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Preu Bohlig & Partner has appointed Dr. Torben Düsing as Partner

Preu Bohlig & Partner is pleased to announce the appointment of Dr. Torben Düsing as a partner. He was admitted to the partnership with effect from 1 July 2018.

Dr. Torben Düsing successfully advises international clients in intellectual property, unfair competition and copyright law as well as press and media law at Preu Bohlig & Partner‘s Düsseldorf office since January 2017. Before joining the firm, Dr. Torben Düsing worked for several years in renowned IP law firms in Cologne and Düsseldorf.

Dr. Torben Düsing‘s main fields of activity are the judicial and extrajudicial prosecution of claims for product piracy, trademark infringement disputes, legal consultation in connection with advertising and other marketing measures, and media law. Dr. Torben Düsing has extensive litigation experience, particularly in the area of unfair competition disputes (UWG).

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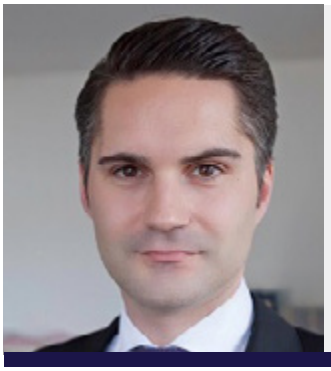

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Damages for an unjustified warning of infringement of intellectual property rights

The case law of the German Federal Court of Justice (BGH) recognises that an unjustified warning of infringement of intellectual property rights may constitute unlawful and culpable interference with the right to operate an established and functioning business under Sec. 823 (1) of the German Civil Code (BGB). The party that gives the unjustified warning is obliged to reimburse the party that was wrongfully warned for all losses incurred due to the unjustified warning of infringement of intellectual property rights (cf. in particular, BGHZ 164, pp. 1 et seq. - Unberechtigte Schutzrechtsverwarnung I).

Compensable losses typically include the costs incurred by the party that received the warning to hire attorneys and/or patent attorneys to defend against the claims asserted in the warning.

In its judgment in the "Ballerinaschuh" case, File No.: I ZR 187/16, dated 11 January 2018, the German Federal Court of Justice had the opportunity to rule on the scope of such a claim for damages in a case where further sales of the contested product were discontinued. The BGH held that losses incurred after the filing of the complaint are also compensable. This is not a matter of course, because the filing of an (unjustified) complaint generally does not constitute interference with the right to operate an established and functioning business, since protection of the opposing party is generally guaranteed by the legal structure of judicial proceedings, particularly by the prevailing party's claim to reimbursement of costs as well as by its claim for damages for unjustified enforcement of a judgment of the Court of First Instance under Sec. 717 (2) of the German Code of Civil Procedure (ZPO) and its claim for unjust enrichment for unjustified enforcement of a judgment of a Higher Regional Court under Sec. 717 (3) ZPO.

The decision of the German Federal Court of Justice was based on the following facts:

The plaintiff is the owner of a registered Community design for a shoe model (a "ballerina shoe"). The (subsequent) defendant sold a shoe model, which, in plaintiff's opinion, infringed its Community design. The plaintiff warned the defendant against infringing its Community design and also based its claim on the ancillary protection of intellectual property rights provided by competition law (wettbewerbsrechtlichen Leistungsschutz) under Sec. 4 No. 3 of the German Law Against

Unfair Competition (UWG). The defendant discontinued further sales of the contested shoe model but did not provide the requested declaration of discontinuance and formal obligation backed by a penalty clause. The plaintiff then filed a complaint with the Regional Court of Düsseldorf, which was primarily based on infringement of the Community design but also invoked to Sec. 4 No. 3 UWG. The defendant petitioned the Court to dismiss the complaint and filed a counter-claim seeking a declaration that the plaintiff must pay damages for past losses caused by its unjustified warning of infringement of intellectual property rights and those incurred in the future.

The Regional Court of Düsseldorf sustained the complaint for infringement of the Community design. The Higher Regional Court (OLG) of Düsseldorf ruled that there was no infringement of the Community design and no claim under Sec. 4 No. 3 UWG. Therefore, in the opinion of the Higher Regional Court, the pre-judicial warning had been unlawful. Accordingly, the OLG set aside the judgment of the Court of First Instance and dismissed the complaint. The OLG sustained the counter-claim for a declaration that the plaintiff was obliged to pay damages for issuing an unjustified warning of infringement of intellectual property rights.

The German Federal Court of Justice sustained the Higher Regional Court's ruling that the defendant had not infringed the plaintiff's Community design. However, the Federal Court of Justice opined that the plaintiff may have a claim under Sec. 4 No. 3 UWG, which would require additional findings by the appellate court. Accordingly, the BGH overturned the judgment of the Higher Regional Court and remanded the matter to the Higher Regional Court for a new hearing and decision. The judgment on appeal was also overturned with respect to the sustained counter-claim for a declaration that the plaintiff was obliged to pay damages for its unjustified warning of infringement of intellectual property rights. According to the court, the defendant had not infringed the Community design, so that the warning had not been justified in this regard. However, as the court had already stated, the plaintiff was deemed to have a claim under Sec. 4 No. 3 UWG. If this claim was sustained, the warning would have been justified and consequently the counter-claim seeking a declaration of the duty to pay damages would fail. The Federal Court of Justice did not doubt that the claim seeking a declaration of the duty to pay damages was permissible. If the warning had been unjustified, there was a legitimate interest in a declaratory judgment. Even if the claim were to become quantifiable in the course of the proceedings, the (counter) claimant would not have to resort to an action for damages (BGH, German Association for the Protection of Intellectual Property (GRUR) 2008, 258 et seq., Marginal no. 18 – INTERCONNECT/T-InterConnect).

