



Avoiding IP law suits and preliminary injunctions when participating at trade fairs in Germany

在德国参展时如何避免知识产权诉讼及临时禁令

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- HOMEWORK – BEING PREPARED | 参展前的准备工作
- FIGHTING BACK | 应对措施
- PRACTICAL CASES | 案例

Introduction | 引言

Worst case scenario – You open your booth | 参展中发生的最坏情景

- 1. The local prosecutor presents you with a preliminary injunction and orders you to close your booth/remove certain products from the display**

展会期间本地的执法者向你出示了临时禁令并要求你关闭展台/把有关的产品从展台上撤走

- 2. You are taken completely by surprise | 你非常的惊讶**
- 3. You close your booth | 你不得不关闭展台**

Introduction | 引言

barely better scenario -You open your booth | 参展中发生的稍许好一些的情景

- 1. The local prosecutor presents you with summons to attend oral hearings regarding a preliminary injunction**

令你参加有关临时禁令的口审本地执法者向你出示传票

- 2. You are taken completely by surprise | 你非常惊讶**

- 3. You attend oral hearings at the fair that you are not prepared for**

你在没有任何准备的情况下在会展期间参加了口审

Introduction | 引言

barely better scenario -You open your booth | 参展中发生的稍许好一些的情景

- 4. The court is convinced by your competitor's arguments and issues a PI
法庭接受了你的竞争对手的主张，并向你发出了临时禁令**
- 5. The local prosecutor presents you with a preliminary injunction and orders you to close your booth/remove certain products from the display
本地执法者向你出示临时禁令并命令你关闭展台/撤走你的有关展品**
- 6. You close your booth | 你不得不关闭展台**

Introduction | 引言

barely better scenario -You open your booth | 参展中发生的稍许好一些的情景

- 1. The local prosecutor presents you with summons to attend oral hearings regarding a preliminary injunction**

本地执法者向你出示传票令你参加有关临时禁令的口审

- 2. You are prepared | 你做好了应对**

- 3. You attend oral hearings at the fair that you are well prepared for**

你在准备充分的情况下参加了展会期间的口审

Introduction | 引言

barely better scenario -You open your booth | 参展中发生的稍许好一些的情景

4. The court is doubtful about your competitor's arguments and refrains from issuing a preliminary injunction

法庭怀疑你的竞争对手的主张，因此拒绝颁发临时禁令

5. (you are taken completely by surprise) ;-)

你非常惊讶

6. your booth stays open

你的展台继续开放

Introduction | 引言

yet better scenario -You open your booth | 参展中发生的令人愉快的情景

1. Your competitor lodges a request for the issuance of a preliminary injunction
你的竞争对手申请颁发临时禁令
2. The court has been prepared - by you! | 你已经做好了应诉准备
3. The court dismisses the request on the grounds you have priorly presented
法庭根据你事先出示的证据与理由，拒绝了竞争对手的请求
4. (your competitor is taken completely by surprise) ;-)| 你的竞争对手非常惊讶
5. You do not (need) to know about this | 你无需理采
6. your booth stays open | 的展台继续开放

Preliminary Injunction – Procedures

临时禁令的程序

Roadmap to obtaining a Preliminary Injunction | 获取临时禁令的途径

1. Applicant files a request for a preliminary injunction with the competent court, claiming
申请人向具有管辖权的法院请求颁发临时禁令，诉称
 - Urgency | 紧迫性
 - An infringement of one of his IPR by one of your products
你的产品侵犯了他的专利权

2. Court examines request and either | 法庭审查了请求，或
 - Dismisses it | 驳回
 - Opponent is not notified of the entire proceedings | 整个过程没有通知被请求人，
or | 或者
 - issues an injunction by way of a decision | 决定发出禁令
 - no oral hearing, opponent is not heard | 无需口审，被请求人不知情
or... | 或...

