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西盟斯律师事务所 科技、传媒和电信法中国研讨会

25 November 2018

2018年11月25日

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IP litigation in Europe and news for Chinese IT industry including FRAND

欧洲知识产权诉讼与对中国IT行业有用的信息（包括FRAND）

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25 November 2018
2018年11月25日

Overview 概要

- Patent litigation in Europe (general)
  欧洲专利诉讼（概述）
- IT cases and FRAND
  IT案例及FRAND
- Border detention
  边境查扣
- IP issues on trade fairs in Europe
  欧洲展会相关的知识产权问题
- Conclusions
  总结

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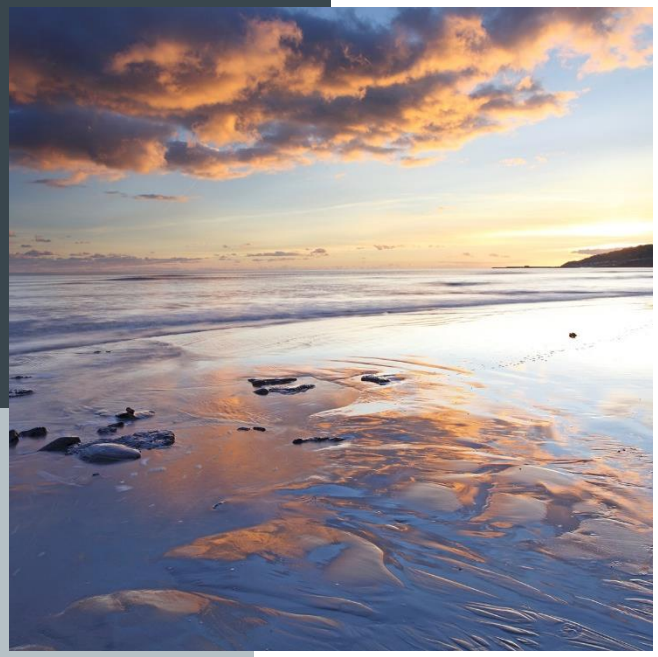
Patent litigation in Europe (general)
欧洲专利诉讼（概述）



General structure of litigation in Europe (1/6)
欧洲诉讼的一般结构（1/6）

- EU-wide procedures with cross-border effect are the exception
  具有跨境影响的欧盟范围内的程序属于例外情况
  - Opposition against European patents
    对欧洲专利局授予的欧洲专利的反对
- European Court of Justice stopped cross-border patent infringement cases
  欧洲法院停止审理跨境专利侵权案件
  - Cross-border preliminary injunctions in the Netherlands still possible
    荷兰的跨境禁令仍可适用
- EU Enforcement Directive
  欧盟执法指令
- Unified Patent Court (UPC) system will be the future
  统一专利法院体系将是专利案件的未来

Patent litigation
专利诉讼

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General structure of litigation in Europe (2/6)
欧洲诉讼的一般结构（2/6）

Forum shopping
法庭的选择

- National procedures are still the rule
  专利诉讼仍由各国国内法庭审理
- Choices where to bring actions
  起诉地点的选择
  - BUT:
    但需考虑:

Practical effects of judgment by the “bigger” countries
“大”国审判的实际效果

Quality, speed and experience of national courts count
国内法庭的质量、速度和经验都很重要

More than half of the European patent litigation cases are heard in Germany (Düsseldorf, Mannheim, Munich)
超过一半的欧洲专利诉讼案在德国进行庭审（杜塞尔多夫、曼海姆、慕尼黑）

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General structure of litigation in Europe (3/6)
欧洲诉讼的一般架构（3/6）

- Major jurisdictions offer quick, straightforward procedures
  主要法域的专利诉讼程序比较快和直接
- No discovery (except in UK and Ireland)
  没有证据开示程序（除了英国和爱尔兰）
- No excessive costs
  没有过高的成本
- No triple damages
  没有三重损害
- Preliminary injunction, ex-parte injunctions (without oral hearing) also available; in particular in non-technical matters
  初始禁令、单方禁令（无口头听证会）仍然适用; 尤其是在不涉及技术性的案件中

No US-style procedure

非美国式程序

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General structure of litigation in Europe (4/6)
欧洲诉讼的一般结构（4/6）

Importance of written documentation
书面文件的重要性

- Most national IP procedures rely on written submissions and written documentation
  大多数国家专利程序都基于书面递交的文件进行
- UK and Ireland have more extensive trials
  英国及爱尔兰更多用审判的方式
- Importance of experts varies from country to country
  专家在专利案件中的重要性在不同的国家各不相同
  - Crucial for trials in the UK
    在英国非常重要
  - Countries with less experienced judges tend to rely on expert opinion
    在法官经验不足的国家更依赖专家意见

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General structure of litigation in Europe (5/6)
欧洲诉讼的一般结构（5/6）

- Role of the judge also varies from country to country
  法官的作用在不同的国家也各不相同
  - Traditional judges hesitate to express preliminary views
    传统法官对表达初步意见持保守态度
  - Very active role of the judge in Germany in steering proceedings
    德国法官则在指导诉讼的过程中非常主动
- Judges are in many cases experienced
  很多案件中，法官都具有丰富的经验
  - Specialised courts for IP matters in most jurisdictions
    大多司法管辖区都设有专门处理知识产权争议的法院
  - Some countries even have specialised chambers and judges for patent matters
    有些国家甚至有专门的专利法庭和法官

Judges and courts
法官及法庭

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General structure of litigation in Europe (6/6)
欧洲诉讼的一般结构（6/6）

