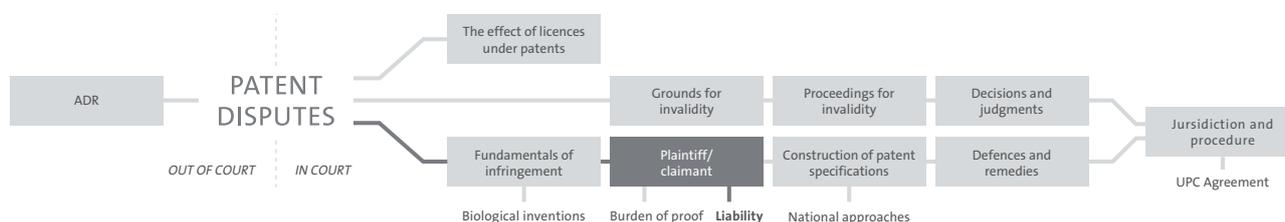


## Liability (Supplementary reading)



## The parties

### Who is the claimant?

In the majority of cases, the claimant in an infringement action will be the proprietor. However, under the Unified Patent Court Agreement (UPCA), exclusive licensees (i.e. a party with a licence which excludes even the proprietor) are also permitted to bring infringement proceedings (Article 47(2) UPCA). Non-exclusive licensees are not permitted to bring infringement proceedings unless their licence expressly permits it (Article 47(3) UPCA).

In almost all cases, the claimant will be the proprietor or an exclusive licensee.

Where a licensee brings infringement proceedings, the proprietor is entitled to be joined as a party. Furthermore, the validity of a patent may only be challenged in proceedings where the proprietor is a party, so in such cases the proprietor will need to be joined as a party.

### Who is the infringer?

In general terms, an infringer is a person who commits any of the acts set out in Articles 25 and 26 UPCA. Article 25 relates to acts of direct infringement and Article 26 relates to acts of indirect infringement.

An infringer is any person directly or indirectly committing any of the infringing acts.

Due to the wide definition of infringing acts (Article 25), a number of different persons (legal and/or natural) are involved in what may otherwise be thought of as a single instance of infringement. For example, a product may be manufactured and sold down a supply chain, and, although a distinction is drawn for some purposes between primary infringers (manufacturers and importers) and secondary infringers (those responsible for subsequent infringing acts), in cases where there are a multitude of infringers, in principle each infringer is liable for his acts without regard to an infringement by another infringer.

The claimant can assert all claims against every infringer, or can select just one infringer to pursue. However, in claims for financial losses, the infringers might be jointly liable (see below), and it is common for a number of different infringers to be included as defendants so as to

ensure that the compensation recovered is maximised and/or in order to put commercial pressure on the main infringer (usually the manufacturer) by suing its customers. However, the claimant is not permitted to “double recover” for any given act of infringement.

Infringement of both European patents and European patents with unitary effect (unitary patents) is determined under the national law of the country in which the infringing act is committed (see Article 64(3) European Patent Convention (EPC) and Article 5(3) Regulation 1257/2012 respectively). The outcome of an infringement action may therefore vary depending on where the infringement occurs. This raises the question of the effect (or non-effect) of Articles 25 to 27 UPCA, which does define infringing acts. It could be argued that all the contracting states should amend their laws to bring them into line with Articles 25 to 27 UPCA, but only the Netherlands has done so to date (although the UK has made some amendments to its legislation).

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## Award of damages

Prior to considering liability further, it is worth clarifying that Article 68 UPCA (worded to be considered with the Enforcement Directive) makes it clear that damages are intended to be compensatory rather than punitive, and sets out the basis on which damages may be awarded.

In cases where the infringer knew, or ought reasonably to have known, that his acts amounted to an infringement, the Court will order the payment of damages commensurate with the harm suffered by the claimant. When assessing damages, the Court may take into account all the appropriate circumstances, including the claimant’s lost profits, any unfair profits made by the infringer, any negative economic consequences for the claimant and any non-economic factors. Alternatively, it may determine the damages on the basis of a licence analogy, i.e. on the basis of the claimant’s lost royalty or fee revenue.