As guidance for the new decision by the Higher Regional Court, the BGH pointed out the following with respect to the counter-claim: If, after making additional findings, the Higher Regional Court were to conclude that the plaintiff had no claim under Sec. 4 No. 3 UWG, the pre-judicial warning would not be justified and may have constituted interference with the right to operate an established and functioning business, which requires payment of damages. The defendant would be able to charge both the losses it suffered up until the filing of the complaint and those incurred thereafter. If a cessation of production and sales, which had already been implemented, were to be maintained after the filing of the complaint, the causal connection between the warning and the loss that was ultimately suffered could not be denied in principle, even if the loss did not arise until after the filing of the complaint. The warned party's decision to discontinue sales of the contested product had been triggered by the warning. The owner of the intellectual property right had added additional force to its request to cease and desist selling the contested product by filing a complaint, so that a complaint filed after an unjustified warning of infringement of intellectual property rights generally cannot be deemed to interrupt the causal connection triggered by the warning of infringement of intellectual property rights.

Note: In the author's opinion, the decisive factor in determining the scope of the damage claim based on a discontinuance of sales due to an unjustified warning of infringement of intellectual property rights is the time when the party receiving the warning discontinued sel-

ling the contested product. If this was done on account of the unjustified warning of infringement of intellectual property rights, the party receiving the warning may demand compensation not only for the losses incurred up until the complaint was filed but also for the losses incurred after the complaint was filed. In the author's opinion, if sales of the contested product are not discontinued based on the warning, but only after the complaint was filed, the resulting losses are not attributable to the warning but to the (privileged) filing of the complaint. In this case, there is no causal link between the losses incurred after the filing of the complaint and the infringing act (the unjustified warning of infringement of intellectual property rights). The same applies if the party receiving the warning does not discontinue sales of the product until the issuance of a conditionally enforceable judgment by the Court of First Instance, which is later overturned by a higher court. When a complaint based on an intellectual property right, which has been sustained by a judgment of the Regional Court, is overturned by a higher court, this means that there was no infringement of the intellectual property right. Consequently, the pre-judicial warning was unjustified. However, sales were not discontinued due to the unjustified warning, but due to the judgment of the Court of First Instance. In this case, too, there was no causal link between the loss and the infringing act. In this regard, consideration should also be given to the fact that the damage claim under Sec. 717 (2) ZPO only covers losses suffered "due to enforcement". Therefore, a claim for damages under Sec. 717 (2) ZPO presupposes that the plaintiff/creditor has actually enforced the judgment of the Court of First Instance or has built up "enforcement pressure". In particular, such "enforcement pressure" exists when the plaintiff/creditor has met all the prerequisites for enforcement of a provisionally enforceable judgment of the Court of First Instance, particularly if the plaintiff/creditor has posted the security required by the Regional Court (cf. BGH, GRUR 2011, 364 - Steroidbeladene Körner). If the plaintiff/creditor does not enforce the provisionally enforceable judgment of the Court of First Instance and does not build up "enforcement pressure", the defendant/debtor cannot seek damages resulting from the discontinuance of sales under Sec. 717 (2) ZPO. In that case, the only remaining basis for a claim for such damages is Sec. 823 (1) BGB ("Interference with the right to operate an established and functioning business through an unjustified warning of the infringement of intellectual property rights"). However, this also presupposes that the defendant/debtor discontinued sales due to the warning and did not wait until the complaint was filed or the judgment of the Court of First Instance was issued. If the defendant/debtor did not discontinue sales based on the warning, but only at a later date, the defendant/debtor comes away "empty-handed".

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Can FRAND-Actions be made up for in the Course of Court Proceedings (Regional Court of Mannheim "Funkstation")?

In its "Funkstation" decision dated 10 November 2017 (GRUR-RR 2018, 273 et seq. – Funkstation), the Regional Court of Mannheim established considerations regarding the catch-up of FRAND negotiations in ongoing patent infringement proceedings. In the opinion of the Regional Court of Mannheim, the patent holder should, under certain circumstances, be able to make up for its obligations in proceedings according to FRAND terms and thus avoid rejection of the injunction and recall applications as currently unfounded.

Background / Objection of abuse under antitrust law in infringement proceedings

A patent for which a patent holder wishes to claim patent infringement against an alleged infringer can represent a standard-essential patent (so-called SEP) for access to the product market due to the actual market implementation of the technology protected by the patent (so-called de facto standard) or due to an industry-wide standardisation agreement (so-called industry standard). A patent holder's claim against a user of such standard-essential, patent-protected technology can therefore be opposed by an objection under antitrust law.

In order to avoid objections of abuse under antitrust law in infringement proceedings, the SEP holder must thus, in principle, allow each user to use the patent on FRAND (fair, reasonable and non-discriminatory) licencing terms.

FRAND-process

In its 2015 decision regarding the legal matter of "HUAWEI Technologies /. ZTE", C-170/13, the ECJ established specific guidelines on the obligations of the parties concerning the determination of FRAND-terms.

First, the SEP holder must inform the alleged infringer of the patent infringement (notice of infringement). In response to the notice of infringement, the alleged infringer must express its desire to conclude a licencing agreement on FRAND terms (licensing request). In response to the licensing request, the patent holder must provide

the alleged infringer with a specific written licensing offer according to FRAND terms (FRAND offer). The alleged infringer must react to this FRAND offer promptly to avoid any objective impression of delaying tactics. The alleged infringer can either accept the FRAND offer or make a specific written counter-offer, also according to FRAND terms, within a reasonable time (FRAND counter-offer) and, if the counter-offer is declined, provide adequate security and account for past actions of use in order to calculate the security (rendering of accounts and provision of security).

If the claimed alleged infringer does not meet its obligations in the FRAND licensing negotiations, it cannot object to an infringement action by the patent holder with abuse under antitrust law. If the SEP holder does not meet its obligations in the FRAND licensing negotiations, the requests to cease and desist and for recall will be rejected as currently unfounded on the basis of a misuse under antitrust law. Claims for damages, disclosure and rendering of accounts, however, are not affected by an objection of abuse under antitrust law. These claims have no direct influence on the availability of the product of the alleged infringer on the market. In this respect, an action would thus be upheld in the event of an confirmed infringement.