- Trend: judges start to exchange views on cases
  趋势：法官开始就案件交换观点
  - Decision by the German Federal Supreme Court: foreign judgments need to be taken into account
    德国联邦最高法院的决定：需考虑外国判决

- Duration of proceedings varies from country to country
  诉讼过程所需的时间在不同的国家不一样
  - IP right infringement proceedings on the merits may in some countries only take a year or less (UK, Germany, Netherlands)
    某些国家（英国、德国、荷兰）的知识产权侵权诉讼可能只需要一年或更短时间
  - Even countries which had slower proceedings are trying to be quicker
    即使是程序较慢的国家也在试图加快诉讼程序
  - Judgments (e. g. injunctions) can be directly enforceable (usually against a bank guarantee)
    判决（例如禁令）可以直接被强制执行（通常银行保函可以直接申请执行）

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Warning letters 警告函

- Warning letter to infringer quite common in Germany (“Abmahnung”)
  在德国，给侵权人发警告函非常普遍（“警告”）
- Cost implication for IP owner if letter not sent before litigation started
  诉讼开始前若未向侵权人发出警告函对知识产权所有权人的成本影响
- A threat will be deemed to be unjustified if
  侵权威胁在以下情况下不成立：
  - The patent is found to be invalid and/or not infringed；and
    该专利被认为无效和/或未被侵害；且
  - The patentee know or ought reasonably to have known the same
    该专利权人知道或应当知道此情况
- request for declaration why one is entitled to use (“Berechtigungsanfrage”)
  （比警告函轻一点的方法），要求侵权人说明为什么有权使用
- Recommendation: examine carefully
  建议：仔细检查

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Preliminary/interim injunctions (1/3)
预先/临时禁令（1/3）

– Germany 德国

Preliminary injunction regularly granted in trademark infringement cases, but today also in patent cases
预先禁令在商标侵权案件中常见，如今在专利案件也会使用

Possible without hearing as ex-parte, in particular in a trade fair situation,
or with a hearing within approximately several weeks after service of the motion
可能（尤其是在开展会的情况下）单方申请（没有庭审），或在数周内庭审

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Preliminary/interim injunctions (2/3)
预先/临时禁令（2/3）

- General requirements 一般要求

  Easy for judge to understand 案件易于法官理解

  Patent apparently valid (e. g. has stood up to opposition/nullity action)
  专利显然是有效的（例如，已经经过被反对/无效的挑战）

  Element of urgency 紧迫性

  Facts supported by documents 事实有文件支持

  Filing protective letter (“Schutzschrift”) as counter-measure
  提交保护信（“保护信”）作为应对措施

- Also available in the Netherlands and the United Kingdom
  在荷兰和英国也可以适用

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Preliminary/interim injunctions (3/3)
预先/临时禁令（3/3）

- Effect of protective letters 保护信的作用
  - Depending on the quality of arguments and documents provided in the protective letter
    取决于保护信中的论据和文件的质量
  - The court may be more inclined to determine an oral hearing
    法院可能更倾向于决定口头庭审
  - Protective letters may prevent surprise injunctions at trade fairs
    保护信可以防止在展会中出现意外的禁令
  - BUT: weak protective letter can be ignored by the court
    但是：法院对于不具有说服力的保护信不予采纳

Preventive measures – Germany
保护措施– 德国

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Infringement and validity – heard together? (1/3)
专利侵权及专利效力诉讼程序 – 可否同时审理?（1/3）

- Germany – no
  德国 – 不可以
- United Kingdom – yes
  英国 – 可以
- The Netherlands – yes
  荷兰 – 可以
- France – yes
  法国 – 可以

Bifurcation in Germany
德国：专利侵权及专利无效两个程序相互独立

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Infringement and validity – heard together? (2/3)
专利侵权及专利效力诉讼程序 – 可否同时审理?（2/3）

- Germany 德国

  – Proceedings are separate
  两个程序分开进行

  – Infringement proceedings are not often stayed until the final decision in the nullity proceedings is rendered
  专利侵权诉讼通常不会在无效申请程序完成之前中止审理

  – In particular if the patent has gone through contradictory validity proceedings (even EPO proceedings) the infringement court is not very much inclined to stay the proceedings
  尤其是在某专利在进行多个（意见不一致的）专利无效程序（包括欧洲专利局无效程序）的情况下，侵权法院不愿意因为其他的专利无效程序而中止审理手里的专利侵权诉讼案件

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Infringement and validity – heard together? (3/3)
专利侵权及专利效力诉讼程序 – 可否同时审理?（3/3）

- United Kingdom/The Netherlands/France
  英国/荷兰/法国
  - Nullity and infringement issues are dealt with together
    专利无效和专利侵权同时处理
  - In nullity proceedings the patentee may counterclaim for infringement and in infringement proceedings vice versa. Both issues will be decided at trial
    在专利无效的程序中，专利权人可以反诉专利侵权，反之亦然。两个问题将被一起审理

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Trends in patent litigation – choosing the right forum (1/3)
专利诉讼的趋势 – 选择对的法庭（1/3）

- Significant competition between the courts in Europe
  欧洲各法院之间的重大竞争
  - Even within Germany: example preliminary injunction
    即使在德国之内，法院竞争也存在：预先禁令就是一个例子

- Bifurcation favours patentee to litigate in Germany
  德国的专利侵权及专利无效相互独立审理制度，有利于专利权人在德国提起诉讼

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Trends in patent litigation – choosing the right forum (2/3)
专利诉讼的趋势 – 选择对的法庭（2/3）

