

**COHAUSZ & FLORACK**

**CFUpdate**

**Intellectual property rights at trade fairs**



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# Introduction

It's fair time – time to show your customers and industry partners how your company has developed in the last few months. The ideas it has pushed forward. And what innovations have emerged from those ideas. Exciting days lie ahead of you — days in which you can make new contacts and feel confident that your team's effort was well worth it. In addition, you also have the opportunity to bring new inspiration to your own business. This may come from other exhibitors or even from your potential competitors.

So a trade fair is a large market of possibilities, a true platform for ideas – but therefore it is also a platform for counterfeiting. This guide serves to help you find out more about how you can already protect the intellectual property (IP) of your company in the time leading up to a trade fair. You will also be shown what to do if during a trade fair you notice that a competitor has infringed your IP rights. In the event that you yourself are accused of having infringed someone else's IP rights, the following pages will also give you useful tips. This brochure gives you the necessary tools to provide effective security for yourself and your company's IP rights.

We wish you a successful trade fair!

Your COHAUSZ & FLORACK team

# The trade fair begins – are you well prepared?

## Registering IP rights

Good ideas are worth a lot: As an innovative company they help you secure your position in the market and to get ahead and stay ahead of the competition. However, this can only be the case if you take your IP rights seriously and register them accordingly. This could be, for instance, in the form of (1) trademarks, which, for example, apply to product names or logos, (2) technical inventions, which are protected by utility models or patents, or (3) designs, which are covered by registered designs and design patents.

Particularly in the time leading up to a trade fair, the registration of IP rights is strongly recommended. In this way you can protect your intellectual property before it becomes known to the public and accessible to third parties – and thus also to the competition. Additionally, when you purchase rights, you should also ensure that you are listed as the registered holder of the respective IP rights in the official register. This is an important prerequisite for you to assert your rights if worse comes to worst.

Incidentally, early registration is particularly important for patents before trade fairs: Technical inventions that are presented at a trade fair are said to have been made public and are therefore no longer “novel” under patent law. The requirement for a patent application would therefore no longer be fulfilled. In order to avoid such consequences, anyone who wishes to present a technical invention at a trade fair and has not applied for a patent yet, should nevertheless do so on the same day.



## The trade fair begins – are you well prepared?

### Applying for border seizures

Trade fairs are an ideal source of inspiration for your company. This is where you can inform yourself about new products on the market and about the areas in which your competitors are active. Unfortunately, you may then also find out that counterfeits are in circulation. So what precautionary measures can you take? For example, you generally have the possibility of filing a free “border seizure application” at the Zentralstelle Gewerblicher Rechtsschutz (ZGR). If this application is granted, the customs authorities will withhold suspicious goods that are to be introduced into the EU or Germany. You, as the holder of the IP rights, are then entitled to closely examine the goods. To do so, you are given extensive information and upon request also samples of the retained products.

Should the customs applicant or owner of the goods not agree to the destruction of his products, you also have the possibility of initiating a judicial (express) procedure. This will clarify whether an infringement on IP rights actually exists. Through a court order you can then determine that the goods will be retained further (for the time being).

It is crucial for your border seizure application that you submit preferably accurate and simple instructions

with which customs officials can check whether an infringement of IP rights is at hand. This particularly applies to patents that sometimes describe technically complex objects. Without clear and understandable instructions, it is not guaranteed that customs officials will be able to identify patent-infringing goods as such.

Incidentally, should suspicious products initially be introduced despite a border seizure application, the customs authorities can still become active even during a trade fair.



# Your own IP rights have been violated? This is how you proceed

## Preliminary injunction

If you notice during a trade fair that a competitor has products that violate your IP rights, you have the possibility of applying for a preliminary injunction. This can be issued within a short time after the application and often even without having to hear the opponent beforehand. The decree requires that you as the applicant state to the court your grounds and entitlement for the injunction. The grounds for the injunction require a particular urgency of the matter. This urgency – i.e. the fact that you cannot wait for a decision through an ordinary complaint procedure – should be set forth by you. In this case, your entitlement results from the infringement on your IP rights by the competitor. This claim is usually for injunctive relief. If granted, the competitor is barred from offering the product.

In patent law, however, the hurdles for injunctive relief are relatively high. A possible alternative to it is the so-called right to inspection. With it, you can have an appraiser examine the exhibited product at the trade fair in order to determine whether a patent infringement is in fact at hand.

Good to know: A preliminary injunction is not delivered by the court. Instead, you must deliver the document to the defendant using a bailiff – for example during the trade fair. In case of an infringement, you are entitled to enforce compliance with the injunction through fine or arrest for disobedience of court orders.

**Tip 1:** Even if a preliminary injunction is not subject to the statutory requirement to be represented by an attorney, it makes sense to hire an attorney or patent attorney to handle the issue.

**Tip 2:** You should immediately collect information and evidence with which the injunction claim can be made credible, such as catalogues or photos.

# The allegation of infringing IP rights – how you can defend yourself against it

## Safeguarding and proof of your own legal position

“The competition never sleeps”. When it comes to IP rights, this means that your competitors will also inform themselves about your exhibits. In certain circumstances it may then be necessary to react quickly in order to prove that your products are not infringing someone else’s IP rights. To do so, you should already prepare the necessary documentation, for example, licensing agreements, and be sure to bring the documentation to the trade fair in order to prove your own legal position, if necessary.

