



Patents 2013

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Patents 2013

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

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ISSN 1742-9862

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Colombia

Carlos R Olarte, Andres Rincon and Liliana Galindo

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Patent enforcement proceedings

1 Lawsuits and courts

What legal or administrative proceedings are available for enforcing patent rights against an infringer? Are there specialised courts in which a patent infringement lawsuit can or must be brought?

A patent holder can pursue civil or criminal actions either to stop or to prevent infringing acts. Before mid-2012, there were no specialised courts. However, recently, the new General Procedure Code granted the Colombian Patent Office jurisdiction over infringement cases. Although such judicial powers are going to be gradually assumed by the CPO, once they are, civil actions may be pursued before civil circuit judges or before the CPO, while criminal actions are pursued before a specialised unit for intellectual property affairs (criminal infringement actions are rare). If the infringer is a public servant or a government entity the patent holder must file a lawsuit before the contentious administrative jurisdiction.

2 Trial format and timing

What is the format of a patent infringement trial?

Civil patent infringement trials start with the filing of a complaint, normally seeking preliminary injunctive relief. If injunctive relief is requested, the complaint is not notified to the defendant until the decision to grant the injunctive relief is taken *ex parte*. Based on current backlogs in Bogotá circuit courts, a decision to grant injunctive relief may take up to three months. The defendant may eventually file a reconsideration action against the grant for injunctive relief, and can suspend the effects of the injunction while the appeal is pending by posting a counterbond. Decisions on appeal typically take from three to six months. Considering that invalidity cannot be contested during the infringement process, cases are typically settled once a preliminary injunction issues.

The trial procedure has the following stages in the following order:

- lawsuit;
- preliminary injunctions;
- service;
- reply to the lawsuit by the defendant;
- conciliation hearing;
- evidence gathering period;
- closing arguments;
- mandatory prejudicial interpretation of applicable Andean law before the Andean Court of Justice (ACJ); and
- final ruling.

At present, Colombia is experiencing a transition from a written procedure to an expedited oral procedure. Therefore, if the court has the material to implement an oral procedure (which is happening gradually but very slowly in civil circuit courts) the procedure might be shortened and has the following stages:

- the preliminary injunction request;
- the preparation and filling of the complaint;
- the admission and service of process on the defendant (alleged infringer);
- the reply to the lawsuit by the defendant;
- the conciliation hearing, the evidence gathering process and oral closing arguments;
- the mandatory prejudicial interpretation of applicable Andean law before the Andean Court of Justice (ACJ); and
- the final ruling.

All in all, an average infringement suit can take between four and six years. However, a standard infringement case under the oral procedure may take anywhere from one to three years to reach a final ruling. This estimate might be reduced once the Colombian Patent Office assumes its judicial powers over infringement cases.

The following types of evidence are admissible:

- witness testimony;
- expert opinions;
- site inspections; and
- requests for production of documents.

Affidavits are admissible, but the witness will most probably be ordered to provide oral testimony in order to provide the defendant with the opportunity to cross-examine the witness and controvert its conclusions.

Criminal trials are restricted to natural persons, are essentially accusatory, and almost completely oral in nature, which makes them substantially quicker (a criminal case could be over in less than 18 months).

3 Proof requirements

What are the burdens of proof for establishing infringement, invalidity and unenforceability of a patent?

The burden of proof to demonstrate civil infringement for product patents lies on the plaintiff and the standard is clear and convincing. This burden is reversed for procedural patents, and where, assuming a lowered evidentiary threshold is met by the plaintiff (essentially that a substantial probability that the allegedly infringing process is in fact infringing), the defendant must demonstrate that its accused process is different from the patented one (see article 240 of Andean Decision 486).

The burden of proof to demonstrate criminal infringement for any patent is beyond a reasonable doubt.

Any grounds for patent unenforceability must be proven by the defendant, based on a clear and convincing standard.

The burden of proof to demonstrate invalidity is carried by the plaintiff (the party seeking to invalidate the patent), who must show the patent office erred when granting the patent, based on a clear and convincing standard.

4 Standing to sue

Who may sue for patent infringement? Under what conditions can an accused infringer bring a lawsuit to obtain a judicial ruling or declaration on the accusation?

Legal standing to sue for patent infringement cases is limited to the titleholder or any of the co-owners of the patent (individually and severally) unless otherwise agreed.