- The Netherlands remain an important place to litigate
  荷兰也是专利诉讼的重要地点
  - Validate the patent in the Netherlands
    在荷兰验证专利有效性
  - Import hub to Europe
    是进口到欧洲的枢纽

- English courts are quick and thorough
  英国法庭速度快且深入透彻
  - Issue: costs
    问题：费用

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Trends in patent litigation – choosing the right forum (3/3)
专利诉讼的趋势 – 选择对的法庭（3/3）

- Brexit?
  脱欧后？

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Trends in patent litigation – the future (1/2)
专利诉讼的趋势 – 未来（1/2）

- Single Unitary Patent effective throughout 26 of the EU Member States
  欧盟统一专利在26个欧盟成员国均有效
- For patentees enforcement of the Unitary Patent or the European bundle through a single court system in most EU countries
  专利权人可以：（1）或者强制执行其欧盟统一专利；（2）或者通过欧洲某一个国内法院就可以达到强制执行其欧洲所有专利的目的
  - Same procedure everywhere
    各地程序相同
  - Experienced judges everywhere and a technical judge in most cases
    各地法官都经验丰富且大多数案件中会配备一名精通专利技术的法官
  - Common appeal court ensures harmonisation
    统一的上诉法院进而确保裁判的一致性

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Trends in patent litigation – the future (2/2)
专利诉讼的趋势 – 未来（2/2）

- One set of proceedings, one set of costs
  一套程序、一套费用
- Speed – 12 months – to judgement in principle
  速度：原则上达到12个月内做出判决

- For defendants, removal of all threats in the EU with one counterclaim
  (in an infringement action) or a revocation action
  被告可以通过一个反诉（不管是禁令程序中的还是撤销专利程序中的反诉），达到整个欧洲范围均有效的目的

- Project is on hold due to a constitutional complaint in Germany and Brexit
  但本改革项目由于在德国的某相关的违宪指控以及英国脱欧事件被搁置了

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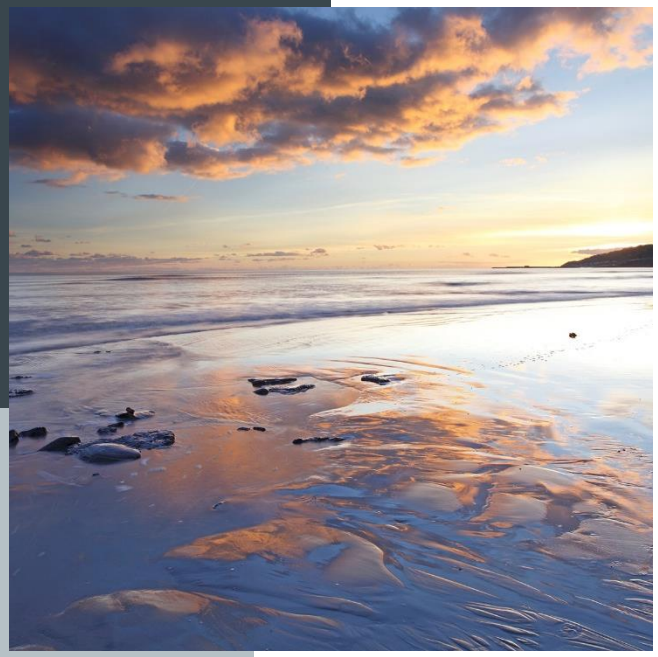
IT cases and FRAND
信息技术领域案例及FRAND条款



Qualcomm vs Apple (1/10)
高通诉苹果（1/10）

- Attempt by Qualcomm to promote its chipsets against Intel's chipsets
  高通发起诉讼打压英特尔芯片
- Litigation as tool to move Apple from Intel to Qualcomm
  意图通过诉讼使苹果放弃英特尔而使用高通芯片
- Main goal in Germany: injunction against Apple – stop product sales by Apple
  在德国诉讼的主要目的：禁止苹果销售手机

Background
背景

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Qualcomm vs Apple (2/10)
高通诉苹果（2/10）

- Germany as a jurisdiction where (1) injunctions are granted as ruled with (2) bifurcation and (3) at reasonably low cost and (4) a large market
  德国：可以申请禁令、侵权诉讼和无效程序平行进行、取得禁令的成本低、禁令覆盖的市场范围广
- Started in 2017, parallel US ITC actions
  2017年提起诉讼，同时期高通还向美国国际贸易委员会针对苹果提出专利侵权指控
- Apple's counter-actions based on antitrust law
  苹果基于反垄断法提出反诉

Background
背景

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Qualcomm vs Apple (3/10)
高通诉苹果（3/10）

- Litigation brought before the courts in Munich and Mannheim
  在德国慕尼黑和曼海姆两地提起诉讼
  - Technical experience of the judges
    法官拥有丰富的科技领域经验
  - Early oral hearing in Munich
    早先在慕尼黑进行了口头审理
- Numerous patent infringement actions in Germany
  (13 patents)
  在德国发起多件专利侵权诉讼（涉及13件专利）
- Patents relate to hard- and software (see examples on the following slide)
  专利涉及硬件和软件（具体见下页举例）
- No standard-essential patents (SEPs)
  不涉及标准必要专利（SEP）

Characteristics and status of German patent litigation today
德国专利诉讼的特点和目前进展

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Qualcomm vs Apple (4/10)
高通诉苹果（4/10）

- No injunction granted yet, one patent infringement claim dismissed by judgment of 11 October 2018 in first instance
  法院尚未颁布禁令，2018年10月11日一审判决驳回一项专利侵权主张
- Nullity actions (EPO opposition or national revocation actions) pending
  专利无效请求（向欧洲专利局的异议请求或在国家层面的撤销请求）尚在审理中