In cases where the infringer did not know, and had no reasonable grounds to know, that his acts amounted to an infringement, the Court may order either the payment of compensation (as above) or the recovery of profits (also known as an “account of profits”).

This distinction is important, since some jurisdictions distinguish between damages and the recovery of an infringer’s profits, with the claimant potentially able to elect which it seeks (e.g. in the UK<sup>6</sup>). Under the UPCA, “damages” potentially encompasses both options.

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<sup>6</sup> The EPC and the UK Patents Act 1977 (as amended) apply equally to all parts of the United Kingdom. Jurisdictionally, however, the United Kingdom is divided into three parts: England and Wales, Scotland, and Northern Ireland. Proceedings in the Scottish courts differ markedly from those in the other jurisdictions.

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## Joint tortfeasorship

A person may be liable as a joint tortfeasor (i.e. an accessory) if he procures an act of infringement (for example by inducing, inciting or persuading) or participates in an act of infringement in some way. Generally, this occurs pursuant to some common design between the parties, i.e. it is more than mere facilitation of an infringing act.

Unfortunately, neither the UPCA nor the EPC contain provisions governing joint tortfeasorship. Accordingly, questions of joint tortfeasorship in infringement proceedings are also determined under national law.

The position in Germany and the UK is as follows:

- **Germany:** The concept of *Störerhaftung* (meaning “interferer’s liability”) is applied. A *Störer* is someone who (without being a participant or a perpetrator) wilfully contributes to an infringement in a sufficiently causal manner. Liability requires the *Störer* to have actual or constructive knowledge of the infringement, i.e. he either knows about the infringement, or at least should have known about it, such that he had the possibility to stop further infringement. Once a *Störer* has either actual or constructive knowledge, he must take steps to prevent further infringement to avoid liability.

By way of example, an internet auction platform is not obliged to check whether a certain offer relates to an infringing product. If, however, the platform operators have been informed about an infringing offer, they have to act to prevent further infringement or risk being held liable.

As a further example, in general a transport company does not have to check whether it is shipping infringing goods, but if it learns that it is, in fact, doing so (e.g. through a customs order to stop the delivery), then it must investigate and potentially stop shipping or risk being held liable.

- **UK:** Two parties will be joint tortfeasors if there was a common design between the parties to do acts which amount to infringements. The mere provision of facilities to assist an infringer which do not inherently lead to infringement and are capable of use in a non-infringing manner is unlikely to lead to joint liability. However, it is possible to obtain documentary disclosure from persons who have been innocently mixed up in the infringing acts of a defendant, for example, to discover the identity of the owner on whose behalf infringing goods are being transported or stored.

### Accessory liability

Involvement of a party who, for example, procures an act of infringement by another.

BGH, GRUR 2011, 152 –  
“Kinderhochstühle im Internet”

BGH, GRUR 2007, 708 –  
“Internet-Versteigerung”

BGH, GRUR 2009, 1142 –  
“MP3-Player-Import”

*Unilever Plc v Gillette (UK) Ltd (Joinder)*  
[1989] RPC 583

*L’Oreal SA v eBay International* [2009]  
EWHC 1094 (Ch)

*Norwich Pharmacal v HM Customs & Excise*  
[1973] UKHL 6

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## Joint liability

According to most national laws, two or more infringers are jointly liable for any damage caused (*in solidum*) if they are liable for the same damage caused to the claimant. In the UK, the House of Lords held that a party who procured an infringement (in the case, of copyright infringement) by inducement, incitement or persuasion was a joint tortfeasor (***CBS Songs v Amstrad***, also known as the “Twin deck tape recorder” case). A joint tortfeasor is jointly liable for infringement. However, in ***Credit Lyonnais v ECGD***, Hobhouse LJ said:

*“There is no tort of knowing assistance ... the liability in tort of a defendant for the act of another depends ... upon the defendant’s participation in or authorisation of that act. Mere assistance, even knowing assistance, does not suffice to make the “secondary” party liable as a joint tortfeasor with the primary party. He must have conspired with the primary party or procured or induced his commission of the tort or he must have joined in the common design pursuant to which the tort was committed.”*

A common example where this may arise is a CEO who is jointly liable with an infringing company due to his actively procuring the company’s infringement.

