

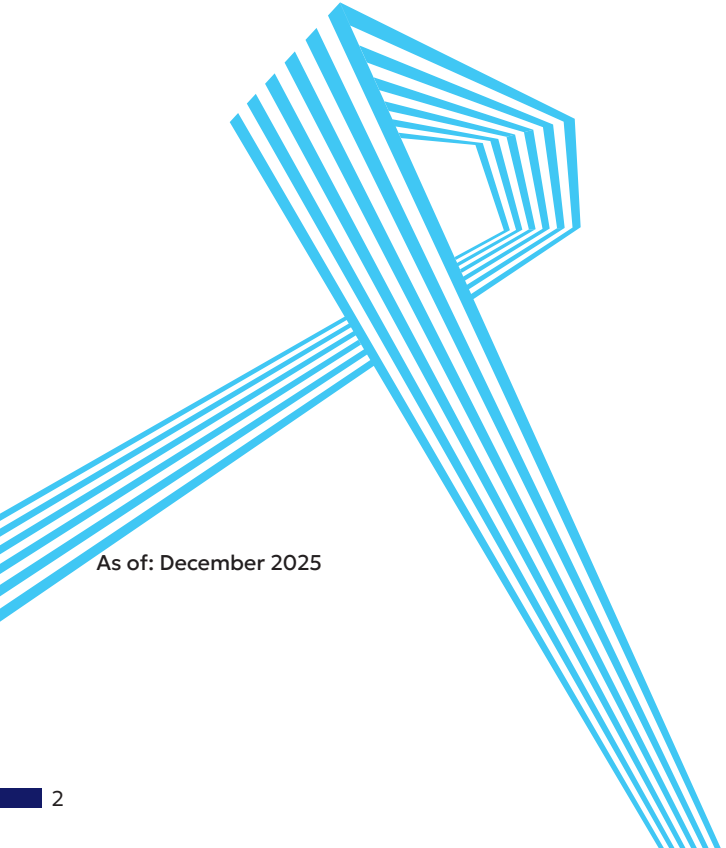
MESSE BERLIN

Patents, Trademarks & more

Important Information about Trade Fairs

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I. Introduction – Protecting intellectual property

It is a long arduous path from the idea to the finished product. Hence, product and trademark piracy are no peccadilloes, but can cause lasting damage to the affected companies. Industrial property rights offer effective protection against counterfeiting. They give property right owners a monopoly status and allow them to take action against imitators and have illegally copied products withdrawn from the market.

Different intellectual creations are protected by different property rights. Technical inventions can be protected by patents and/or utility models. Trademarks, which are often emotionally boosted by marketing departments to strengthen customer loyalty, serve as an indicator of the origin of a product or service. The outer shape and design of an item can be protected by a design right. In individual cases, the copyright law may play a part, for instance because of the photographs used or a particular graphic layout or design. It goes without saying that sophistically written texts as a rule are also protected by copyright law. In contrast to the other property rights mentioned above, in Germany a copyright does not require registration with an authority to become effective. It comes into existence at the time that the original work is authored (a process referred to as the creation), provided that the authoring process is sufficiently „creative“.

If at a fair, a conflict should arise between an exhibitor and a property right owner, who might be an exhibitor himself or not as the case may be, an examination of the factual and legal situation is usually highly complex. Professional advice by specialist patent lawyers is recommended. Please understand that Messe Berlin, as an intermediary and platform for third parties‘ affairs, cannot get involved in disputes and also cannot and may not provide any legal advice.

In cases of product and trademark counterfeiting you can take both civil and criminal legal action. Below, we offer some advice as to how you can prepare for potential disputes prior to a fair and what you can do during the fair in the event of litigation. Please keep in mind that this information cannot be and is not intended to be a substitute for legal consultation with a lawyer. At the end of this brochure you will find a selection of law firms specialising in industrial property protection.