Characteristics and status of German patent litigation today
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Qualcomm vs Apple (5/10)
高通诉苹果（5/10）

Software patent: EP 1 995 529
软件专利：EP 1 995 529

- Possibility for a user handling one or more communication channels for communication with a certain party (voice or text) efficiently
  使某用户同时高效处理与一方或多方（通过声音或文字）的多个通讯频道的可能性

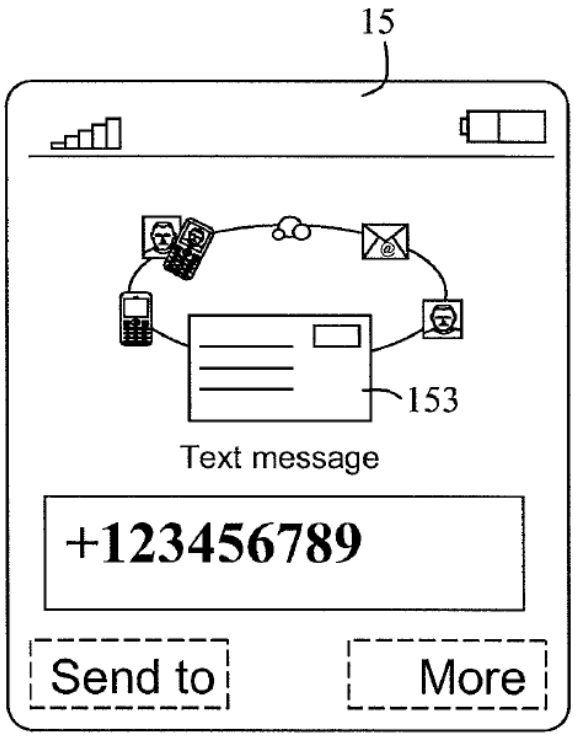

Fig. 3

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Qualcomm vs Apple (6/10)
高通诉苹果（6/10）

Hardware patent: EP 3 036 768
硬件专利：EP 3 036 768

- Patent addressing the issue of electromigration in a complimentary metal oxide semiconductor device to prevent a decrease in reliability of an integrated circuit
  一项解决金属氧化物半导体设备中电迁移而造成集成电路可靠性降低问题的专利

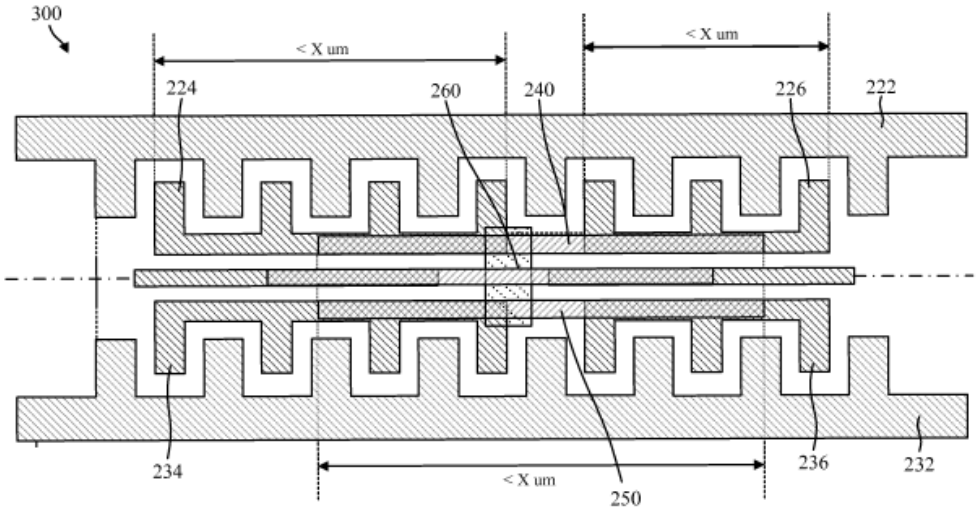

FIG. 3

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Qualcomm vs Apple (7/10)
高通诉苹果（7/10）

- Infringement
  专利侵权
  - Some patents not infringed
    某些专利未侵权
  - Often Qualcomm needed to narrow down patents due to validity challenges
    为避免专利无效，高通常常需要缩小专利权利要求
  - Patents newly granted: not gone trough opposition
    新授权的专利：尚未出现异议请求
- Validity
  专利有效性
  - Often questionable: stay of proceedings
    常常不确定：是否中止侵权诉讼
  - Specific issue: prior use rights - Qorvo chip
    具体问题：在先使用权利 - Qorvo芯片

Typical issues
典型问题

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Qualcomm vs Apple (8/10)
高通诉苹果（8/10）

- Interesting questions of the scope of the prior use right
  关于在先使用权利范围的讨论

Typical issues
典型问题

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Qualcomm vs Apple (9/10)
高通诉苹果（9/10）

- License
  专利许可
  - Has Qualcomm licensed the use of the patents?
    高通是否曾经许可使用这些专利？
  - License by prior use right?
    基于在先使用权利而强制许可？
- Antitrust law argument in patent case
  专利案件中反垄断法下的抗辩
  - Abuse by Qualcomm
    高通滥用市场支配地位
  - Patent litigation to drive Intel from the market for baseboard chipsets?
    通过专利诉讼来强迫英特尔退出主板芯片市场？

Typical issues
典型问题

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Qualcomm vs Apple (10/10)
高通诉苹果（10/10）

- Technical connection of the patent hardware with baseboard chipset? Is a switch at all possible?
  专利硬件和主板芯片之间存在技术联系？技术上是否存在替换的可行性？

