. 371 cases were filed in Düsseldorf (+5.1%), 262 cases in Munich (+29.7), and 142 cases in Mannheim (+10.9%).

The regional courts in Munich, Düsseldorf, Mannheim and Hamburg will definitely become even more popular when the Unitary Patent Court (UPC) starts operating, probably at the beginning of 2023, since the [UPC's German regional chamber and local chamber](#) will be located there.

It seems that it is currently more popular to invest in enforcing and defending patents than to invest in new inventions.

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Responsible according to German press law: Mark Wegener, Patentanwalt

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