The Regional Court of Mannheim's Decision

Following the ECJ's decision, in particular the Regional Court of Düsseldorf, the Higher Regional Court of Düsseldorf, the Regional Court of Mannheim and the Higher Regional Court of Karlsruhe have further substantiated the exact course of FRAND licensing negotiations in several decisions. However, it remained open whether FRAND-obligations of the parties can still be made up for – especially during pending court proceedings.

The Regional Court of Mannheim has now stated its opinion in this respect – surprisingly detached from the case in an obiter dictum: under certain conditions, it should be possible to make up for the obligations of the SEP holder in FRAND licensing negotiations during pending proceedings.

The Regional Court of Mannheim bases its argument on the intention of the FRAND negotiation process, which, in the opinion of the Regional Court of Mannheim, is inherent in the ECJ ruling: The alleged infringer should be able to decide by way of negotiation to take a license according to FRAND terms without the pressure of an injunction already filed. This intention is initially fundamentally contrary to making up for the individual steps

of the FRAND negotiation in pending court procedures. However, the Regional Court of Mannheim perceives the means of interruption and suspension in the German Code of Civil Procedure (Sec. 249 ZPO) and the stay of proceedings (Sec. 251 ZPO) as options for carrying out a negotiation without pressure during pending court proceedings. In the opinion of the Regional Court of Mannheim, the attacked alleged infringer is even obliged to agree to a suspension request or a request to stay the proceedings by the plaintiff/SEP holder for the purpose of subsequent FRAND negotiations. Otherwise, the alleged infringer would demonstrate its unwillingness to take a license, which would cut off its objections under antitrust law. Furthermore, the Regional Court of Mannheim justifies its opinion by the fact that the conditions for a judgement in the fact and merits of an action must always be available only at the solely decisive time of the conclusion of the last hearing.

The Regional Court of Mannheim's arguments on the ECJ's decision intentions appear bold. In particular, the ECJ made it explicitly clear in its "HUAWEI Technologies ./. ZTE" decision in its amending decision for the German version that the SEP holder must initiate the FRAND proceedings before filing the action. The Higher Regional Court of Düsseldorf also made reference to this (Higher Regional Court of Düsseldorf GRUR 2017, 1219 – mobiles Kommunikationssystem, marginal no. 168) when it stated that the FRAND negotiations must in principle be concluded unsuccessfully before an action is filed so that the SEP holder can successfully oppose an objection under antitrust law.

However, the principle of procedural economy speaks in favour of the Regional Court of Mannheim's opinion – and thus for the ability to make up for the FRAND negotiations in pending infringement proceedings. The legal literature and the case law agree that acting contrary to antitrust law does not result in a permanent loss of rights (cf. e.g. Block in: GRUR 2017, 121, 127, with additional notes). From this principle it follows that if the SEP holder violates its obligation in the course of the FRAND negotiations (leading to the corresponding partial dismissal of the action), the SEP holder is not prevented from seeking new injunction proceedings after – extrajudicial – rectification of its obligations in FRAND licensing negotiations. Since the claims for damages, disclosure and rendering of accounts are not affected by the objection of abuse under antitrust law, two legal actions would then be pending concerning the same

dispute subject matter and the same legal questions. This, however, would be diametrically contrary to the principle of process economics. The prohibition of making up for FRAND negotiations in the pending proceedings and reference to extrajudicial negotiations appear to be a mere formality.

However, it remains to be seen whether the opinion of the Regional Court of Mannheim will prevail. An appeal against the ruling is pending before the Higher Regional Court of Karlsruhe.

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LEADERS LEAGUE

Leaders League 2018 –
Patent Litigation – Preu Bohlig & Partner (1-Leading)

New focus on suspension in patent infringement proceedings?

The Federal Court of Justice suspended the patent infringement proceedings in the appeal proceedings for case no: X ZR 58/16 on 5 June 2018 to await the decision of the Federal Patent Court on the action for nullity filed against the patent in suit, stating that the suspension appeared to be "appropriate" to ensure a uniform interpretation of the patent in suit in the nullity and appeal proceedings.

Anyone making a patent infringement claim must expect the defendant to challenge the patent in suit, whether with an appeal, if the deadline for doing so has not expired, or with an action for nullity. German law does not provide for a counterclaim for nullity of the patent in infringement proceedings. For this reason, defendants can only introduce the circumstance that the patent claim has been challenged into the infringement proceedings by requesting a suspension of the infringement proceedings until the decision in the opposition or nullity proceedings.

The decision of whether such a suspension will be ordered or not is at the discretion of the infringement court, Sec. 148 German Code of Civil Procedure (Zivilprozessordnung – ZPO).

Since a plaintiff's patent represents a verified intellectual property right with claims that cannot be enforced for a period of time, the discretionary decision often turns out in favour of the plaintiff, with the consequence that at least the courts of appeal are rather reluctant when it comes to suspension.

It is typically considered a requirement for suspension that the infringement court considers it highly likely that the patent in suit will be revoked or nullified on the basis of the opposition or action for nullity (cf. Kühnen, Handbuch der Patentverletzung [Patent Infringement Manual], 10th edition, E-book, marginal no. 652, with additional notes). If the plaintiff already has a preliminary enforceable judgement in its favour, the "sufficient" likelihood of revocation or nullification of the patent in suit is deemed adequate reason for ordering the suspension (cf. BGH GRUR 2014, p. 1237 et seq., marginal no. 4 – Kurznachrichten).

The issue of whether the revocation or nullification of the patent in suit is to be expected with pre-dominant or sufficient probability did not play a role in the Federal Court of Justice's new decision dated 5 June 2018.