- Antitrust law complaint filed at EU Commission
  向欧盟委员会递交反垄断申诉
- Antitrust law action in the UK and China
  在英国和中国提起反垄断诉讼

Typical issues
典型问题

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European Court of Justice: Huawei vs ZTE (1/5)
欧盟法院：华为诉中兴（1/5）

- Referral from the Düsseldorf court
  由杜塞尔多夫法院递交欧盟法院
- Standard-essential patents relating to the LTE standard
  有关长期演进技术（LTE）标准的标准必要专利
- Notified to ETSI and FRAND declaration provided
  华为向欧洲电信标准化协会作出FRAND声明
- Negotiation between the parties on license, but no agreement reached
  双方就许可展开谈判，但并未就许可协议达成一致

Facts
案件事实

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European Court of Justice: Huawei vs ZTE (2/5)
欧盟法院：华为诉中兴（2/5）

- Balance between free competition and protection of IP rights needs to be found
  寻求知识产权保护与自由市场竞争之间的平衡
- Limitations on exercise of IP rights based on the FRAND declaration → excessive use can be abuse of a dominant position
  基于华为FRAND声明，其行使知识产权应受到相应限制 → 过度行使知识产权可能构成滥用市场支配地位

Ruling
判决

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European Court of Justice: Huawei vs ZTE (3/5)
欧盟法院：华为诉中兴（3/5）

- If no agreement is reached, ECJ proposes a certain process
  如双方未达成协议，欧盟法院建议如下：
  - SEP owner must send prior notice to infringer (proud list)
    在发起专利侵权诉讼前，标准必要专利权人必须向侵权人发送侵权通知
  - Implementer must express willingness to conclude a license to FRAND terms (willing licensee)
    专利实施人必须明确表明愿意签订基于FRAND条款的许可协议

Ruling
判决

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European Court of Justice: Huawei vs ZTE (4/5)
欧盟法院：华为诉中兴（4/5）

- SEP owner must make FRAND offer and provide details of calculation
  标准必要专利权人必须发出基于FRAND条款的许可协议要约并提供专利许可费的具体计算方法
- Implementer must provide counter-offer at FRAND terms and provide security
  专利实施人必须基于FRAND条款提出反要约并提供相应担保
- Implementer keeps the right to challenge the validity of the patent
  专利实施人保留提出专利无效请求的权利

Ruling
判决

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European Court of Justice: Huawei vs ZTE (5/5)
欧盟法院：华为诉中兴（5/5）

- Consequence: numerous rulings by the German and English courts on interpretation of Huawei vs ZTE
  影响：德国、英国法院的众多判例参照了本案的解读

Ruling
判决

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Unwired Planet (UP) vs Huawei – High Court (1/6)
Unwired Planet (UP)诉华为 – 英国高等法院（1/6）

- Litigation in the United Kingdom
  在英国提起诉讼
- Enforcement of standard-essential patents by UP against handset manufacturers
  UP指控手机生产商侵犯其标准必要专利
- Patents concerned ETSI standards
  专利涉及欧洲电信标准化委员会颁布的标准
- Google and Samsung settled, Huawei not
  谷歌、三星先后选择和解，华为未和解
- 2 out of several patents found valid and essential
  涉案多件专利中2件被认定为有效且构成标准必要专利

Background
背景

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Unwired Planet (UP) vs Huawei – High Court (2/6)
Unwired Planet (UP)诉华为 – 英国高等法院（2/6）

- Remaining question in the dispute with Huawei: FRAND license
  遗留问题：FRAND许可
- Ruling from English High Court on 5 April 2017
  2017年4月5日英国高等法院作出判决
- Ruling from English Appeal Court on 23 October 2018 in principle agreed with the High Court
  2018年10月23日英国上诉法院作出判决，基本维持了高等法院的判决

Background
背景

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Unwired Planet (UP) vs Huawei – High Court (3/6)
Unwired Planet (UP)诉华为 – 英国高等法院（3/6）

- SEP owner can request implementer to sign a global license → implementer cannot limit scope to one patent or one region
  标准必要专利权人有权要求专利实施人签订全球性的授权许可→专利实施人不能要求仅授权许可某一项专利或某一个地区

- Only one FRAND license for any set of circumstances depending on equipment, mode and region
  针对某种特定情形（比如某种设备、型号、地域），只有一个FRAND许可

- Implementer risks injunction if it refuses FRAND terms determined by the court
  若专利实施人拒绝接受法院确定的FRAND条款，则可能面临被禁令

- The requirement of non-discrimination is not absolute
  非歧视原则并不要求绝对相同待遇

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Unwired Planet (UP) vs Huawei – High Court (4/6)
Unwired Planet (UP)诉华为 – 英国高等法院（4/6）

- Careful analysis of comparable licenses, taking into account cross-license, pass-through
  详细分析类似许可，考虑交叉许可、穿透许可
- Recent licenses by SEP-holders most important
  关注近期标准必要专利权人授予的许可
- Royalty payable for UP SEPs set by reference to a total royalty burden determined to be 3.1% for 3G infrastructure and 8.8% for multi-mode handsets
  UP标准必要专利的许可费率最终被确定为3G设备3.1%、多模设备8.8%

FRAND criteria
FRAND条款的确定

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Unwired Planet (UP) vs Huawei – High Court (5/6)
Unwired Planet (UP)诉华为 – 英国高等法院（5/6）

- Judge set UP royalty rate by assessing proportionate value of UP's portfolio relative to total SEP pool for each mode
  法官通过评估各型号设备中UP专利在整个标准必要专利池中的价值来最终确定UP专利的许可费率
- Differentiation by region
  针对不同区域市场而在基准费率上作出调整