Although neither is not common nor specifically contemplated under Colombian local practice, whenever a patent infringement action has not yet been filed by the patent holder, a potential infringer may request a civil judge to declare that its conduct does not infringe a particular patent. Beyond a general perceived threat, there is no specific conduct that must be alleged or shown in order to have standing for such declaratory action.

5 Inducement, and contributory and multiple party infringement

To what extent can someone be liable for inducing or contributing to patent infringement? Can multiple parties be jointly liable for infringement if each practises only some of the elements of a patent claim, but together they practise all the elements?

Colombian IP law (Andean Decision 486) does not specifically contemplate the figure of inducement or contributory infringement. There is likewise no case law on this point. However, article 238 of Andean Decision 486 provides that a patent holder may seek protection against acts that present the imminence of infringement. Under a broad interpretation of 'imminence', a patent holder could argue that acts of inducement present a high risk of infringement and hence could be stopped.

Multiple party infringement of a single claim is not specifically contemplated nor is there case law on point. However, as noted in the prior paragraph, it is possible that a broad interpretation of article 238 may allow the patent holder to pursue different actors that may be contributing in a concerted fashion to materialise the infringement.

6 Joinder of multiple defendants

Can multiple parties be joined as defendants in the same lawsuit? If so, what are the requirements? Must all of the defendants be accused of infringing the same patents?

The plaintiff may join various infringers in a single complaint, insofar as they share some corporate or commercial relationship in the infringing conduct and the conduct is related to the violation of the same patent or patents.

7 Infringement by foreign activities

To what extent can activities that take place outside the jurisdiction support a charge of patent infringement?

A Colombian court may prevent the importation of infringing products, even if they were manufactured outside of Colombia. Similarly, a Colombian court can prevent the importation of a product directly resulting from a patented process in Colombia, even where such a process occurred outside of Colombia. In both cases, if there is evidence of infringing activity outside of Colombia it is useful to obtain a preliminary injunction in Colombia and prevent importation.

8 Infringement by equivalents

To what extent are 'equivalents' of the claimed subject matter liable for infringement?

Andean Decision 486 does not specifically contemplate the doctrine of equivalents. There is likewise no case law on point. At best, a plaintiff may seek a broad interpretation of the terms in the claim. The patent specification, drawings and examples may be used to interpret the scope of the claim as granted.

9 Discovery of evidence

What mechanisms are available for obtaining evidence from an opponent, from third parties or from outside the country for proving infringement, damages or invalidity?

Colombian procedural law provides pre-litigation evidence preservation mechanisms such as preliminary injunctions seeking to preserve a given document or the embargo of a given product or goods that may serve as further evidence of any sort of conduct or fact. It is also possible to request pre-litigation discovery motions for site inspections, document production or depositions. There are also broader evidence gathering requests that can be made once a complaint is filed. Both pre-litigation and post-complaint evidence gathering may be requested outside Colombia. Failure to comply in certain cases will allow the court to draw adverse inferences from the failure to comply with the request.

10 Litigation timetable

What is the typical timetable for a patent infringement lawsuit in the trial and appellate courts?

A standard infringement case may take anywhere from two to four years to reach a first instance decision if it follows the written procedure, and up to one or two years following the oral procedure. A second instance decision may take approximately two more years. Preliminary injunctions are available and may be obtained in about two to three months.

11 Litigation costs

What is the typical range of costs of a patent infringement lawsuit before trial, during trial and for an appeal?

The costs of prosecuting an infringement lawsuit vary depending on the complexity of the case and are normally invoiced on an hourly basis. Excluding the invalidity portion, it is reasonable to budget for an average case anywhere between US\$150,000 and US\$400,000 over a four-year period. If the case is settled after a preliminary injunction, the amount would be reduced to approximately US\$75,000 spread out over a year. The cost of an invalidity suit will vary greatly depending on the amount of evidence that requires processing and also on the complexity of the case. A prudent budget would range between US\$200,000 and US\$500,000 over a six-year period.

12 Court appeals

What avenues of appeal are available following an adverse decision in a patent infringement lawsuit?

The parties may appeal an adverse infringement decision issued by a trial court before a superior court. Infringement cases, by petition of a party, may eventually be selected to be heard by the Supreme Court.

Invalidity suits are single instance procedures and no appeals are available.

13 Competition considerations

To what extent can enforcement of a patent expose the patent owner to liability for a competition violation, unfair competition or a business-related tort?