### Joint liability and apportionment

The concept of joint liability means that each infringer is liable for the same damage caused to the claimant in full, even though his personal share or contribution to that damage may be lower. Once an infringer who was jointly liable has reimbursed the claimant in full, the claimant may not pursue the other jointly liable infringers for the same damages. Thus, the claimant may choose which of the jointly liable infringers he holds liable.

In cases where the claimant is awarded damages, and those damages are calculated on the basis of lost profits or a license analogy, it may appear fair to apply the above principles, i.e. that each infringer is jointly and severally liable for the full amount of the damages awarded.

In cases where the claimant is awarded an account of profits, it may be argued that each infringer should only have to pay his own profits. On the other hand, as this is effectively only a different calculation of the same damage suffered by the claimant, it may also be argued that each infringer is jointly and severally liable for all profits made by all infringers.

### Joint liability (*in solidum*)

Where a multitude of infringers have caused the claimant damage, each infringer is liable for the damage in full (also known as joint and several liability).

*CBS Songs v Amstrad* [1988] RPC 567

*Credit Lyonnais v ECGD* [1998]  
1 Lloyds Rep 19

The impact of joint liability on the claimant’s recovery of damages / an account of profits.

## Joint liability and indemnification

An infringer who reimbursed the claimant may ask the other jointly liable infringers for indemnification. Among the infringers, depending on the national law and on the particulars of each case, the share of each is determined on the basis of their contribution to the overall infringement of the patent. (According to Article 2055 of the *Codice civile* (Italian Civil Code), the level of negligence/fault and the range of consequences of the contributory elements must be assessed, with a presumption of equal partition of negligence/fault unless the evidence shows otherwise.)

An infringer who has reimbursed a claimant in full may ask the other infringers for indemnification.

## Liability within companies and groups

An infringer can be a natural person (i.e. a human being) as well as a legal person (e.g. a private company or public organisation). The complex question of liability for infringement within a company (or group of companies) is treated differently depending on the applicable national law concerned: liability may relate to the company itself or its members (i.e. its owners, directors, employees or any legal person who is part of the group of companies). In a chain of contracts – mainly in distribution contracts – there are several entities that may be liable for infringement.

Liability often extends beyond a company to its officers, owners, employees or other group companies (e.g. its parent).

A company can be held liable for infringement as a consequence of acts committed by its employees in its name and on its behalf (e.g. Germany: Section 31 *Bürgerliches Gesetzbuch* (German Civil Code) (BGB); France: Article 1384 Section 5 *Code civil* (French Civil Code); Italy: Article 2049 *Codice civile* (Italian Civil Code)).

## Liability of directors

According to most national laws, the director of a company can be held liable for acts of infringement committed by that company. (Where the director has directly committed the infringing act, he will generally be liable.) The position in France, Germany, Italy and the UK is as follows:

Directors can be held liable when they act beyond the scope of their duties.

- **France:** A director can only be held liable if he has committed a “personal fault separable from his functions”. The *Cour de Cassation*, the French Supreme Court, has provided guidance: it means that the director intentionally commits a serious tort which is incompatible with the execution of his normal duties. Otherwise, only the company is held liable.
- **Germany:** The director of a company or any other manager (i.e. an employee with management responsibilities) can be held liable because of his duty to avoid infringement of third-party rights. If there are several directors, only the directors responsible for the infringing activities can be held liable.
- **Italy:** Under Italian tort law, it is possible for company representatives to be personally liable for infringement. However, personal liability is only pursued in exceptional cases (see also Article 2395 *Codice civile*).