Preliminary Injunction – Procedures

临时禁令的程序

Roadmap to obtaining a Preliminary Injunction (cont'd) | 获取临时禁令的途径 (继续)

3. Court examines request and | 法院审查请求并

– Summons to oral hearings including the opponent and

- following the hearing | 发出包括被请求人参加的口审传票，参加以下听证
- issues an injunction by way of a ruling | 裁决发出禁令

or | 或者

- Dismisses it | 驳回

Note: Only prima facie evidence will be considered!

注意：无须进一步核查证据

Preliminary Injunction – Remedies

临时禁令的法律救济

Preliminary Injunction has been issued by way of a decision (no hearing)
决定 (非口审) 发出临时禁令

1. Check chances of successful defense | 核查辩护成功的可能性
2. If you decide to defend yourself: | 如果你决定自辩:
 - File a protest against the decision | 申请一项对裁决的抗辨
Grounds: | 理由
 - lack of urgency | 非紧迫性
 - Lack of infringement | 非侵权
 - Court will issue summons for oral hearings | 法院将发出口审传票
 - Injunction confirmed or | 确认禁令或
 - Injunction revoked | 否定禁令
3. for upholding the preliminary injunction court may require deposition of a security bond by applicant | 为支持临时禁令法院可要求申请人缴纳保证金

Preliminary Injunction – Remedies

临时禁令的法律救济

Preliminary Injunction has been issued by way of a ruling (following a hearing)
(经口审) 裁决发出临时禁令

1. Appeal to the competent Court of Appeal | 上诉至有管辖权的上诉法院
 - Grounds cf. protest against decision | 理由：抗诉法院的裁决
2. The first instance court may suspend enforcement of the preliminary injunction while appeal is pending, | 在上诉期间，法院有可能暂缓临时禁令的执行
 - Possibly upon deposition of a security bond by you | 根据你缴纳的保证金的数额

Homework - being prepared | 参展前的准备工作

1. Know your competitors | 了解你的竞争对手
 - e.g. review the list of exhibitors/attendees | 比如：审阅参展人员名单
2. Search/Monitor your competitors' enforceable IP portfolio | 检索/监控竞争对手的IP组合
 - Patents | 专利
 - Utility models (Gebrauchsmuster) | 实用新型
 - Design patents | 外观设计
3. Risk assessment – building of scenarios | 根据不同的情景进行风险评估
 - Who might claim what against which product based on which IP-right and with what court?
有谁在哪个法院依据哪些IP权利，针对哪些产品提起诉讼？
 - perform freedom-to-operate-analyses | 进行排除侵权可能性的分析
 - Rely on local expertise concerning caselaw, jurisdiction, procedural law
依赖涉及案例法、管辖、诉讼法等方面的专家意见

Homework - being prepared | 参展前的准备工作

4. **Go/no-go decisions | 决定是否参展**
 - **Infringement yes/no? | 是否侵权**
 - **if yes: Challenge validity of competitor's IPR?**
如果是：能否无效掉竞争对手的IP权利
5. **Tune in the courts | 做好庭审的准备**
 - **Draft a defensive letter (it better be good) | 起草一份抗辩书 (这样更好)**
 - **Identify the competent court(s) | 确定有管辖权的法院**
 - **Submit to competent court(s) | 向有管辖权的法院提交抗辩书**

Homework - being prepared | 参展前的准备工作

Challenging the validity of competitor's IPR | 使竞争对手的IP权利无效

1. Patents (German/European) 专利 (德国/欧洲)

- Applications: file an observation by Third Parties | 申请：由第三方提交一份意见陈述书
 - Use strawman in order to remain anonymous? | 使用匿名的稻草人
- Recently granted patents: File an opposition | 对刚授权的专利：提出异议
 - Can be done by strawman in order to remain anonymous | 可以使用匿名的稻草人
 - Term: 3m (German Patent)/ 9m (European Patent) following grant
 - 期限：3个月 (德国专利) / 9个月 (欧洲专利)
- granted patents: Lodge nullity proceedings with the German Federal Patent Court
已授权的专利：向德国联邦专利法院提出无效
 - Use strawman in order to remain anonymous? | 使用匿名的稻草人
 - No terms | 没有期限