IP rights are a legitimate exception to free-market rights. Patent rights, however, are not absolute rights and are limited to the scope of the claims as granted. In that sense; for example, making an unduly broad interpretation of the granted claims could be interpreted by the defendant as an abuse of IP rights, providing an alleged infringer with legal standing to seek relief relying on unfair competition arguments. From an antitrust perspective, if the patent holder has a dominant position in a relevant market, an abusive exercise of its patent rights

could be taken as an abuse of dominant position. To the best of our knowledge, neither the courts nor antitrust authorities have issued a decision in this direction.

14 Alternative dispute resolution

To what extent are alternative dispute resolution techniques available to resolve patent disputes?

Disputes regarding patent infringement or patent unenforceability may be resolved by conciliation, mediation, or arbitration. However, invalidity issues are not considered the subject of local ADR mechanisms because they are considered exclusive subject matter for the courts.

Scope and ownership of patents

15 Types of protectable inventions

Can a patent be obtained to cover any type of invention, including software, business methods and medical procedures?

As a general rule and pursuant to the TRIPS Agreement, Colombian authorities have to provide patent protection for inventions in all fields of technology (see article 14 of Decision 486). However, there are certain limited exceptions to that rule either in the form of subject matter that are not considered inventions (see article 15 of Decision 486) or that is excluded from patentability (see article 20 of Decision 486). Business methods are not considered inventions and medical procedures are expressly excluded from patentability. Software as such is not considered an invention. However, computer implemented inventions are patentable insofar as they provide a technical contribution.

According to the current position of the Andean Court of Justice and article 21 of Decision 486, use and second use claims are not patentable subject matter, not even if drafted in Swiss-type style.

16 Patent ownership

Who owns the patent on an invention made by a company employee, an independent contractor or multiple inventors? How is patent ownership officially recorded and transferred?

The right to a patent belongs to the inventor (individual) and may be transferred to third parties by written assignment or succession in title (to an individual or a corporation). There is a presumption of assignment for inventions developed in the frame of an employment relationship or performed by an independent contractor. However, the inventor must still assign the invention to the employer or contractor. Regarding multiple inventors, they shall share the right to patent the invention in the same proportion unless otherwise agreed (see article 22 of Decision 486).

Patent ownership is officially recorded and transferred when the assignment document from the inventor to the applicant is filed with the patent application.

Defences

17 Patent invalidity

How and on what grounds can the validity of a patent be challenged? Is there a special court or administrative tribunal in which to do this?

Invalidity does not provide grounds for a defence within an infringement case. Instead, the defendant in an infringement action must bring a separate lawsuit (annulment action) against the Patent Office before the Council of State seeking to invalidate the patent and requesting the joinder of the patent holder as an interested third party.

The Council of State is the highest court charged with reviewing the legality of administrative acts. A decision in an annulment action is taken in a single instance procedure with no appeal available.

The purpose of the invalidity complaint is to demonstrate that the resolution that granted the patent was issued in violation of Decision 486.

According to the new Colombian Administrative Procedural Code (Law 1437/2011, in force from 2 July 2012), a typical annulment action for a patent case involves:

- filing of the complaint;
- admission and service on the defendant (the CPO) and the interested third (the patent holder);
- the formal reply by the CPO and the patent holder;
- the preliminary hearing, comprising agreement on the facts to be litigated and the opening of the evidence gathering stage;
- the evidence gathering process;
- the evidence hearing (up to 15 consecutive days);
- the closing arguments hearing;
- mandatory prejudicial interpretation of applicable Andean law before the ACJ; and
- the final ruling.

With the exception of the complaint and reply, the foregoing procedure is almost completely oral in nature and intended to last less than one year (as opposed to the current five to eight years). Given that the procedure has just been implemented, there is no experience to confirm if the one year time period is realistic. However, conventional wisdom suggests this time frame is entirely unreasonable and we believe that the overall procedure will actually last anywhere between two and four years depending on the complexity of the case, the amount of evidence that has to be gathered, and, of course, the usual court backlog.

18 Absolute novelty requirement

Is there an 'absolute novelty' requirement for patentability, and if so, are there any exceptions?

There is an absolute novelty requirement. An invention is novel when it is not included in the prior art. The prior art includes any public worldwide disclosure, including any written or oral description, use, offer for sale or sale before the claimed priority date. Solely for the purpose of determining novelty, the content of an earlier patent application pending before the CPO shall also be considered part of the prior art, provided that the said content is included in the earlier application when published or after 18 months from filing or priority date have passed.