*Cass. Com.* 20 May, 2003, case No. 99-17.092

BGH, GRUR 2012, 1145 – “*Pelikan*”

OLG Hamburg, GRUR-RR 2013, 464 – “*Z. Games Abo*”

- **UK:** A director will generally not be held liable where he only carries out his constitutional role in the governance of the company, for example, by voting at board meetings. If, however, his acts go beyond the exercise of constitutional control and he procures or induces the infringing acts to be done by the company, he may be liable as a joint tortfeasor.

*MCA v Charly Records* [2002] FSR 26

### Liability of employees

According to some national laws, an employee (whether a manager or not) can be held personally liable for infringement. The position in Germany, France, Italy and the UK is as follows:

Employees of a company may be liable in some jurisdictions

- **Germany:** Employees can theoretically be held liable but are rarely sued.
- **France:** An employee can be held personally liable for infringement if he acts outside the scope of his employment, without permission of the company and for non-business purposes (Article 1384 Section 5 *Code civil*).
- **Italy:** Employees can be held liable for infringement, individually or jointly with the company, although as a general principle the employer is responsible for damages caused by the employee acting within his normal duties (see also Article 2055 *Codice civile*.)
- **UK:** Employees are not liable for acts of infringement committed by the company they work for unless they can be shown to be a joint tortfeasor. Where an infringing act is directly committed by an employee, then the employee is liable for that act (and his employer is vicariously liable if the employee was acting within the scope of his employment). However, actions against employees innocently carrying out their normal duties are extremely rare and are not encouraged.

OLG Düsseldorf, GRUR 1978, 588

*Cass. Assemblée plénière*, 19 May 1988, case No. 87-82.654

### Liability of company owners

In general, company owners are unlikely to be liable unless they have engaged in the infringing acts themselves or can be shown to be joint tortfeasors. For example, in the UK, shareholder control alone is not enough to attract liability.

Company owners/shareholders are unlikely to be liable except in specific circumstances.

*Unilever v Chefaro* [1994] FSR 135

Under some national laws the owner of a company can be liable for infringement for acts committed before the incorporation of the company (e.g. France: Article 1843 *Code civil*; Germany: Sections 128, 161 *Handelsgesetzbuch* (HGB) regarding the *offene Handelsgesellschaft oHG* and the *Kommanditgesellschaft KG*).

*Cass. Civ. 1*, 10 July 2013, case No 12-12.277

## Liability within a group of companies

It is often the case that a claimant will allege that a parent company is either jointly liable with the company actually carrying out the allegedly infringing acts in the relevant jurisdiction, or is a joint tortfeasor. This may be for a number of reasons, including:

- if there is doubt about whether the subsidiary is able to meet an award of damages;
- to obtain an injunction against the parent to prevent it from continuing infringement through other subsidiaries; or
- if an order for documentary disclosure is available, to obtain documents from the parent.

A parent company is not automatically liable for an act of infringement committed by its subsidiary (as set out above, company owners are unlikely to be liable unless they engaged in an infringing act or are a joint tortfeasor). However, there are certain exceptions to this principle, the details of which may vary according to national law. The following are two key examples of these high-level exceptions:

- **The appearance theory:** A client thinks he is concluding a contract with the parent company whereas he is in fact contracting with the subsidiary.
- **The interference theory:** A parent company interferes with the internal management of its subsidiary. Usually, case law requires strong evidence in this regard and it is possible that, in such a case, only the parent company will be held liable.

Here are two examples relevant to Germany and Italy:

- **Germany:** A company affiliated with and acting on behalf of a parent company with respect to the infringing acts may be jointly liable for infringement with the parent company.
- **Italy:** A company controlling another company and whose conduct causes harm to the controlled company and to its creditors may be liable for infringement (Article 2497 *Codice civile*).