Furthermore, the heading of Sec. 148 ZPO uses the term "anticipated", meaning that a suspension is generally ordered only if the decision in the opposition or nullity proceedings against the patent in suit is significant. The decision in the opposition or nullity proceedings is not relevant if the action is to be dismissed on grounds that are unrelated to the validity of the patent, e.g. on account of the plaintiff's lack of capacity to sue, due to the defendant's lack of capacity to be sued, or due to the defendant's prioruse right pursuant to Sec. 12 German Patent Act (Patentgesetz – PatG). A decision in the opposition or nullity proceedings is also not significant if the infringement court is of the opinion that the defendant has not infringed the patent in suit. No suspension occurs in such cases, but the action is dismissed, irrespective of whether the patent in suit is valid or not. Accordingly, a suspension generally occurs only if the infringement court assumes that the patent has been infringed (cf. Kühnen, loc. cit., E-book, marginal no. 644 et seq., with additional notes).

In the decision dated 05 June 2018, the Federal Court of Justice did not presume patent infringement, but rather made the issue of patent infringement dependent on how a particular feature is to be interpreted. In this case, the Federal Court of Justice left the interpretation

to the Federal Patent Court for the time being, which is also rather unusual because ultimately, the infringement court has to interpret the patent on the issue of patent infringement.

In its decision dated 05 June 2018, the Federal Court of Justice did not state that the previous case law on exercising discretion on suspensions is to be abandoned. For this reason, the previous principles should probably continue to be considered in the suspension decision. Bearing in mind that a suspension seems “appropriate” in order to ensure a uniform interpretation of the patent claim, at least in the appeal proceedings if the plaintiff already has a provisionally enforceable judgement in its favour, the suspension can always ultimately be justified.

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Handelsblatt – Deutschlands beste Anwälte 2018

Mentioned in Health Law and Pharmaceutical Law:
Peter von Czettritz

The German Government's draft legislation implementing the Know-How Directive has been published

Sometimes reality is stranger than fiction: Ironically, a draft of the Act to Protect Trade Secrets was "leaked" in April of this year, possibly because the Federal Ministry of Justice had failed to take "reasonable measures to ensure secrecy" within the meaning of Sec. 2 No. 1 b of the draft bill. The draft legislation, which is scheduled to be adopted in December 2018, was "officially" published on the Ministry's website[1] on 18 July 2018.

The Act is intended to implement the so-called Know-How Directive of 08 June 2016[2]. The EU directive had become necessary because the protection of confidential information depended on very dissimilar provisions in individual Member States – i.e. a "regulatory patchwork", which was not in accord with the great economic importance of protecting confidential information. According to a study, more than 70% of all companies consider the protection of trade secrets important or very important – apart from the protection of intellectual property. Accordingly, in about 40% of all companies, trade secrets are never shared with third parties for strategic reasons[3]. Nevertheless, the annual losses suffered by German companies due to industrial espionage, sabotage and data theft amount to about EUR 50 billion[4].

What is in the draft legislation proposed by the German Government?

First, after specification of the scope in Sec. 1, Sec. 2 defines the key terms. According to this section, a "trade secret" means information that

- is not generally known or readily accessible in the precise configuration or assembly of its components and therefore has commercial value

- and is the subject to reasonable steps under the circumstances to keep it secret, by its lawful owner.

Reasonable measures to ensure secrecy

Therefore, to enjoy the protection of the Act, it will be necessary to take reasonable steps to ensure secrecy in the future. This constitutes a considerable deviation from the current legal practice in Germany. Until now, the courts in Germany recognised the existence of a trade secret if the owner of the secret (e.g. the entrepreneur) had an interest in secrecy and an intention of

1 https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/GeschGehG.html.
2 Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Available at https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32016L0943&from=DE.
3 Study on Trade Secrets and Confidential Business Information in the Internal Market, 4/2013 (MARKT/2011/128D), available at http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf.
4 https://www.focus.de/finanzen/news/unternehmen/mittelstand-besonders-gefaehrdet-wirtschaftsspionage-kostet-industrie-50-milliarden_aid_1083974.html.

maintaining secrecy. In the future, the mere intention to maintain secrecy will no longer be sufficient. Entrepreneurs must also take actual measures to ensure secrecy and if they fail to do so, the courts will no longer recognise the existence of a trade secret worthy of protection.

The new draft legislation refers to „reasonable steps under the circumstances to keep information secret". In other words, not all potential trade secrets need to be accorded equally strong protection. Rather, this depends on the respective „importance" of the trade secret to the operation of the business. For minor secrets, it may be sufficient to establish clear responsibilities within the company or to protect files with passwords.

Currently, many legal essays are published on which steps should be taken to ensure secrecy. However, the most important thing is to make a start. The most sophisticated plan does not help if it is not implemented, and even small measures still constitute "steps to ensure secrecy".

It is best to start by collecting the company's secrets that are worthy of protection, i.e. by identifying, evaluating and categorising potentially relevant trade secrets and/or know-how. Then, depending on relevance, various measures can be taken – also at short notice and those that are easy to implement. It may make sense to store documents containing business and trade secrets in central places that not everyone has access to (e.g. a lockable file cabinet or an office with a fixed door knob rather than a door handle). Other possible measures include the organisation of work processes, i.e. limiting access to certain documents to certain personnel. For electronic documents, enhancements to IT security are important and can already consist of simple steps, such as password protection for sensitive data or up-to-date virus protection.

Entering into confidentiality agreements or non-disclosure agreements is important both internally (with respect to employees) and externally (in supply chains and in customer relations). In addition, training sessions for employees should be on the agenda to raise staff awareness of the need to protect trade secrets.

The measures implemented must be documented, monitored and safeguarded through compliance measures so that the steps taken to ensure secrecy can later be argued before a court. Additional recommended measures and an overview of the complex risks to the German economy following an inadequate protection of trade secrets are provided, for example, by the Initiative Wirtschaftsschutz[5]. (Economic Protection Initiative), which is cosponsored by the Federation of German Industry and the German Chamber of Commerce and Industry.

Reverse engineering is permissible

The general permissibility of reverse engineering is another important change in the legal situation in Germany. Sec. 3 of the draft legislation defines what will be permitted in the future. Under this section, a trade secret may be acquired by „observing, studying, disassembling or testing a product or object that has been made available to the public or that is in the lawful possession of the person doing the observing, studying, disassembling or testing, if this person is under no obligation that restricts the acquisition of the trade secret". In addition, a trade secret may be acquired, used or disclosed if this is permitted by law, based on a law or by way of a legal transaction.