II. What can be done prior to the trade fair?

Steps to be taken as a property right owner

In order to protect your intellectual property we suggest that you keep the following points in mind prior to the fair:

- It is strongly recommended that you protect your own products against infringements by means of intellectual property rights. Address this aspect well ahead of the fair and perhaps – for example with the aid of a specialist lawyer – file appropriate applications for your trademarks (brands), inventions (patents or utility models) or copyrights for individual designs.

- Bring the documents showing the industrial property rights (original documents or certified copies) with you to the trade fair. This also applies to documentation covering previous cases of property right infringements – such as previously delivered written warnings, signed cease-and-desist covenants or court rulings in your favour. This is the only way that you can take fast and effective action against property right infringements.

- Every owner of a property right has the opportunity to file a so-called "border seizure application" with the Central Customs Authority for Intellectual Property Rights (Zentralstelle Gewerblicher Rechtsschutz), General Directorate of Customs (Generalzolldirektion). On the basis of an approved border seizure application, the Customs Authority stops any goods originating from third states (e.g. at the import) even prior to the trade fair, which are suspected for property rights infringements. In case the suspected right infringement is confirmed, the goods will be destroyed, if necessary, after completing a legal proceeding. In this way, you as owner of a property right can prevent that goods from manufactures outside of the European Union which infringe your property rights are being exhibited at the trade fair.

- Should you learn either prior to the trade fair or as it is being set up that such an infringement of your own property rights is imminent, you should collect as much evidence as possible, e.g. photos, copies of prospectuses or website printouts. Only if you can establish a prima facie case of (this is legalese – in other words if you can prove) the infringement, you will be given the opportunity to initiate expedited proceedings before the civil courts to obtain a ban on the exhibition of the items at the trade fair while it is still ongoing. This is also referred to as an interim injunction *(einstweilige Verfügung)*, which would be served already at the trade fair – thus taking effect immediately.

- In the case of a deliberate or negligent infringement of property rights, the appropriate action in the particular circumstances may be the filing of charges and initiation of criminal investigations.

Steps as an exhibitor who comes into conflict with third party industrial property rights

If there is reason to believe (for instance due to a warning letter having been received prior to the fair) that a property rights owner might proceed against your own products at the trade fair, you should consider the following:

- In order to avoid imminent interim injunctions, a protective letter may be deposited in court (generally these would be Regional Courts *(Landgerichte)* in which case you have to retain a lawyer, as representation by a lawyer is mandatory), before the property rights owner files for an interim injunction. The protective letter must set forth the reasons why there is no property rights infringement. The protective letter must then be considered in the court's deliberations and an interim injunction may thus possibly be averted.

- If you have any information that criminal investigations have been initiated and fear in particular a seizure of the exhibited goods by the Customs or the Public Prosecution Department, a lawyer should be consulted. The lawyer can then contact the competent authorities even prior to the trade fair and, as the case may be, similar to the civil procedure, deposit a „protective letter under criminal law" with the competent authorities and, often more importantly, discuss the matter with the competent public prosecutor's department. In practice, public prosecutors are often quicker to order a seizure without such counter-measures, and this can lead to highly unpleasant situations at the trade fair when nothing can be done about it there and then.

- You should bring any licensing agreements to the fair, so that you are able to produce evidence of your rights. It may also be useful to provide proof of license fee payments, in particular if there is some indication that a dispute might arise over this.

III. What can be done during the trade fair?

The policy of impartiality does not allow Messe Berlin to intervene in a legal dispute. The only points of contact in such cases are the courts, lawyers or the law enforcement authorities. In the following we provide you with a brief of outline of possible options for action or responses in disputes under civil law.

Both as the owner of the property right and also as the alleged infringer you should conduct a thorough examination of the situation. Case law shows that it depends on the type of trade fair and the actual product presentation as to whether an industrial property rights infringement may possibly have occurred.

Steps as a property rights owner against possible property rights infringements

If you notice at a trade fair that another exhibitor is infringing your industrial property right, the imitator may first be served a warning letter. The warning letter is intended to persuade the imitator to refrain from further exhibition and to give a cease-and-desist covenant with a penalty clause.