In most cases, some evidence that the parent company was actually involved in furthering the common intention to infringe the patent must be shown. Some illustrative examples from UK case law are set out below:

- **Unilever v Gillette:** The claimant was held to have a good arguable case that a US parent and its UK subsidiary were acting in concert pursuant to a common design as there was a “meeting of minds” between the two companies with a view to furthering the sale of infringing products in the UK.

Liability of a parent company for the acts of an affiliated company

BGH, GRUR 2012, 1279 –  
“Das große Rätselheft”

*Unilever v Gillette* [1989] RPC 583

– **Lubrizol v Esso:** A worldwide research effort by a parent company for the benefit of all subsidiary companies, and centralised sales literature and training, led to a finding of joint infringement.

*Lubrizol v Esso* [1992] RPC 281

– **Napp v Asta Medica:** A parent company which was content with the actions of, or gave willing assistance (e.g., supply of product, help with a Medicine Controls Agency application) to, a subsidiary was, nevertheless, not sufficiently involved in the (allegedly) tortious actions of the subsidiary to be liable.

*Napp v Asta Medica* [1999] FSR 370

### **Liability in cases of company asset transfer**

When a company transfers assets (e.g. by assignment, cession, merger or amalgamation of a firm), patents may be transferred and enforced by the new proprietor provided the patents are in force.

The transfer of company assets may include patents.

Where a patent is co-owned, if one of the co-owners illegally transfers the patent rights to a company, that company can be held liable for infringement of the patent “*if it commits an act which would infringe the patent*”.

*Cour d'appel Paris* (Paris Court of Appeal) (CA), 23 September 2009, case No. 08/11403

In cases involving a large group of companies, or a complex series of transactions involving patents, a thorough understanding of the company/partnership laws of the relevant jurisdiction, and the details of the various transactions, is often required to work out the parties that are liable for any acts of infringement.

Further, in the UK, a potential claimant must be careful not to fall foul of the provisions on “groundless threats” when making enquiries to establish the true identity of an infringer (see “Action for threats” below). Section 70(5) Patents Act 1977 permits “notification” to be made without liability, including the provision of factual information about a patent and making enquiries to discover whether the patent has been infringed by a manufacturer, importer or user of a process, and if so, by whom.

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## Infringements within a distribution chain

Where an infringing product is manufactured and sold down a distribution chain, in principle each infringing party in the distribution chain is liable for its own acts, irrespective of the acts of the other infringers. The claimant can sue each infringer in the chain, but there are often commercial reasons why only certain parties are sued.

The position in France, Germany, Italy and the UK is as follows:

- **France:** Manufacturers, importers and customers (including retailers) can be held liable (e.g. Article L. 613-3 *Code de la propriété intellectuelle* (French Intellectual Property Code) (CPI)). Companies performing the role of an intermediary, such as a packager, transit company or carrier, may also be held liable.
- **Germany:** Different parties within the distribution chain are not jointly liable. Where a claimant seeks an account of profits, each infringer is liable on the basis of their own profits only. Further, an infringer at a higher level of the supply chain (e.g. a manufacturer) may claim his profit is reduced as a result of sums (e.g. damages) paid to the claimant by subsequent customers in the supply chain (“*Tripp Trapp Stuhl*”, which relates to copyright law).
- **Italy:** Article 2055 *Codice civile* sets out the principle of joint liability (see also Court of Turin, 27 January 1999), although the liability of sole traders is limited (Court of Turin, 5 June 1993).
- **UK:** See the comments above on joint tortfeasorship in the UK.

The general issues involved in claiming damages from multiple infringers have been discussed above. In a distribution chain, calculating damages based on a licence analogy can be particularly problematic.

On the one hand, it could be argued that the proprietor of a patent is only entitled to ask for a licence once with respect to a distribution chain (as, once licensed, the rights are exhausted). If the licence fee differs between infringers because of different infringing acts (e.g. sale of a patented component versus sale of a larger article including the component within it), then there is only partial overlap.