Whereas, reverse engineering, as defined in the above citation, has generally been inadmissible in Germany thus far, reverse engineering will now in principle be legally permissible. This will even be true if the cost of reverse engineering is high. However, the permissibility of reverse engineering can be excluded by contract. Therefore, companies that are concerned about reverse engineering must ensure that their contracts with suppliers, customers and research and development partners preclude reverse engineering, including a retroactive exclusion for products already delivered.

5 https://www.focus.de/finanzen/news/unternehmen/mittelstand-besonders-gefaehrdet-wirtschaftsspionage-kostet-industrie-50-milliarden_aid_1083974.html.

Prohibited actions

Sec. 4 of the draft legislation contains a list of various prohibited actions. According to that section, a trade secret may not be acquired through unauthorised access to, appropriation of or copying of documents, objects (etc.) or electronic files lawfully under the control of the trade secret owner and containing the trade secret, or by any other conduct which, under the circumstances, is considered contrary to honest market practice. Anyone who has acquired a trade secret through such conduct may not use nor disclose it. The same applies to anyone who is in breach of a duty to limit the use or disclosure of the trade secret. Paragraph 3 of the norm contains a provision regarding the use or disclosure of trade secrets by third parties, and Sec. 5 contains justifications for the acquisition, use or disclosure of trade secrets.

Claims by the owner of a trade secret

Secs. 6 – 14 of the draft legislation lay down the claims of the owner of a trade secret against an infringer. Sec. 6 entitles the trade secret holder to claim for removal and injunctive relief, while Sec. 7 contains provisions for the destruction, surrender, or recall of infringing products and their removal and withdrawal from the market. Sec. 8 codifies a right to information and contains provisions regarding damages for breaching the infringer's duty to provide information.

The aforementioned claims are subject to the requirement of proportionality under Sec. 9 of the draft Trade Secrets Act. This means that claims are excluded if the value of the trade secret is low or the trade secret holder took inadequate steps to ensure secrecy. Therefore, it is in the interest of the trade secret holder to ensure taking reasonable steps to keep such information secret.

Under Sec. 10 of the draft Trade Secrets Act, an infringer who acts intentionally or negligently is liable to the owner of the trade secret for damages, which, according to Paragraph 2 of the norm are based on the three customary methods to calculate damages under intellectual property law. In addition, monetary compensation can be demanded for any non-material damages suffered.

Sec. 11 enables an infringer, who has acted neither intentionally nor negligently, to pay a cash settlement to the owner of the trade secret to avert claims under Secs. 6 or 7, if the infringer would suffer a disproportionately large burden through satisfying such claims and the cash settlement appears reasonable. This provision should only apply in cases in which rights were infringed inadvertently, or there would be an undue destruction of economic value or an undue impediment

to competition and innovation, and this constitutes a counterweight to Secs. 6 and 7 – which generally do not require fault as a prerequisite.

Liability of the business owner for infringements of rights by its employees

If the infringement of rights is committed by an employee or representative of a company, the owner of the trade secret also has claims against the owner of the company under Secs. 6 – 8, as stipulated in Sec. 12 of the draft legislation. This provision conforms to the provisions of Secs. 8 (2) of the Act Against Unfair Competition (UWG), 44 of the Design Act (DesignG) and 14 (7) of the Trademark Act (MarkenG). The liability of the company owner is secondary to claims against the infringer. Therefore, if the infringer pays a monetary settlement under Sec. 11 of the draft legislation, claims cannot be asserted against the company owner.

Additional provisions

Sec. 14 contains an additional corrective measure in the form of a general prohibition on abuse conforming to Sec. 8 (4) UWG. Secs. 15 – 22 contain procedural provisions, and Sec. 23 contains a criminal provision regarding the infringement of trade secrets. When the Trade Secrets Act takes effect, Secs. 17 – 19 UWG, which have thus far governed the protection of trade secrets, will be repealed. Until then, Secs. 17 – 19 UWG must be interpreted in conformity with the Directive.

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WTO upholds Australia's plain packaging laws

On June 28, 2018, the WTO issued a 888 pages strong report on the complaints brought by Honduras, the Dominican Republic, Cuba and Indonesia concerning Australia's plain packaging laws. This decision will have an important impact on tobacco manufacturers and their ability to promote their products. Apart from Australia, many other jurisdictions have introduced plain packaging laws in order to reduce the health risks related to the consumption of tobacco products. The article explains some of the report's key points and takes a look at its impact on Europe.

From an IP lawyer's point of view, the WTO's opinion on several articles of the Paris Convention for the Protection of Industrial Property ("Paris Convention") and of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs [Agreement]") is of particular interest. Inter alia, the complainants have argued that Australia's plain packaging laws result in a devaluation of their trademarks, prevent the registration of certain kinds of trademarks and lead to a confusion of the public about the origin of tobacco products.

No substantive minimum standard of trademark protection required under Article 6quinquies Paris Convention

The complainants' first argument was based on Article 6quinquies Paris Convention as incorporated by Article 2.1 TRIPs. According to Article 6quinquies Paris Convention, there was an obligation of the member states to afford trademark protection. According to the complainants this involves ensuring that trademark owners are put in a position to use their trademarks. This ability to use a trademark was an integral part of the availability, acquisition, scope, maintenance and enforcement of trademark rights.

The WTO disagreed. According to the WTO's interpretation of Article 6quinquies Paris Convention, the law does not provide any guidance as to what the protection flowing from the registration under the domestic law should consist of. There was no support in the language of the Paris Convention for a substantive minimum standard of rights that WTO members would be obliged to make available to the owner of a registered

trademark. The WTO did not share Honduras's opinion that footnote 3 of the TRIPs Agreement serves an additional function of expanding the meaning of the term "protected" to include substantive minimum rights to be conferred by the members or that such minimum rights should include a minimal ability to use a trademark. Consequently, the WTO held that the requirement of Article 6quinquies Paris Convention to afford "protection as is" concerns a trademark protection that flows from the registration under the member's domestic law. Accordingly, the WTO did not find that Australia violated its obligations under Article 2.1 TRIPs in conjunction with Article 6quinquies Paris Convention.

