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Amendments and additions to protective letters in Switzerland

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Swiss procedural law foresees the possibility to file a protective letter if someone believes it will be confronted with a request for ex-parte interim measures without being heard. The corresponding provision of the Swiss Civil Procedure Code (CPC) reads as follows:

1 Any person who has reason to believe that an ex-parte interim measure [...] will be applied for without prior hearing, may set out his or her position in advance by filing a protective letter.

2 The opposing party shall be served with the protective letter only if he or she initiates the relevant proceedings.

3 The protective letter becomes ineffective six months after it is filed.

In its decision of 9 February 2016 the Federal Patent Court (FPC) now clarified what amendments and additions can be made to a protective letter which had been filed at an earlier stage.

The President of the FPC held that addendums to a protective letter could only be made if the factual circumstances have changed during the six month period a protective letter will be considered by the FPC or if a party would be allowed to introduce new facts into proceedings after the exchange of briefs.

It is not possible to amend a protective letter if there are no admissible new facts. According to the President of the FPC, addendums to protective letters are limited to *novae*. In case an addendum covers admissible *novae* as well as facts that were already known when the protective letter was filed, the amendment shall not be taken into consideration.

Further, the President of the FPC held that amendments and additions which bring admissible new facts had to fulfil the same conditions as briefs in civil litigation. Thus, available physical records which serve as evidence have to be filed together with the addendum to the protective letter. Notably, it is not sufficient to refer only to the address of a website as the applicants did in the case at hand. Since websites are

subject to constant changes, a current screenshot of the website is to be put on file as evidence.

If a party would like to file an amended version of a protective letter but cannot meet the *novae* criteria said party will have to file a new protective letter. This triggers new fees of CHF 1,000 – 2,000 according to the FPC's fee schedule.

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