In order to defend yourself against the allegation of infringement, the following considerations are helpful:

- Is evidence available or are there reasons why your product should not fall under the scope of protection provided by the opposing IP rights?
- Do you have a right of use for the opposing IP rights (for example in the form of a license contract)?
- Are the opposing IP rights possibly exhausted? This would be the case, for example, if your product contains a provided product that was brought to the market with the consent of the IP rights holder.
- Was the product concerned already used by your company before the registration of the IP rights? For patents and utility models, the so-called right of prior use would then apply.
- Did the requirements for protection not actually exist at the time of registration, meaning that the IP rights are in fact not valid? In such a case you may, under certain circumstances, be able to request the deletion of the IP rights. This may also be considered as a means or argumentation in a protective letter (see next chapter).
- Have the granted IP rights already expired? This could be the case with unused trademarks.
- How long has the owner of the IP rights already been informed about my product? If he has been aware of it for a longer period of time, it might be possible to fend off the preliminary injunction as the owner of the IP rights can no longer base his case on the argument of urgency (see above).

# The allegation of infringing IP rights – how you can defend yourself against it

## The protective letter

If it becomes apparent leading up to the trade fair that one of your competitors might apply for an injunction against the presentation of your product, a protective letter is recommended. This should generally be deposited with the court that will presumably receive the application for a preliminary injunction. This is where the central protective letter registry ([www.zssr.justiz.de](http://www.zssr.justiz.de)) is of great help, with which various district and state courts are connected. In that way your filed protective letter can reach several courts.

So why a protective letter? To give you an instrument with which to explain yourself. Because, a preliminary injunction may be issued even without hearing you – meaning that you, as the defendant, would initially have no means of presenting your arguments. However, with a protective letter you do. In it you can address certain aspects in advance and clarify them – for example, your entitlement to use IP rights, the missing entitlement of the applicant to use the IP rights, or the lack of urgency (see above).

**Tip 3:** Even if a protective letter is not subject to the statutory requirement to be represented by an attorney, it makes sense to hire an attorney or patent attorney to handle the issue.



## The allegation of infringing IP rights – how you can defend yourself against it

### Dealing with a preliminary injunction

If your competitor has obtained a preliminary injunction, you should prepare for a bailiff coming to your stand at the trade fair – and initially comply with his requests. In this case you should closely examine the content of the decision, in particular the precise extent of the prohibition. Caution: Should you not immediately adhere to the prohibition, you may be subjected to a fine or may even be arrested for the disobedience of court orders.

At a later stage you should of course check the legal options with which you can defend yourself. If the injunction has been issued without a hearing, you may appeal. The court will then set a date for the hearing, after which it will make a decision again. However, it usually takes several weeks until such a decision is reached. Together with the appeal, you can also request that compulsory enforcement is ceased for the time being. The decision on such an application can often follow within a short period of time. However, it is usually rejected by the courts, meaning that it generally only makes sense in exceptional cases.

The good news for you as a defendant: If the preliminary injunction has been wrongly issued against you, the applicant must provide compensation. You should therefore document the damage arising from the injunction precisely and collect the respective evidence. Furthermore, your claim for damages also gives you the possibility of negotiating a settlement with the applicant until the court has made a final decision.

# Checklist

## Measures to secure your own products:

-  Register IP rights for your exhibits prior to the trade fair (patents, utility models, registered designs and trademarks)!
-  File a border seizure application at the Zentralstelle Gewerblicher Rechtsschutz (ZGR)! This will prevent conspicuous products that may violate your IP rights from being imported into the EU or Germany. Even during the trade fair, customs authorities can still intervene and take the products out of circulation.
-  Take a tour of the exhibition grounds as early as possible at the beginning of the trade fair in order to detect possible violations. Collect information about possible infringers and infringement objects.
-  Take action as early as possible against conspicuous products that infringe your IP rights at the trade fair! Seek a temporary injunction from the court for this purpose. Make clear that urgent action is required (“grounds for the injunction”) and present the extent to which your IP rights have been violated (“entitlement for the injunction”).

-  In your organization, identify persons who may submit written witness statements (affidavits).

## Measures to defend yourself against the accusation of property right infringement:

-  If you yourself are accused of infringing a property right at the trade fair, gather counterarguments to defend yourself and keep the relevant documents ready to confirm the legality of your use.
-  If it already becomes clear leading up to the trade fair that a preliminary injunction is pending, draw up a protective letter – ideally with the support of an attorney or patent attorney – and deposit it in the central protective letter registry (ZSSR).
-  In the case of a preliminary injunction: Comply with the prohibition by the bailiff at the fair stand! You can check the legal options with which you can defend yourself later on.

## About COHAUSZ & FLORACK

COHAUSZ & FLORACK is an interdisciplinary firm of patent attorneys and attorneys founded in 1954 and based in Düsseldorf that combines technical and scientific know-how with legal competence. 21 patent attorneys and four attorneys currently work for the firm. In total, the firm has more than 110 employees.

Our consulting services include all aspects of IP rights, as well as the adjacent areas of law such as unfair competition and contractual matters. This is where we assist our national and international clients in everyday business matters as well as in dealing with specific conflict situations.

COHAUSZ & FLORACK is a service provider in legal matters as well as a strategic management consultant for the legal aspect of the trademark and innovation policies of our clients. We have particular expertise in the design, registration, tracking and management of extensive IP rights portfolios.

COHAUSZ & FLORACK represents clients in all legal disputes relating to IP rights before state courts and offices, also within the framework of alternative dispute resolution. Our clients include DAX and Dow Jones-listed international corporations as well as innovative medium-sized companies from all over Germany.

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