FRAND criteria
FRAND条款的确定

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Unwired Planet (UP) vs Huawei – High Court (6/6)
Unwired Planet (UP)诉华为 – 英国高等法院（6/6）

Royalty rates
专利许可费率

	Major Markets		China and Other Markets	
	Handsets	Infrastructure	Handsets	Infrastructure
2G/GSM	0.064%	0.064%	0.016%	0.032%
3G/UMTS	0.032%	0.016%	0.016%	0.004%
4G/LTE	0.052%	0.051%	0.051%	0.026%

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Unwired Planet (UP) vs Huawei – Court of Appeal (1/3)
Unwired Planet (UP)诉华为 – 英国上诉法院（1/3）

- Note: limited review, FRAND calculation as such not contested
  上诉法院仅对部分问题进行审理，双方未就FRAND费率的计算提出争议
- SEP owner can claim a global license: no cherry-picking for implementer
  标准必要专利权人有权要求授予全球性许可，专利实施人不能挑选许可地域
- There is not only one FRAND license but court will have to determine whether the patentee's offer is FRAND
  不仅存在唯一的FRAND许可，但法院必须决定专利权人的要约是否符合FRAND
  - If this is confirmed by the court, the implementer has to accept or risk an injunction
    若法院认定专利权人的要约符合FRAND，则专利实施人必须接受该要约或面临禁令

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Unwired Planet (UP) vs Huawei – Court of Appeal (2/3)
Unwired Planet (UP)诉华为 – 英国上诉法院（2/3）

- "Non-discriminatory" is a flexible requirement: if SEP owner determines a benchmark, it cannot claim higher rates, but lower ones
  非歧视原则有一定的灵活性：若标准必要专利权人确定了许可费率的基准，则它不能要求高于该基准的费率，但有权采用更低费率

- Conditions of the ECJ in Huawei vs ZTE are not mandatory, but only safe harbour
  欧盟法院在华为诉中兴案中设置的条件并非强制性的，仅是避风港

- No automatic abuse by an SEP owner if not compliant with all steps of Huawei vs ZTE
  如未满足华为诉中兴案的所有条件，并不当然构成标准必要专利权人滥用专利权

- Only giving prior notice or consult before starting proceedings is mandatory
  在诉讼前，只有事先通知或协商是强制的前置程序

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Unwired Planet (UP) vs Huawei – Court of Appeal (3/3)
Unwired Planet (UP)诉华为 – 英国上诉法院（3/3）

- Consequences 影响:
  - English courts strengthen SEP holder‘s position
    英国法院强化了标准必要专利权人的权利
  - Implementer must be careful
    专利实施人必须谨慎
  - English courts will attract SEP litigation for global license
    英国法院此举可能吸引寻求全球唯一许可的标准必要专利诉讼

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Sisvel vs Haier (1/7)
Sisvel诉海尔（1/7）

- Similar facts to case in the United Kingdom
  与在英国的诉讼案情相似
- Enforcement of a standard-essential patent of Sisvel related to data transfer (GPRS)
  涉案专利是Sisvel持有的一项有关数据传输（GPRS）的标准必要专利
- Sisvel has given FRAND declaration to ETSI
  Sisvel已向欧洲电信标准化协会作出FRAND声明
- X4 Wireless Patent Program of Sisvel with 47 patent families
  包含47项专利组合的Sisvel X4无线专利项目
  - Standard-essentiality of patents has been contested
    专利的标准必要性遭受质疑

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Sisvel vs Haier (2/7)
Sisvel诉海尔（2/7）

- Sisvel offered global license, but negotiations failed
  Sisvel向海尔提出全球性许可要约，但协商失败

- Ruling of the Düsseldorf Appeal Court on 17 March 2017 appeal to the Federal Supreme Court filed
  2017年3月17日杜塞尔多夫上诉法院作出判决，上诉至联邦最高法院

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Sisvel vs Haier (3/7)
Sisvel诉海尔（3/7）

- After determination of standard-essentiality main dispute about FRAND
  上诉法院已肯定专利的标准必要性，最高法院主要审理FRAND条款的争议

- Court focuses on Art. 102 EC Treaty: abuse of dominant position, not on FRAND declaration
  法院着重审查欧共体条约第102条：滥用市场支配地位，而不是FRAND声明

- First step: market dominance required
  第一步：认定市场支配地位
  - Ownership of SEP not sufficient for dominance; but possibility to restrict competition on the downstream market (here the product market)
    持有标准必要专利并不足以构成市场支配地位，但可能限制下游市场（即产品市场）的自由竞争
  - Standard-essentiality is no assumption of market dominance: effects on the product market needs to be argued, but practically not too complex
    标准必要性并不当然构成市场支配地位，应实际考量其对产品市场的影响效果；实践中并不复杂

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Sisvel vs Haier (4/7)
Sisvel诉海尔（4/7）

- Second step: abuse required
  第二步：认定滥用市场支配地位
  - Court applied CJEU test of Huawei vs ZTE
    法院适用欧盟法院在华为诉中兴案中的标准
  - SEP holder as a rule must substantiate infringement in pre-litigation correspondence: claim-charts
    标准必要专利权人必须在诉前交流中说明侵权实质内容：专利侵权对照表
  - Implementer must declare to be a willing licensee: general declaration is sufficient
    专利实施人必须声明其愿意接受授权许可：概括声明即可
  - SEP holder must make a FRAND offer
    标准必要专利权人必须发出FRAND要约

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Sisvel vs Haier (5/7)
Sisvel诉海尔（5/7）