The applicant is provided with a 12-month grace period counted from the priority date for any disclosure of the contents of the patent, providing that the disclosure was attributable to:

- the inventor or the inventor's assignee;
- a competent national office that publishes the contents of a patent application filed by the inventor or the inventor's assignee in contravention of the applicable law; or
- a third party who obtained the information directly or indirectly from the inventor or the inventor's assignee.

19 Obviousness or inventiveness test

What is the legal standard for determining whether a patent is 'obvious' or 'inventive' in view of the prior art?

An invention shall be regarded as having an inventive step if it is not deemed obvious or evidently derived from the prior art for a person ordinarily skilled in the art. An inventive step is determined by a general problem-solution approach. Evidence of unexpected or surprising results, as well as secondary indicia of non-obviousness (for example, a long felt and unresolved need in the art, teachings in the art suggesting an opposite path, etc), are all persuasive to rebut a prima facie case of obviousness.

20 Patent unenforceability

Are there any grounds on which an otherwise valid patent can be deemed unenforceable owing to misconduct by the inventors or the patent owner, or for some other reason?

A patent can be deemed unenforceable regarding acts carried out privately and for non-commercial purposes, for experimentation, for the purposes of teaching, for scientific or academic research or when the patent protects biological material (see article 53 of Decision 486). Furthermore, a patent can be deemed unenforceable in cases of international exhaustion of rights (see article 54 of Decision 486). Finally, recently Colombia implemented a regulatory submission exception through (Decree 729 of 2012) allowing third parties to use the subject matter of a subsisting patent to generate the information necessary to support an application for the marketing approval of a pharmaceutical product under the condition of it not being made, used, sold, offered for sale or imported into the territory, other than for purposes of meeting marketing approval requirements.

21 Prior user defence

Is it a defence if an accused infringer has been privately using the accused method or device prior to the filing date or publication date of the patent? If so, does the defence cover all types of inventions? Is the defence limited to commercial uses?

The rights conferred by a patent may not be asserted against a third party that, in good faith and before the priority date or the filing date of the application on which the patent was granted, was already using or exploiting the invention, or had already made effective and serious preparation for such use or exploitation. This defence covers all types of inventions and the said third party has the right to start or continue using or exploiting the invention, but that right may only be assigned or transferred together with the business or company in which that use or exploitation is taking place (see article 55 of Decision 486).

Remedies**22 Monetary remedies for infringement**

What monetary remedies are available against a patent infringer? When do damages start to accrue? Do damage awards tend to be nominal, provide fair compensation or be punitive in nature?

Andean Decision 486 provides the plaintiff with a variety of alternatives to calculate the compensation to be paid for damages, including:

- lost profits and actual damages;
- unjust enrichment; or
- reasonable royalty (see article 243 of Decision 486).

Very few cases get to the damages stage (a preliminary injunction is often enough). Punitive damages are not available. Attorney fees as set by the national bar are available for the winning parties.

Obviously, a patent holder can recover damages for acts of infringement occurring after the date of grant. The patent holder can, additionally and once the patent is granted, recover damages for pre-issuance acts of infringement occurring after the date of publication (see article 239 of Decision 486).

23 Injunctions against infringement

To what extent is it possible to obtain a temporary injunction or a final injunction against future infringement? Is an injunction effective against the infringer's suppliers or customers?

The patent holder may request a court to grant injunctive relief to stop or prevent an infringement from occurring. This relief may consist, among others, the following:

- an order to seize infringing activities;
- the seizure of all infringing products;
- the suspension of the importation or exportation of the infringing products;
- the establishment of a bond; and
- the temporary closure of the business belonging to the defendant, if necessary to avoid the continuation or repetition of the alleged infringement (see article 246 of Decision 486).

The injunction may be requested and granted ex parte and requires the plaintiff to show title to the patent, the existence of the patent and summary evidence of the infringement (normally an expert attesting to the fact the allegedly infringing product or process reads on the claims). A bond must be offered and posted to cover potential damages caused by the injunction should the plaintiff eventually lose the case on the merits.

The defendant may eventually file a reconsideration action against the grant for injunctive relief, and can suspend the effects of the injunction while the appeal is pending by posting a counter-bond.

In most cases, a preliminary injunction will become final should the plaintiff win on the merits.

Injunction relief, if properly requested, may extend to the infringer's suppliers and customers.

24 Banning importation of infringing products

To what extent is it possible to block the importation of infringing products into the country? Is there a specific tribunal or proceeding available to accomplish this?

Importation is an act of infringement. Accordingly, it is possible to block the importation of infringing products by requesting injunctive relief before a civil court (see answers to questions 8 and 23).