Homework - being prepared | 参展前的准备工作

Challenging the validity of competitor's IPR | 使竞争对手的IP权利无效

2. Utility Models (Gebrauchsmuster) | 实用新型

- file a request for cancellation with the German Patent and Trademark Office
向德国的专利及商标局提出撤销请求
 - Use strawman in order to remain anonymous? | 使用匿名的稻草人？
- Proprietor actively opposes the request within 1 month?
权利所有人是否在一个月內积极地应对？
 - Yes -> commencement of cancellation proceedings | 是：启动撤销程序
 - Decision following oral hearing | 口审听证后决定
 - No -> cancellation of utility model | 否：撤销实用新型

Homework - being prepared | 参展前的准备工作

Challenging the validity of competitor's IPR | 使竞争对手的IP权利无效

3. Design Patents | 外观设计

a. German Geschmacksmuster | 德国外观设计

- Lodge nullity proceedings with a civil court | 向民庭提起无效程序
 - Basis: searches of earlier identical/similar designs known in the EU
依据：检索欧洲公知的相同或近似的外观设计
 - use straw man in order to remain anonymous? | 使用匿名的稻草人？

b. Community Designs | 共同体外观设计

- Submit an application for a declaration of invalidity to OHIM
向OHIM提出无效声明
 - Basis: searches of earlier identical/similar designs known in the EU
依据：检索欧洲公知的相同或近似的外观设计
 - use straw man in order to remain anonymous? | 使用匿名的稻草人？

Homework - being prepared | 参展前的准备工作

Challenging the validity of competitor's IPR | 使竞争对手的IP权利无效

4. Unregistered community designs – problem? | 未注册的共同体外观设计的问题？

a. Unregistered Community Designs confer protection | 给予未注册共同体外观设计保护：

- only if the contested use results from copying the protected design.
如果出于竞争性的使用目的复制被保护的外观设计

b. Deemed no copying if: | 不认为是复制，如果：

- independent work of creation by a designer and | 设计者独立创新的设计产品，和
- Designer may be reasonably thought not to be familiar with the design made available to the public by the holder
设计者有理由认为他的设计与持有者向公众公开的设计不相似

Homework - being prepared | 参展前的准备工作

- c. If you did copy | 如果你确实复制了
 - Search earlier identical/similar designs known in the EU
检索欧洲公知的相同或近似的外观设计
 - Submit an application for a declaration of invalidity of the unregistered design with a competent national court in Germany
向有管辖权的德国法院提起针对此项未注册外观设计的无效程序
 - Use straw man in order to remain anonymous? | 使用匿名的稻草人？

Homework - being prepared | 参展前的准备工作

ad 5. Tune in the courts | 做好庭审的准备

5. Draft a defensive letter (it better be good) | 起草一封抗辩书 (最好)

a. Raise as much doubt with the court as possible, e.g. | 向法院提出尽可能多的质疑

b. Challenge urgency | 质疑所谓的紧迫性

- e.g. Has there been correspondence with opponent prior to trade fair?
比如在参展前是否已经与对手进行过沟通

c. Challenge that an infringement exists 质疑所谓的侵权是否存在

- Challenge validity of IPR 质疑IP权利的有效性
 - ideally by pointing to pending invalidation proceedings | 最好指出无效程序仍在进行
 - Present prior art/prior designs | 出示现有技术和现有外观设计
- Challenge that your falls under the scope of protection
质疑你的外观设计未落入保护范围

d. Prima facie evidence 表面证据

Homework - being prepared 参展前的准备工作

2. **File the defensive letter with the competent court
PRIOR TO EVEN RECEIVING AN INJUNCTION
在收到禁令之前就向有管辖权法院提交抗辩书**

