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Essential Changes in the Protection of Intellectual Property

Effects on the entrepreneurial everyday life

By Paul-Alexander Wacker,
Founder and Managing Partner,
KUHNEN & WACKER

Your doorman informs you at 8:00 o'clock in the morning that a bailiff is about to visit the metal press in your production plant, together with two police officers, an unknown patent attorney and an authorized expert. Do you know that you are only allowed to keep these gentlemen waiting for a maximum of two hours with the indication that your own patent attorney will accompany this inspection? Have you put up ropes with curtains in your workshop in such a way that other parts of the production can be sealed off during the inspection? Have you stored the programs of your electronic data processing system on separate data carriers in such a way that you can use the control orders of your "multisplit"-system with respect to data, time and product at any time for a presentation without also giving away other valuable information on a copy?

European Enforcement Directive

You should have checked all these and many other questions since September 1, 2008, the date on which the European Enforcement Directive was implemented in German Law and entered into force, with your patent attorney and should have introduced respective precautionary measures in order to be equipped against unpleasant surprises. Here are the most important bullet-points that should be discussed if you are the plaintiff or the defendant:

1. securing proof within the framework of a preliminary injunction before filing a lawsuit
2. submission of bank documents, financial, commercial, certification and programming documents as well as inspection of goods/property during



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- the process for the finding of facts and the assessment of damages.
3. information to and from uninvolved third parties
4. recall of infringing products and goods from commercial channels to the industrial ultimate consumer
5. simplified process for the destruction of goods which are stored by customs authorities without prior court decision within the boarder seizure regulation
6. publication of court decisions

Loopholes in the Product Piracy Act of 1990

Unfortunately, the Product Piracy Act of 1990 showed loopholes which facilitated the gigantic increase in product piracy, and, unfortunately Germany - which claims to be friendly to small and mid-sized enterprises in political orations - has only implemented the European Directive for Asserting Intellectual Property Rights into national law with a delay of four years as one of the last few European countries. Many promising lawsuits could so far not be conducted in most cases, due to a lack of reasonable possibilities for obtaining proof so that many small and mid-sized enterprises have resorted to keeping their new developments secret which became apparent from a drastic and continuous decrease in patent applications of these small and mid-sized enterprises. With the law changes that have finally been implemented for all kinds of intellectual property protection those small and mid-sized owners of intellectual property - that cannot threaten their adversaries with values in dispute that endanger their existence - can now again file applications for their process patents and are thus no longer exposed to the danger that valuable know-how is betrayed or spied on.

Illegal Imitation can be Prosecuted more easily

The new legal situation has increased the financial risk of infringers of intellectual property rights to such an extent that the illegal imitation can be prosecuted more easily on the one hand, and has lost its recent attractiveness, due to significant damages on the other hand. It remains to be seen, however, whether case law will actually demand the increased "special licence" reaching beyond the "retroactive normal licence" within the legal frame, or whether merely the more comfortable way of the "normal licence" percentage which increases the attractiveness for infringers, will be granted to the aggrieved



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have become known to the employer by means of explanation in text format. The increase in the grounds for a trademark opposition in respect of earlier company rights does in the future also help mid-sized enterprises to avoid cost-intensive lawsuits at civil courts.

Increase in Patent Filing Fees

The increase in the filing fees for patent applications containing more than 10 patent claims are disadvantageous since the German Patent and Trademark Office pays over a surplus of fees of as much as 40 million euros to the minister of finance. Insufficient payment, however, can result in the loss of the application. The internationally recognized special quality of the appointment in patent invalidity proceedings at the Federal Court of Justice (BGH) is going to deteriorate because the appointment of a neutral authorized expert involves extra work for federal court judges who are no longer willing to do this extra work. Instead, they wish to deal with other procedures which would represent an intellectual challenge.