No requirement to allow registration of signs capable of acquiring distinctiveness under Article 15 TRIPs Agreement

Secondly, the complainants argued that Australia's plain packaging laws violated Article 15.4 TRIPs. The plain packaging laws were inconsistent with Article 15.4 TRIPs in that they operate to prevent the registration of signs that are capable of acquiring distinctiveness through use.

The WTO rejected this argument, too. According to the WTO, the obligation for members in Article 15.1 to consider distinctive signs as being capable of constituting a trademark does not require members to make eligible for registration as trademarks signs that are not inherently distinctive and that have not yet acquired distinctiveness through use. According to the WTO, the term "trademark" as used in Article 15.4 TRIPs does not encompass signs that do not meet the distinctiveness requirement.

The complainants further raised the argument that the plain packaging laws were inconsistent with Article 15.4 TRIPs in that they prevent certain signs from acquiring distinctiveness through use.

The WTO dismissed this argument. According to the WTO, the fact that Australia's domestic law allows the registration of signs that have acquired distinctiveness through use cannot imply that the use of such sign needs to be permitted on all goods and services, irrespective of the nature of the goods and services at issue. A contrary reading would imply that, whenever a member exercises the option of enabling registration of non-inherently distinctive signs on the basis of distinctiveness acquired through use. it would deprive itself of the possibility of determining the conditions under which signs or combinations of signs may or may not be used in relation to specific categories of goods or services.

The complainants also asserted that the plain packaging laws were inconsistent with Article 15.4 TRIPs in that they reduce the protection flowing from registration for tobacco-related trademarks because of the nature of the product.

The WTO did not accept this argument either. According to the WTO, Article 15.4 TRIPs does not stipulate an obligation that the scope and content of trademark protection flowing from such registration has to be the same notwithstanding the nature of the goods or services to which trademarks are or may be applied. The WTO therefore concluded that any consequences of the restrictions on the use of such trademarks does not constitute a violation of Article 15.4 TRIPs. Article 15.4 TRIPs only relates to the availability of protection through the act of registration, which remains available for tobaccowrelated trademarks under the disputed measures.

No obligation to safeguard market conditions for maintaining distinctiveness under Art. 16 TRIPs Agreement

Additionally, the complainants invoked Article 16.1 and

16.3 TRIPs. They argued that the plain packaging laws resulted in a loss of distinctiveness of their trademarks, which would eventually diminish the scope of protection and turn the original trademarks into mere paper rights without any commercial value. The complainants argued this for registered trademarks as well as for well-known trademarks under Article 16. TRIPs.

The WTO rejected these arguments. In the WTO's opinion, the situation described by the complainants as the basis for their claim was a reduction of the instances in which a "likelihood of confusion" would arise in the market with respect to tobacco-related trademarks whose use is affected by the plain packaging laws. According to the WTO, reducing the instances in which "likelihood of confusion" may arise does not constitute a violation of Article 16.1 TRIPs. There is nothing in the text of Article 16.1 TRIPs to suggest an obligation by members not only to provide protection where "likelihood of confusion" does arise but also to maintain market conditions that enable a "likelihood of confusion", to actually occur in a particular situation. To conclude otherwise would broaden the scope of Article 16.1 TRIPs to encompass an additional right to protect against reduction of distinctiveness of a trademark or even a right to protect against lesser awareness of a trademark among consumers.

The WTO clarified that Article 16.1 TRIPs is merely a right to prevent infringing uses but does not serve to maintain or extend the distinctiveness of an individual trademark, which inevitable fluctuates according to market conditions and the impact of regulatory measures on those market conditions.

The WTO also considered whether Article 16.1 TRIPs obligates members to provide a minimum opportunity to use trademarks. The WTO concluded that Article 16.1 TRIPs does not require members to refrain from regulatory measures that may affect the ability to maintain distinctiveness of individual trademarks or to provide a "minimum opportunity" to use a trademark to protect such distinctiveness.

Finally, the WTO analysed whether the plain packaging laws erode a trademark owner's right to prevent a use that is likely to result in confusion by requiring the use of deceptively similar marks on identical products. According to the WTO, while the plain packaging laws introduced mandatory design features with respect to the appearance of tobacco products and packaging, the right to prevent trademark infringements remains available to owners of registered tobacco trademarks in Australia. The plain packaging laws did not impede the trademark owners' right to prevent the use of a brand or a variant of words that are identical or similar to an existing registered trademark in a manner that creates a likelihood of confusion. The mandatory nature of the plain packaging laws has not left trademark owners without adequate remedy.

Similar arguments were made with regards to Article 16.3 TRIPs, which relates to well-known trademarks.

According to the WTO, the members do not have an obligation to prevent a reduction in the factual occurrence in the market place of situations that would trigger well-known trademark protection. The reduction of such occurrence does not constitute a reduction in the availability of protection mandated by Article 16.3 TRIPs. In other words, while Article 16.3 TRIPs obligates members to protect currently well-known trademarks, they do not require members to provide such protection for trademarks that do not, or do no longer, fulfil these criteria – and not doing so is therefore not a violation of Article 16.3 TRIPs.

No unjustifiable encumbrances under Article 20 TRIPs Agreement

The complainants argued that the plain packing laws constituted a violation of Article 20 TRIPs according to which the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

The WTO held that a limitation of the use of the trademark as such, as any other measure, cannot be held unjustifiable exclusively due to its "extreme nature". According to the WTO, measures that involve a high degree of encumbrance, such as those in the plain packaging laws are not per se unjustifiable. Rather, they must be measured against the same standard of review as other special requirements contained in other measures. Furthermore, the WTO held that a member's compliance with its own domestic regulatory procedures does not, in itself, determine whether a member has complied with its obligations under Article 20 TRIPs. Domestic procedures do not need to be taken into consideration for determining whether a limitation of the use of a trademark is justifiable or not. Moreover, the WTO clarified that the examples given in Article 20 TRIPs may be justifiable according to the circumstances of the case.