FIGHT BACK! | 应对措施

following issuance of a Preliminary Injunction | 收到临时禁令后

- File a request to issue a ruling forcing the applicant to lodge an infringement trial within a term set by the court
请求法院裁决要求申请人在法院规定的期限内提起侵权诉讼
 - Failure to lodge the trial within the term will lead to revocation of the preliminary injunction | 没有在期限内提起诉讼程序将导致撤销临时禁令
- File a request for compensation of damages | 请求损害赔偿
 - as incurred by the enforcement of the preliminary injunction
由于行使临时禁令所产生的
 - as incurred by deposition of a security bond | 由于缴纳保证金所产生的
 - Pre-requisite: the preliminary injunction turns out to be invalid ex tunc (from the beginning) | 前提：临时禁令至始无效

FIGHT BACK! | 应对措施

- obtain a preliminary injunction against your opponent
获得一份应对你的竞争对手的临时禁令
 - directed against publicly stating that your products infringe against his IPR
直接反对你的竞争对手公开声称你的产品侵犯了他的权利
- Lodge a trial for a declaratory judgement of non-infringement
提起没有侵权的诉讼

SUMMARY | 总结

- **Do your homework**
做好参展前的准备工作
- **File a defensive letter**
提交抗辩书
- **Fight back**
应对措施



Cases at Fairs 展会上的案例

1. Design Infringement at fair 展会上的外观设计侵权

- **European Community Design 152 384**
欧共同体外观设计152 384
- **Offering of goods, distribution of catalogue**
商品许诺，商品目录分发
- **Friday evening; small fair**
周五晚；小型展会
- **Request to cease and desist;**
被要求中止和终止

1. Design Infringement at fair 展会上的外观设计侵权

- European Community Design 152 384
欧共同体外观设计152 384

Heimchen mittel 200 St.
Heimchen klein 1000 St.

Heuschrecken



Heuschrecken groß ca. 10 St. pro Portion
Heuschrecken mittel ca. 13 St. pro Portion
Heuschrecken klein ca. 20 St. pro Portion
Heuschrecken groß, lose 100 St.
Heuschrecken mittel, lose 100 St.

Schaben



RCD-ONLINE - Design consultation service - RCD information

Design number : 000152384-0002
Number of results : 1 of 1

Design	
Filing date:	23/03/2004
Registration date:	23/03/2004
Publication date (A1):	15/06/2004
Locarno class-subclass:	99.00
Verbal element:	HEUSCHRECKEN GROSS LOCUSTA MIGRATORIA
Status:	Registered and fully published (A1)
Language of filing:	German
Second language:	English

Representation

0002.1



2. Trademark Infringement at fair 展会上的商标侵权

- German Trademark DE 300 09 607;
德国商标 300 09 607
- Internet and shop design;
互联网和店面设计
- Request to cease and desist, followed by PI and oral hearing;
被要求中止和终止侵权，随后颁布临时禁令和要求参加口审听证

2. Trademark Infringement at fair 展会上的商标侵权

- German Trademark DE 300 09 6
德国商标 DE 300 09 607



3. Patent Infringement at fair 展会上的专利侵权

- European Patent EP 0 862 958
欧洲专利 EP 0 862 958
- Machine for making unidirectional reinforcement mats (rolmats);
种用于制造单向加固垫 (防滑垫) 的设备
- PI, court suit, nullification, agreement;
临时禁令 , 法院诉讼 , 无效 , 协议