- Second step: abuse required (continued)
  第二步：认定滥用市场支配地位（续）
  - If no FRAND offer by SEP holder, the implementer does not need to make a FRAND counter-offer
    若标准必要专利权人未作出FRAND要约，专利实施人无需作出FRAND反要约
  - Process steps determined by the European Court in Huawei vs ZTE are important and need to be followed
    欧盟法院在华为诉中兴案中设立的程序十分重要，应当遵循

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Sisvel vs Haier (6/7)
Sisvel诉海尔（6/7）

- FRAND offer
  FRAND要约
  - Offer must contain royalty and details with regard to the calculation method
    要约必须包含许可费和许可费计算方法的细节
  - Offer must also contain standard provisions of a license
    要约必须包含许可的标准条款
  - SEP holder must provide reasons why his offer and the calculation are FRAND
    标准必要专利权人必须陈述其要约和许可费计算方法符合FRAND原则
  - Requesting a world-wide license can be FRAND
    要求签署全球性许可并不必然违反FRAND原则

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Sisvel vs Haier (7/7)
Sisvel诉海尔（7/7）

- FRAND offer (continued)
  FRAND要约（续）
  - Court will factually examine FRAND: no limited review; different opinion by the Karlsruhe Appeal Court?
    法院将从事实层面审查是否符合FRAND：不限于法律审查，与上诉法院观点相悖
  - Here, the court could avoid a detailed review because it concluded a case of discrimination (no equal treatment without objective reasons) problem: licensing policy
    本案中，法院无需进行细节审查，因为法院认定本案存在歧视（缺乏事实理由的不平等对待）。问题：许可政策

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Conclusion
结论

- Antitrust law defense beyond SEP cases remains difficult, but is available
  标准必要专利案件以外的反垄断抗辩仍然困难，但仍然存在

- SEP portfolios can be enforced in one litigation procedure in Europe (in the UK or Germany) → a request for a global license can be FRAND
  标准必要专利组合可在欧洲（英国或德国）一项诉讼程序中执行→要求全球性许可也是可以符合FRAND原则的

- In FRAND cases slightly different approaches between courts in the United Kingdom and Germany (Düsseldorf, Karlsruhe); open legal FRAND questions remain on the agenda
  FRAND案件中英国和德国（杜塞多夫、卡尔斯鲁厄）法院采取的思路略有不同；仍有未决的FRAND法律问题

- Europe as litigation venue for SEP holders?
  会有更多标准必要专利权人选择欧洲作为诉讼地？

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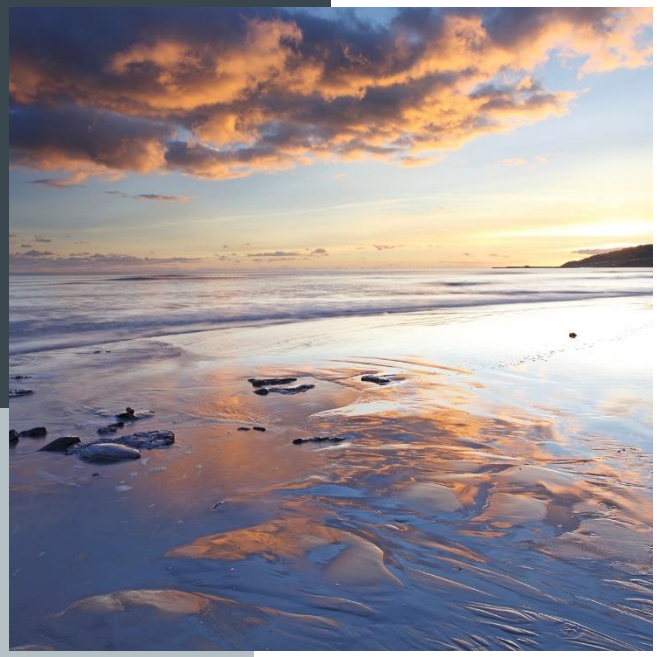
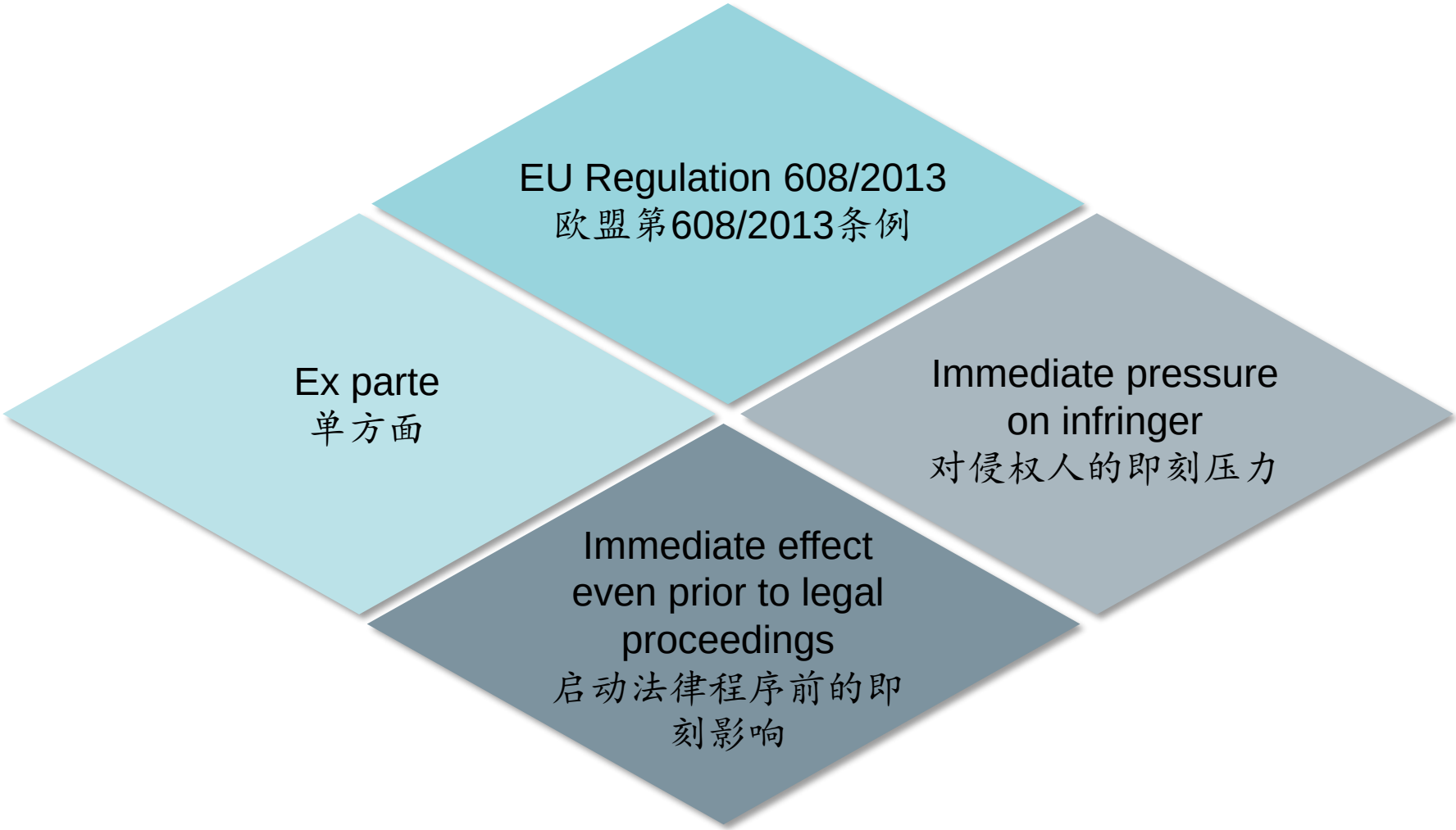
EU border detentions
欧盟边境查扣