In the view of the WTO the term "unjustifiably" in Article 20 TRIPs provides a degree of latitude to a member to choose an intervention to address a policy objective. This intervention may impact the use of trademarks in the course of trade, as long as the reasons sufficiently support any resulting encumbrance. This does not oblige the member to refrain from a certain intervention if an alternative measure involving a lesser or no encumbrance on the use of trademarks is available. However, in the circumstances of a particular case the availability of an alternative measure could call into question the reasons for the adaption of a measure challenged under Article 20 TRIPs. This might be the case in particular if a readily available alternative would lead to at least equivalent outcomes in terms of the policy objective of the challenged measure.

Overall, the WTO was not persuaded that the complainants have demonstrated that Australia has acted beyond the bounds of the latitude available to it under Article 20 TRIPs. The WTO recognized that trademarks have substantial economic value and that the special requirements are farreaching in terms of the trademark owners' possibilities to extract economic value from the use of figurative or stylized features of trademarks. However, the WTO also noted that the plain packaging laws, including their trademark restrictions, are an integral part of Australia's comprehensive tobacco control policies. The WTO further noted that Australia, while having been the first country to implement tobacco plain packaging, has pursued its relevant domestic public health objective in line with the emerging multilateral public health policies in the area of tobacco control as reflected in the FCTC and the work under its auspices, including Article 11 and Article 13 FCTC guidelines.

The position in Europe

The WTO decision will give impetus to the political plans of many European governments to impose plain packaging rules for tobacco products. Corresponding laws have been in force in France, the UK and Norway since 2017. Ireland, Hungary and Slovenia will follow shortly.

However, this is countered by the immense costs to which states are exposed through complaints by the tobacco industry against corresponding laws and a highly controversial, actual use of plain packaging against the consumption of tobacco products. According to the Australian Senator Rex Patrick, Australia's costs for defending the controversial law amount until today to approximately 25 million.

At EU level, the Tobacco Directive 2014/40/EU already sets binding requirements for Member States on the presentation and sale of tobacco products. For example, a warning notice is required which accounts for 65% of the total package of the tobacco product. In Germany, the Tobacco Products Act in force since May 2016 has implemented the EU Tobacco Directive into national law. Although the EU Tobacco Directive does not prescribe plain packaging for tobacco products, its introduction is expressly at the discretion of the member states if this is justified by the protection of public health.

The ECJ has ruled that the EU Tobacco Directive is legally permissible following the submission of a UK court. The national courts in France and the UK have also consistently considered the laws of their countries, which go beyond the measures prescribed by the EU Tobacco Directive, to be legally permissible and took the view that the restrictions of the tobacco industry were justified both in constitutional and trademark law terms by the high weight of public health.

From the point of view of an IP lawyer, the requirement of plain packaging on which word marks may at best be printed in a standardized font and size raises the question of the right-preserving use of figurative trademarks – in part with a high reputation – after the 5-year grace period. Even if „proper reasons for non-use“ (Art. 16 (1) EU Trademark Directive) can be seen in corresponding legal provisions, as adopted by the French Conseil d'État, it cannot be ruled out that this may be viewed differently by courts in other jurisdictions. However, this does not take into account the economic value of a trade mark which can decrease considerably by prohibiting its use in the form actually registered and can turn a trademark with a reputation into an ordinary registered trademark. Whether owners need to accept such a devaluation of existing trademarks without compensation is unclear.

Representatives of Honduras have already announced to appeal the decision. In this case, the WTO Appellate Body will have the last word.

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Preu Bohlig & Partner successful before the ECJ:

The data exclusivity period for all Member States participating in the decentralised (DCP) procedure is established when the Reference Member State (RMS) determines that agreement has been reached and may not be re-examined by national authorities.
(ECJ, judgment of 14 March 2018, Case C-557/16[1])

I. Introduction

For reference authorisations, Art. 10 of Directive 2001/83/EC governs the protection of the authorisation documents of the previous applicant and generally establishes a 10-year data exclusivity period, with an eight-year exploitation protection period followed by a two-year marketing protection period, which can be extended for an additional year under certain conditions, during which generic drugs may not be marketed. This is the so-called 8+2+1 provision, which is incorporated into Sec. 24b of the German Medicinal Products Act (AMG) in national law. Under Sec. 141 (5) AMG, it does not apply to reference medicinal products if their authorisation was applied for prior to 30 October 2005.

Under Art. 10 (1) in conjunction with (2) of Directive 2001/83/EC, the data exclusivity is initiated by the first authorisation granted under Art. 6 in conjunction with Art. 8 of Directive 2001/83/EC – i.e. by an acquis-compliant authorisation.

In this case, the first authorisation for a medicinal product containing Bendamustin – "Cytostasan" – was granted in 1971. However, it was granted in the former GDR by recordation in that country's Register of Medicinal Products. After German reunification, the medicinal product was initially deemed to be authorised under the provisions of the EC Legal Transition Regulation (EG-Recht-Überleitungsverordnung) of 18 December 1990 and then went through a retroactive authorisation procedure (Nachzulassungsverfahren), beginning with the filing of a timely application for renewal of the fictitious authorisation on 26 June 1991, by way of analogous application of the procedure in Art. 3 Sec. 7 of the Act Reorganising Medicinal Product Law. By decision dated 19 July 2005, retroactive authorisation was granted for the indications non-Hodgkin's lymphoma (NHL) and multiple myeloma (MM). Authorisation was denied for the indiciation chronic lymphatic leukaemia (CLL).

The two ECJ decisions regarding Nivalin, Case C-527/07, dated 18 September 2009, and Memantine,

1 Published in GRUR 7/2018, pp. 747 et seq.

Case C-195/09, dated 28 July 2011, generally established that a positive grant of retroactive authorisation constitutes an acquis-compliant authorisation within the meaning of Art. 6 in conjunction with Art. 8 of Directive 2001/83/EC and therefore initiates the data exclusivity period.