If the imitator is not willing to provide such cease-and-desist covenant, you can file for an interim injunction. An interim injunction prohibits the infringer from continuing to exhibit the counterfeit item or offer the same in a different way, from putting it into circulation or advertising or promoting it. An interim injunction can be issued by the court within just a few hours – often without prior hearing of the opposing party. The court order must then be enforced by a bailiff. Enforcement is effected by service of the interim injunction and may include sequestration, which means recovery of the counterfeit products by the bailiff. In special cases, a claim for compensation of costs which otherwise might be difficult to enforce (as the opponent is located outside the EU) may also be enforced immediately by dint of a seizure order and, possibly through attachment of the debtor‘s cash in hand.

Besides such injunctions to abstain from an act as outlined above – other emergency measures aimed at search and inspection for instance in order to prove that an infringement (of a patent) actually took place are also conceivable.

Steps as an exhibitor accused of a property right infringement

In such cases, you will as a rule first receive a warning letter. You should take such warnings very seriously. Otherwise they may lead to severe legal consequences for you, usually such a letter is then followed by the issuing of an interim injunction order and ban on sales. You should then call in a specialist lawyer who can examine the contents and scope of the warning.

If an interim injunction has been issued against you, even though you responded to the warning letter or, in very rare cases, without such warning, and if such an injunction order is served at the fair, it must be observed and the bailiff‘s measures (service, confiscation) must be tolerated. The bailiff is an official of the judiciary. He has the sovereign powers of a public authority and can, if necessary, ask for police assistance. The bailiff‘s measures should not be obstructed as this can be punished by a fine imposed by the court.

You can file an appeal against the interim injunction and/or the bailiff‘s measures. Since all too often the results of the appeal proceedings will be too late for the trade fair, you can try to approach the opposing party in order to settle the issue out of court or at least negotiate a staying period for the duration of the trade fair.

IV. Particularities of Criminal Law

Searches and confiscations may be conducted by state authorities (customs, tax investigations, monopolies and mergers authority, police, public prosecutor‘s office etc.) at the fair. Due to the state monopoly on power and criminal investigation, the courts, public prosecutor‘s offices, customs officials or Federal Police are the exclusive formally competent bodies to contact. The trade fair as an impartial third party must tolerate such searches of exhibitors‘ booths.

If a search or confiscation measure is carried out, there is hardly anything that can be done on the spot. Such measures must be tolerated. Whoever tries to prevent or impede such a search / confiscation measure may be arrested by the police authorities. It is not until later that an appeal can be brought against such measure before the competent local court with a motion that the legality of the measure be reviewed by the court. The local court which issued the search and confiscation order also has jurisdiction in the matter.

In the event of a search or confiscation we strongly recommend that you consult a lawyer. You and/or the lawyer should take your time to examine the search / confiscation order. Search and confiscation orders serve to recover incriminating evidence. It might be tempting to make spontaneous comments and witness statements which later might prove to be incriminating for the company concerned. Hence the general rule is: „Listen, not speak."

The action by the state authority overrides the domiciliary rights of Messe Berlin. If the authorities do not take documents and / or items, but „seal them" on site to prevent further access and/or protect against modification, the sphere of responsibility of Messe Berlin ends there and then. If any damage should result from the sealing measure, the competent authority should be contacted.

Following the search, a schedule of the documents / items to be "taken" is drawn up. You should object to such removal by way of precaution so that confiscation is conducted instead. The company can bring an appeal only against such confiscation measure. If the taking of documents and items is permitted, this is considered a recovery which is very hard to verify later on.

V. What can be done after the trade fair?

After the trade fair you can check the brochures of competitors for products which may infringe your industrial property rights. Subsequently, appropriate action may be taken.

If at the trade fair a dispute with an infringer should have arisen, we recommend that you verify after the fair whether the sanctions obtained are actually observed, for instance whether infringing products are still being offered on the internet.