25 Attorneys' fees

Under what conditions can a successful litigant recover costs and attorneys' fees?

The successful litigant may recover attorneys' fees by simply requesting the judge to order the losing party to pay. However, in practice, the amount recognised by the judge does not correspond to the true invoiced fees, but rather predetermined fees set by the national bar.

26 Wilful infringement

Are additional remedies available against a deliberate or wilful infringer? If so, what is the test or standard to determine whether the infringement is deliberate?

No.

27 Time limits for lawsuits

What is the time limit for seeking a remedy for patent infringement?

The time limit for seeking a remedy for patent infringement is two years counted from the date the titleholder had knowledge of the infringement or, in any case, five years counted from the date the last act of infringement occurred.

28 Patent marking

Must a patent holder mark its patented products? If so, how must the marking be made? What are the consequences of failure to mark? What are the consequences of false patent marking?

Neither Andean Decision 486 nor local regulation provides any regulation in relation to patent marking.

Update and trends

In 2012, Colombia implemented the new General Procedural Code (Law 1564 of 2012) and the Colombian Administrative Procedural Code (Law 1437/2011, in force from 2 July 2012), which provide several amendments for the patent enforcement procedures, including oral procedures for infringement and annulment cases, in contrast with the prior and substantially lengthier written procedure. In addition, the General Procedure Code granted the CPO judicial powers to decide in patent infringement cases.

In addition, at present, the Colombian government is in the implementation process of internal legislation reflecting legal commitments acquired in the framework of different free trade agreements (FTAs) with the US, the EU and EFTA, involving IP patent provisions. Those provisions are related to the implementation of the regulatory exemption and patent linkage system.

Regulatory exemption

In accordance with article 16.9.5 of the Colombia-US FTA, Decree 729 of 2012 (in force from 13 April 2012) implemented the regulatory submission exemption, allowing third parties to use the subject matter of a subsisting patent to generate information necessary to support an application for marketing approval of a pharmaceutical product

under the conditions of it not being made, used, sold, offered for sale or imported into the territory, other than for purposes of meeting marketing approval requirements.

Therefore, contrary to the previous practice, the patent holder cannot now request a preliminary injunction arguing that the mere filing of a health registration application is an act that expresses the imminence of infringement.

Patent Linkage

In accordance with article 16.10.4 of the Colombia-US FTA, Decree 733 of 2012 (in force from 13 April 2012) implemented an online information system regarding health registration applications, which allows a patent owner to obtain timely information about possible infringers. Decree 733 establishes that the National Institute for Food and Drug Regulation (INVIMA) has to publish on its website the basic information related to a health registration application within five days of the filing date.

This new information system is going to be gradually implemented by the INVIMA, as it requires a substantial modification of their information system.

Licensing

29 Voluntary licensing

Are there any restrictions on the contractual terms by which a patent owner may license a patent?

Technology transfer agreements involving voluntary patent licences must not include provisions limiting the right of experimentation, research and development of the licensee. These types of restriction fall within the unenforceable clause types contemplated in the Common Regime for the Treatment of Foreign Capital. Attempting to enforce such a clause could also run foul of our local antitrust legislation (Decree 2153 of 1992), forbidding, in general, any sort of illegal restriction of access to a given market.

30 Compulsory licences

Are any mechanisms available to obtain a compulsory licence to a patent? How are the terms of such a licence determined?

The CPO may declare compulsory licences (CLs) for the following reasons (see article 65 et seq of Decision 486):

- lack of working: patent owners are obligated to exploit the patent either directly or through authorised third parties. The standard for granting a CL under these grounds is unjustified lack of working after three years following grant, or when exploitation is suspended for more than one year. Potential licensees must first contact the patent owner and attempt to obtain a voluntary licence;
- public interest, emergency and national security reasons: whenever public interest, emergency or national security reasons are declared by the Colombian government, the CPO may open a CL public bid over those patents subject to the prior declaration. Interested third parties meeting the terms of reference established by the CPO may subsequently tender offers to obtain CLs. On 13 November 2008, the Colombian Ministry of Trade issued Decree No. 4302 (later modified by Decree 4966/2009) establishing a procedure for the declaration of public interest, providing each ministry of the government with the authority to declare, after an investigation, the existence of a public interest related to the subject matter under its jurisdiction. The declaration of a public interest might also take place upon the request of interested parties;

- abuse of dominant position: the Colombian antitrust authority, either ex officio or at the request of a party, may grant CLs to correct practices previously declared as contrary to the exercise of free competition, especially where they constitute an abuse by the patent owner of a dominant position in the market; and
- patent dependence (compulsory cross-licensing): the CPO shall grant a CL, upon request by the owner of a patent whose exploitation necessarily requires the use of another patent, and where the right holder has been unable to secure a contractual licence to the other patent on reasonable commercial terms. The dependent patent must claim an invention that constitutes an important technical advance and of considerable economic importance over the senior patent.