In this regard, it is also relevant that Art. 6 (1) subparagraph 2 of Directive 2001/83/EC provides that data exclusivity begins with the initial authorisation of a substance in the European Union, and all subsequent changes and expansions for the purposes of application of the document provisions are deemed to be components of the same comprehensive authorisation (global marketing authorisation).

The principle of global marketing authorisation conforms to the established case law of the European Court of Justice - ECJ, judgment dated 03 December 1998, Case C-368/96 "Generics"; ECJ, judgment dated 29 April 2004, Case C-106/01, "Novartis" – and must also be followed by national authorities. Under these judgments, no separate protection is granted for new indications.

The global marketing authorisation was implemented in national law in Sec. 25 (9) AMG. However, under Sec. 141 (9) AMG, this does not apply to medicinal products if their authorisation was applied for prior to 06 September 2005. The grant of the initial original authorisation is not controlling with respect to the reference date of 06 September 2005, but rather the granting of the subsequent change or expansion, so that, with respect to the question of the application of Sec. 25 (9) AMG, the focus must be placed on the granting of the subsequent authorisation – Higher Administrative Court (OVG) of Münster, decisions dated 11 October 2013, Case No. 13 B 2756/12, and 27 November 2014, Case No. 13 B 950/14.

After the expiration of the data exclusivity period, generic drugs may be authorised and placed on the market, and the originator cannot claim any infringement of its data exclusivity rights (see v. Czettritz, Strelow: "Consequences of the ECJ's judgment of 23 October 2014 (Case C-104/13) affirming an objective right under the Code of Administrative Court Procedure (VwGO) in the case of third-party objections", PharmR 2015, 96).

II. Facts

On 07 November 2011, Helm AG applied for authorisation to market the medicinal product Alkybend in a decentralised procedure, in which Denmark acted as the reference member state and Finland was one of several concerned member states, in an abridged procedure in accordance with Art. 10 of Directive 2001/83/EC. Ribomustin and Levact, both containing the active ingredient bendamustine, served as the reference medicinal products.

Authorisation for Ribomustin was granted by the Federal Institute for Medicinal Products and Medical Devices for the indications NHL and MM on 19 July 2005 under a retroactive authorisation procedure. Astellas Pharma held the authorisation for Ribomustin.

On 15 July 2010, Astellas received authorisation for Levact under a decentralised procedure, which also contained the active ingredient bendamustine, for the indications NHL, MM as well as for CLL, which had been denied under the retroactive authorisation procedure for Ribomustin. After receiving authorisation for Levact, Astellas waived the authorisation for Ribomustin.

After the conclusion of the DCP procedure, Astellas opposed the generic authorisations that had been granted in both the RMS and all the CMSs, arguing that its data exclusivity period had been infringed, because the

granting of the authorisation for Levact in France on 15 July 2010 was controlling with respect to the data exclusivity period in question and not the retroactive authorisation granted in Germany on 19 July 2005.

Astellas asserted this in Germany, the Member State in which the first authorisation for the active ingredient bendamustine was granted on 19 July 2005 (Ribomustin), as well as in the RMS, which coordinated the respective DCP procedure, and in all the CMSs, which participated in the DCP procedure. Gradually, negative decisions were issued in the individual Member States, which all confirmed the lawfulness of the national authorisations granted – with varying degrees of clarity.

Against this background, the Supreme Administrative Court in Finland decided to stay the Finnish procedure and submit the following questions to the ECJ for a preliminary ruling.

III. Questions submitted

The Finnish court submitted two questions to the ECJ for a preliminary ruling.

First, the court wished to know whether Art. 28 (5) and Art. 29 (1) of Directive 2001/83 should be interpreted to mean that the competent authority is authorised to determine the starting date of the data exclusivity period of the reference medicinal product when granting national authorisation.

Second, if the answer is "no", whether a court may examine the starting date of the data exclusivity period in response to an appeal by the originator, or whether the court is subject to the same restriction as the authority. In addition, the Finnish court wished to know how effective judicial protection can be provided to the originator under Art. 47 of the Charter and Art. 10 of Directive 2001/83 with respect to data exclusivity and whether this includes an obligation for the courts of the individual states to examine whether the initial authorisation to market the reference medicinal product granted in another Member State was issued in conformity with the provisions of Directive 2001/83.

IV. The ECJ decision

The ECJ answered the first question submitted in the negative and found that the competent national authorities have no authority to decide the starting date of the data exclusivity period. Its rationale was that the decentralised procedure ends when the reference member state determines that all the Member States in which an application for marketing authorisation was filed have reached agreement. Once it has been determined that all the Member States have reached agreement, the competent authorities in the Member States are no longer able to question the results of this procedure when issuing their decisions regarding the marketing of these medicinal products on their sovereign territory. The expiration of the data exclusivity period of the reference medicinal product was examined in this procedure, so

that the competent authorities in these Member States cannot make a new examination after agreement has been determined.

With respect to the second question submitted, the ECJ found that the originator must be able to challenge the determination of the starting date of the data exclusivity period in an appeal so as to protect its rights. It follows that, to ensure effective judicial protection, the originator can assert its data exclusivity rights before a court of the Member State whose competent authority made the decision on the authorisation to market the generic drug. However, the originator is not permitted to question this in other Member States.

Accordingly, the ECJ answered the second question by stating that Article 10 of Directive 2001/83 in combination with Article 47 of the Charter are to be interpreted to mean that a court in the affected Member State is authorised to review the determination of the starting date of the data exclusivity period of the reference medicinal product.

However, this court is not authorised to determine whether an initial authorisation to market the reference medicinal product, which was granted in another Member State, was consistent with this Directive.

V. Summary

Based on this pleasing decision of the ECJ, it can be assumed that, in the future, separate complaints contesting the granting of a generic authorisation will no longer be filed in every affected Member State. This will save time and costs and further contribute to harmonisation of the EU's Single Market in the medicinal product sector.

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