If an interim injunction should have been issued against your company or even products confiscated during the trade fair, you can now initiate a review of the legality of such measures and, as the case may be, file an appeal against the measures.

VI. Frequently Asked Questions (FAQs)

1. Which industrial property rights can be used to protect your intellectual property?

- Technical inventions can be protected by obtaining patents and utility models.
- Company names and product designations can be protected by trademarks.
- The external appearance of a product can be protected by applying for design rights.

Industrial property rights are always territorial in nature, hence they are only effective in certain countries. There is the possibility of obtaining European industrial property rights, in addition to German industrial property rights (patent, utility models, trademark, design rights), which would afford protection beyond Germany's borders.

2. Can the trade fair assist in the enforcement of industrial property rights and/or the defence against attacks?

No, the trade fair is bound by its duty to impartiality, and it cannot and may not give legal advice and will not get involved in any disputes. Messe Berlin does, however, have a separate IPR helpdesk at some trade fairs.

3. What can you do if you believe that an interim injunction is about to be issued?

If you fear that an interim might be issued against your company, you should consult a specialist lawyer to discuss your next steps. There is the possibility of depositing a protective letter with the competent courts for disputes under intellectual property law. The protective letter should contain your own view of the facts of the case so that these are taken into consideration by the court. This may under certain circumstances prevent an interim injunction being issued.

4. Do you have to comply with directions given by the bailiff / customs authority?

Yes. You should comply with directions given by sovereign enforcement officials. Otherwise these are authorised to use means of coercion, and may impose an administrative fine, coercive detention or substitute performance, for instance.

5. What can you do, if, prior to or at the trade fair, you discover products which are infringing your industrial property rights?

As a first step you should verify whether there is protection in Germany, in other words whether the industrial property right is actually effective in Germany. Then you should verify whether the exhibition in fact constitutes an industrial property right infringement. This is usually always the case for patent-infringing products, unless the trade fair is a mere performance show. In the case of a trademark infringement, such infringement usually requires that there is a specific offer for purchase of the item. You should collect all the evidence possible, such as photos or brochures. You can then use this evidence to initiate further action against the infringer. First of all the infringer can be given a warning. Should the infringer fail to react, you can apply to the court for an interim injunction.

6. What can you do as preparation for the trade fair?

You should verify for the most significant competitors whether these offer products which may infringe your own industrial property rights and whether the competitors own industrial property rights which might be relevant for your own products. Collect information about competitors' products from their websites, catalogues or product brochures. This information should then be compared with your own industrial property rights to establish whether there is a conflict. On the other hand you should analyse the competitors' industrial rights portfolio in order to ascertain whether it contains property rights which might be of relevance to your products. It is recommended that you work together with specialist lawyers on these analyses.

7. How can you use licenses?

You should bring your license agreements to the trade fair. The agreements serve to prove that you are authorised to use specific products / trademarks and under certain circumstances may enable you to avoid a dispute. Thus you can cite existing licenses as a defence, should you be served with a warning letter. Licensing agreements can also be mentioned in a protective letter, thus providing proof of the legal use of a product. Unfortunately, licensing agreements are no longer of use, if confiscation by a bailiff is imminent. The bailiff will not accept the defence that there is a license agreement in place.

8. What is there to consider regarding shared exhibition stands?

Each exhibitor at a shared exhibition stand is liable for the industrial property rights infringements committed by the other exhibitors of the shared exhibition stand. Patent law provides that whoever culpably (even if only out of negligence) enables the crime element of usage to be realised by a third party or promotes such realisation, even if they can obtain, with reasonable effort, knowledge that the act supported by them infringes the absolute right of the patent owner, is an infringer. As a participant at a shared exhibition stand you have the duty to verify any industrial property rights infringements by other participating companies. If you fail to do so, the patent owner may raise claims against you as an accessory perpetrator.





CONTACT

Messe Berlin GmbH · Messedamm 22 · 14055 Berlin
T +49 30 3038-0 · info@messe-berlin.de
www.messe-berlin.de