On the other hand, it could be argued that each level of the distribution chain causes a new act (or acts) of infringement, and therefore each infringer should pay damages on the basis of a licence analogy.

As can be seen from the above, joint liability generally only applies to damages (and indemnification for the same). Other remedies – e.g. claims for injunctions – are specific to infringers.

### Chain of Infringers

The liability of infringers who consecutively infringe a patent at different stages of a distribution chain depends on the method used for calculating damages.

*Cass. Com.*, 14 May 2013,  
case No. 11-27.686

BGH, GRUR 2009, 856 – “*Tripp Trapp Stuhl*”

Assessing damages based on a licence analogy in cases involving a distribution chain can be problematic.

Joint liability is only relevant in respect of damages, not other remedies.

## The liability of third-party suppliers

A third party may be liable for infringement where it indirectly participated in the infringing acts of an infringer by supplying means to facilitate those acts. For example, this may cover the provider of an internet auction platform, a transport company or a raw materials supplier. The position in France, Germany, Italy and the UK is as follows:

- **France:** A seller or supplier may be held liable for infringement if they acted with full knowledge of the facts. Further, a subcontractor that had participated in the infringement process was held liable based on general civil law principles. Joint liability of internet service providers is subject to the conditions set in the E-Commerce Directive 2000/31 and, in addition, participation in the infringement must be shown.
- **Germany:** The concept of *Störerhaftung* is applied. This liability is usually limited to the cease and desist claim and does not include a liability for damages. The liability is based on the factual and legal ability of the *Störer* to stop an infringement, i.e. that the *Störer* knows about the infringement or at least should have known about it. Specific examples relating to internet auction companies and shipping companies are discussed above.
- **Italy:** Italian case law does not provide for an equivalent principle to the German *Störerhaftung*, but similar considerations would apply in Italy in the e-commerce sector (including for infringement of other intellectual property rights) as a consequence of the implementation of the E-commerce Directive 2000/31.
- **UK:** Third-party suppliers, for example of raw materials, may be liable if they supply “means essential” to an infringer for carrying out the infringing acts and they knew, or reasonably ought to have known, that the means supplied were suitable for putting, and intended to put, the patented invention into effect. Those who do not keep products for the purpose of supply, such as carriers and warehousemen, do not infringe. However, it is still possible to obtain documentary disclosure from such persons to discover the identity of the owner on whose behalf the goods are being transported or stored (***Norwich Pharmacal v HM Customs & Excise***).

Facilitating an infringement can lead to liability.

*Cass. Com.*, 6 November 2012, case No. 11-19.375

*Cass. Com.*, 13 November 2013, case No.13-14 803

German *Störerhaftung* for internet auction platforms and transport companies

*Norwich Pharmacal v HM Customs & Excise* [1973] UKHL 6

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## Intention, negligence and innocent infringement

In cases of direct infringement, the intention or negligence (i.e. the knowledge or reasonable deemed knowledge) of an infringer is irrelevant (Article 25 UPCA). Accordingly, this section is only relevant in cases of indirect infringement.

However, in cases of indirect infringement (i.e. supplying means relating to an essential element), Article 26 UPCA requires that the third party “knows or should have known” of the patentee’s rights (it should, be noted that Italian law does not yet contain a similar rule, although Italian case law does incorporate this principle). Also, Article 68 UPCA states that an infringer who knowingly (intention) or with reasonable grounds to know (negligence) engages in the infringement is liable for the damage caused to the claimant.

### Intention

An infringer acts with intent when he knows the facts (i.e. has actual knowledge) from which it can be inferred that the process or the product he uses fall within the claims of a patent. Intention may also apply when the infringer has doubts regarding the claims of the patent but nevertheless accepts that his act may constitute an infringement (“*Spielautomat II*”), or when he deems the patent to be possibly invalid but nevertheless accepts that it may turn out to be valid (“*Kunststoffschläuche*”).

