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German Courts Differ on the IP Infringing Character of the Presentation of a Product at an International Trade Fair

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In recent time the trademark, copyright and competition law senate (1st senate) of the Federal Court of Justice (FCJ) and one of the patent senates of the Düsseldorf Higher Regional Court have issued conflicting decisions on the question of whether the presentation of a product at a trade fair in Germany constitutes an IP infringing offer.

Under German law the exclusive right of the patentee includes the act of offering a product which uses the patented invention. The meaning of offering is very broad since it does not only cover offers within the meaning of contract law but all acts which from an objective point of view make a patent infringing item available for purchase. With regard to the exhibition of products at trade fairs there is case law, though, saying that trade fairs are not generally held for sales purposes. In an older judgment the FCJ's patent senate (10th senate) decided that taking part in an exhibition where companies only present their achievements does not amount to a patent infringing offer, unless it is a sales event. In 2010 the FCJ's 1st senate held that the presentation of a product at an international trade fair in Germany does not constitute an offer to domestic customers, unless it can be shown that the company presenting the product has invited domestic customers to purchase the product. In the opinion of the 1st senate the presentation of a product at an international trade fair in Germany does not even establish the presumption that this product will also be offered or sold on the domestic market. The 10th senate of the FCJ has so far not rendered a decision on that topic in recent time. However, the patent board of the Mannheim Regional Court applied the case law of the FCJ's 1st senate in preliminary injunction proceedings. Since the claimant there had only stated that the patent infringing product was presented at a trade fair, the court held the case to be not sufficiently clear for preliminary injunction proceedings and therefore rejected the request for a preliminary injunction. The case law of the 1st senate has been criticized since it is hardly conceivable that a company operating internationally will exhibit products at a trade fair in Germany without intending to sell the products exhibited in Germany, unless it is clear beyond doubt from the circumstances of the case that sales in Germany are out of question (see Haedicke/Timmann, Patent Law – A Handbook, 1st ed., 2014, § 8 para. 37).

On March 27, 2014 one of the two patent senates of the Düsseldorf Higher Regional Court (I-15 U 29/14) issued a [judgment](#) in which the court rejected the case law of the FCJ's 1st senate. Firstly, the court held that the presentation of a product at a trade fair which is located in Germany is typically a patent infringing offer in Germany, unless the defendant can prove the exceptional case

that the fair is only a show which does not aim at the sale of the products on display. In the opinion of the court companies regularly present their products at a trade fair in order to attract the visitors' attention and to facilitate the conclusion of transactions. Such activity is sufficient to establish a patent infringing offer. The claimant was not required to prove an individual offer by the defendant. Secondly, in view of the Düsseldorf court that reasoning also applies to cases where the defendant has its business seat abroad and has no intention to undertake business transactions in Germany. In such constellation the only requirement for a patent infringing offer is that in the audience's perception the defendant's offer is also directed to the domestic market. The visitor of a trade fair will regularly presume that this is the case, unless there is an explicit notification to the contrary.

The 1st senate of the FCJ had recently again the opportunity to revisit its case law on trade fairs (judgment of October 23, 2014, I ZR 133/13 – Biscuit Sticks). The written judgment is not yet published but a press release has been issued which is available on the court's [website](#). In that case the Turkish defendant did not market its product – biscuit sticks – in Germany, but the biscuit sticks were presented at an international trade fair that took place in Germany. The claimant sued the defendant for trade dress infringement, claiming that the defendant's products were almost identical copies of the claimant's biscuit sticks thereby causing likelihood of confusion. The Cologne Higher Regional Court had ordered the defendant to cease and desist from marketing its biscuit sticks. According to the Cologne court the presentation of the product at the trade fair entailed the risk that the defendant would also market its biscuit sticks on the domestic market. The FCJ disagreed on that point and therefore revoked the decision of the 2nd instance court and rejected the claimant's complaint. Following its previous case law the FCJ explicitly stated that the presentation of a product at an international trade fair in Germany which can only be accessed by professionals does not mean that the defendant will market its product on the domestic market.

For the IP practitioner the two conflicting decisions mean that different standards apply to the various fields of IP. The lower instance courts will follow the 1st senate's reasoning in the "Biscuit Sticks" case in trademark, copyright and competition law cases, since the 1st senate is responsible for these fields of law. Meanwhile the decision of the Düsseldorf Higher Regional Court suggests that patent courts will normally regard the exhibition of a product at a trade fair in Germany as a patent infringing offer. However, in order to facilitate its case, also the patentee should present facts to the court showing that the particular trade fair is a sales event directed at the domestic market. A uniform approach for all fields of IP law requires that in the future the patent senate of the FCJ will be seized with a case where the court has to decide on the same question. In case the patent senate will disagree with the 1st senate's approach, the case will be referred to the FCJ's greater senate in civil matters, unless the 1st senate relinquishes its current practice.

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