Patent office proceedings

31 Patenting timetable and costs

How long does it typically take, and how much does it typically cost, to obtain a patent?

The patent prosecution usually takes, depending on the art section, approximately three to six years. The costs of filing, prosecuting and obtaining a patent will range, depending on the complexity of the case and the amount of office actions, between US\$2,500 to US\$8,000 over the course of the prosecution, including official and professional fees.

32 Expedited patent prosecution

Are there any procedures to expedite patent prosecution?

Neither Decision 486 nor local regulations provide accelerated procedure options. However, a diligent prosecution practice may reduce the timeline of the application significantly, for example, by requesting examination shortly after publication takes place, by modifying the application excluding use claims, method of treatment claims, or any other non-patentable subject matter. It is also convenient to interview examiners in charge of the case and discuss alternatives in order to expedite prosecution and avoid unnecessary office actions.

33 Patent application contents

What must be disclosed or described about the invention in a patent application? Are there any particular guidelines that should be followed or pitfalls to avoid in deciding what to include in the application?

Decision 486 requires the specification to include sufficient disclosure of the invention in order to allow a skilled artisan to reproduce the invention and make clear the inventor was in possession of the invention at the time the application was filed. Additionally, the description must contain the preferred embodiment of the invention.

34 Prior art disclosure obligations

Must an inventor disclose prior art to the patent office examiner?

Applicants have the obligation to provide 'prior technology known to the applicant that would help the invention to be understood and examined and references to previous documents and publications that discuss the technology involved' (article 28(b) of Decision 486). The foregoing has not been interpreted by the CPO as a specific duty to disclose prior art that may be materially relevant to the patentability of the invention.

35 Pursuit of additional claims

May a patent applicant file one or more later applications to pursue additional claims to an invention disclosed in its earlier filed application? If so, what are the applicable requirements or limitations?

In general, amendments to the specification or claims are possible at any time during prosecution before the issuance of a final resolution, as long as the said amendments do not extend the original scope of the invention and find support on the specification. Divisional applications directed to material split out from the parent application are possible, as long as they are filed during the pendency of the parent application. Divisional application practice must carefully carve out claimed subject matter that will remain in other applications. Post-grant amendments to the specification are not possible; however the applicant may limit the claims.

36 Patent office appeals

Is it possible to appeal an adverse decision by the patent office in a court of law?

Before seeking judicial review, the applicant may file a reconsideration action before the CPO against the adverse decision within five days following its notification.

If the CPO confirms its decision, the applicant may seek judicial review by filing an annulment action against the Council of State within four months following the notification of the final resolution from the CPO.

37 Oppositions or protests to patents

Does the patent office provide any mechanism for opposing the grant of a patent?

The Andean Community provides a pre-grant opposition system. Interested third parties may file an opposition within 60 days following the publication of the application, which can be extended for an additional 60-day term upon request. The CPO will consider the relevance of the opposition in the framework of the examination and will take a final decision at the time of granting (that is, there is no separate opposition procedure to delay the prosecution of the application).

In addition, third parties may also file observations providing arguments and evidence to the Patent Office at any time (for example, even after the time to file an opposition has expired). However, unlike an opposition, the Patent Office is not compelled to take this information into consideration.

38 Priority of invention

Does the patent office provide any mechanism for resolving priority disputes between different applicants for the same invention? What factors determine who has priority?

The affected party may seek the transfer of the pending application or the patent before the CPO, providing evidence of the prior right of the patent.

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39 Modification and re-examination of patents

Does the patent office provide procedures for modifying, re-examining or revoking a patent? May a court amend the patent claims during a lawsuit?

Post-grant limitation to the claims may be made before the CPO (see article 70 of Decision 486). There is no re-examination procedure available. A patent can only be revoked via an annulment action before the Council of State.

It is not possible for a court to amend the patent claims during an infringement lawsuit.

40 Patent duration

How is the duration of patent protection determined?

Patents are granted for a 20-year period from the date on which the application was filed (for conventional applications, article 50 of Decision 486) or from the international filing date (for PCT National Phase applications, article 11.3 PCT).

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