### Negligence

An infringer acts negligently if he fails to exercise reasonable care. Thus, negligence applies when the infringer ought reasonably to have known that his acts would amount to an infringement (= deemed knowledge). This is a high duty of care. For example, traders must inform themselves about patent rights that might relate to their business area (“*Dia-Rähmchen I*”; “*Melanie*”; a presumption of knowledge of the patent applies and can be rebutted only where appropriate due diligence is shown).

Traders may have to engage patent attorneys or experts for such an evaluation. There are stricter requirements for manufacturers and importers than for mere intermediaries, and the level of the duty of care is influenced by the size of the company. Where an infringer has been notified of a potential infringement, he cannot argue that he did not act intentionally or negligently if he fails to then engage an expert, i.e. if he continues to rely on his own judgment.

### Direct infringement

The knowledge of the infringer is irrelevant.

### Indirect infringement

The knowledge of the infringer is relevant.

### Intention

Knowledge of the facts from which it can be inferred that the process or the product used fall within the scope of a third-party patent right

BGH, GRUR 1973, 518, 521 – “*Spielautomat II*”

OLG Düsseldorf, GRUR 1982, 35 – “*Kunststoffschläuche*”

### Negligence

Failure to exercise reasonable care – the level of reasonable care which can be expected depends on the personal abilities of the infringer.

BGH, GRUR 1958, 288 – “*Dia-Rähmchen I*”;  
BGH, GRUR 2006, 575 – “*Melanie*”

## Negligence in Germany, France and Italy

It is important to be aware of how broad the concept of negligence is in the legal systems of France, Germany and Italy.

- **France:** Proof of the intent to infringe may be required by the criminal courts. In some cases, for example where the infringer is a mere distributor rather than an importer or manufacturer, the *Code civil* requires the claimant to show that the infringer had knowledge in order to establish liability.
- **Germany:** A party must, before entering the market, inform itself as to whether or not its acts fall within the scope of a patent. The onus is therefore upon the infringer to show that (a) it discharged that duty with reasonable care and (b) despite doing so it was unable to establish that its acts would amount to infringement. Generally speaking, a company can only avoid liability if it has undertaken, and can provide evidence of, for example, a full freedom to operate analysis performed by a patent attorney (“*Kunststoffhohlprofil I*”; “*Wandabstreifer*”).
- As regards newly granted patents, a potential infringer is usually permitted a grace period of one month to inform itself of that newly granted patent. In practice, this means that claims for infringement may only be asserted one month after the publication of the grant of the patent (“*Formstein*”).
- **Italy:** Knowledge of the existence of the patent is presumed and this presumption can only be rebutted where a high level of due diligence can be shown.

In principle, every company is considered to act negligently, because it can be assumed that before entering the market it has informed itself about third-party patent rights that might be affected.

BGH, GRUR 1977, 250 – “*Kunststoffhohlprofil I*”; BGH, GRUR 1993, 460 – “*Wandabstreifer*”

BGH, GRUR 1986, 803 – “*Formstein*”

## Innocent infringement under UK law

In the UK, an innocent infringer is not liable for damages or to render an account of profits (Section 62 Patents Act 1977). This differs from the principle set out in Article 68(4) UPCA. The onus is on the infringer to prove that its infringement was innocent, which is a heavy burden to meet (see *Lancer Boss v Henley Forklift*). The infringer must show that it “was not aware, and had no reasonable grounds for supposing, that the patent existed”. This is an objective test and the infringer will be liable if he has not made full investigations despite having reasons to suspect the existence of the patents, i.e. whether the infringement is innocent is directed at the infringer’s actual or deemed knowledge of the existence of the patent, not at whether or not the patent is infringed (*Schenck Rotec v Universal Balancing*; *Lux v Pike*).

**Innocent infringement**  
In the UK, there is no liability in cases of innocent infringement.

*Lancer Boss v Henley Forklift* [1975] RPC 307

*Schenck Rotec v Universal Balancing* [2012] EWHC 1920 (Pat); *Lux v Pike* [1993] RPC 107