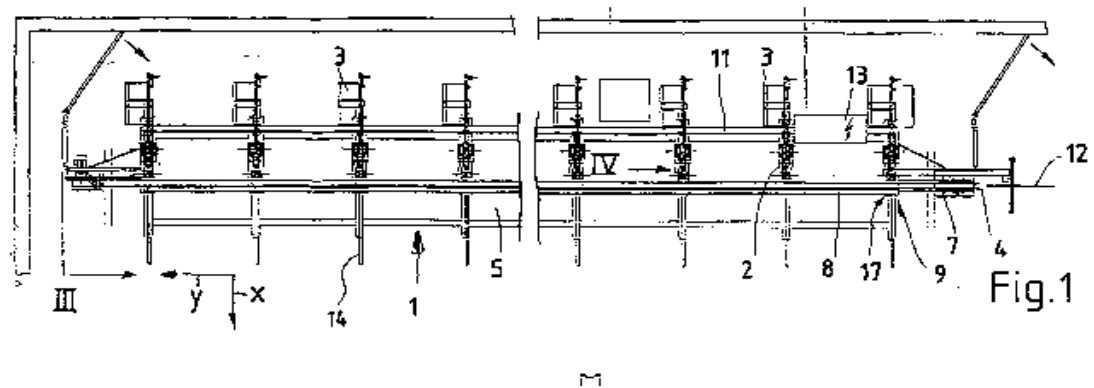
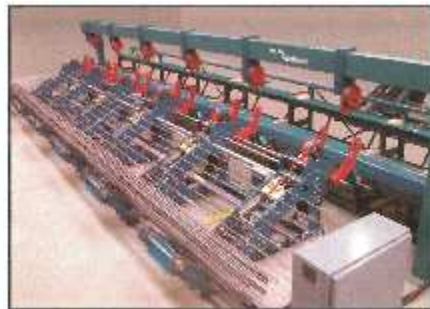
3. Patent Infringement at fair 展会上的专利侵权

- European Patent EP 0 862 958
欧洲专利 EP 0 862 958



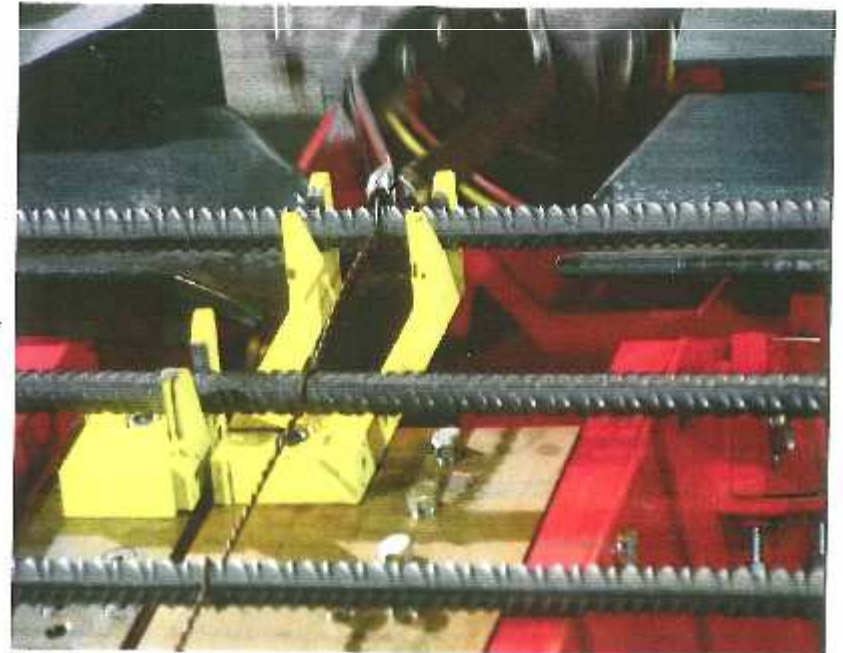
3. Patent Infringement at fair 展会上的专利侵权

- European Patent EP 0 862 958
欧洲专利 EP 0 862 958



3. Patent Infringement at fair 展会上的专利侵权

- European Patent EP 0 862 958
欧洲专利 EP 0 862 958



Figur 7

Thank You
谢谢