Features of EU border detentions
欧盟边境查扣的特征



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The border detention procedure
边境查扣程序

Patentee applies for a border detention at central customs authority
(on a country-by-country basis)
专利权人向每个欧盟成员国的中央海关机关提出边境查扣申请

→

Central customs authority examines formalities and grants border detention
中央海关机关审查申请手续并予以准许

→

Central customs authority informs local customs of grant
中央海关机关将该准许通知地方海关机关

↓

Local customs stops import of the potentially infringing goods and informs patentee
地方海关机关暂停潜在侵权货物进口并通知专利权人

←

Patentee has to initiate litigation if infringer opposes against stay of the product release at customs
如果侵权人反对暂停上述货物的海关放行，专利权人应当起诉

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Border detention remedies (1/3)
边境查扣的救济措施（1/3）

- Opposition at customs, BUT it is the same authority which ordered the border detention
  向作出查扣决定的海关提出反对
- Application for preliminary measures at fiscal court, BUT will the fiscal court review the patent?
  向财政法院申请临时措施，但是财政法庭是否会审查专利?

Remedies for potential infringer
对潜在侵权人的救济

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Border detention remedies (2/3)
边境查扣的救济措施（2/3）

- Preliminary injunction to civil court, BUT court is not competent to examine infringement and validity -> customs authorities and fiscal court must do (Regional Court Düsseldorf, Druckbogenstabilisator II)
  向民事法院申请临时禁令，但是民事法院不能就专利侵权及有效性进行审查 -> 必须由海关和财政法院处理

Remedies for potential infringer
对潜在侵权人的救济

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Border detention remedies (3/3)
边境查扣的救济措施（3/3）

- How can you learn about a border detention?
  如何获悉边境查扣?
- Administrative measure? No effect yet
  行政措施？收效甚微
- Conclusion: weak position of importer and owner
  结论：进口方和货主处于弱势地位
- Factual escape: re-routing
  现实的出路：改变航线

Limited remedies
有限的救济

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Border detentions in different EU jurisdictions
欧盟各国的边境查扣比较

- Where it takes place 如果发生在
  - Germany: very active, potential issue with security for release of the goods
    德国：非常活跃，但如果有担保，可能可以放行
  - Netherlands: active case management and very efficient
    荷兰：案件管理很积极、非常高效
  - Italy: very efficient, significant pressure also because of criminal sanctions
    意大利：非常高效，同时面临刑事制裁带来的巨大压力
  - France, Spain: less activity
    法国、西班牙：不活跃
  - Belgium: very efficient
    比利时：非常高效
  - Poland: very efficient
    波兰：非常高效
  - United Kingdom: focus on narcotics, less attention for IPR infringement
    英国：知识产权侵权不是重点，重点是毒品
- Trend: less activities 趋势：变少

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EU border detention U.S. ITC proceedings
欧盟边境查扣与美国贸易法委员会程序

- Advantages of EU border detention
  欧盟边境查扣的优势：
  - Pre trial – no court involvement
    诉前 - 无法院参与
  - Ex parte – hearing may follow later
    单方面 – 庭审可以事后举行
  - Monitor the market, obtain information
    监管市场，获取信息
  - Low costs, very high pressure
    成本低，对侵权人压力非常大

- BUT 但是：
  - One strike only 一次性打击对手
  - No claims for damages 不能索要赔偿

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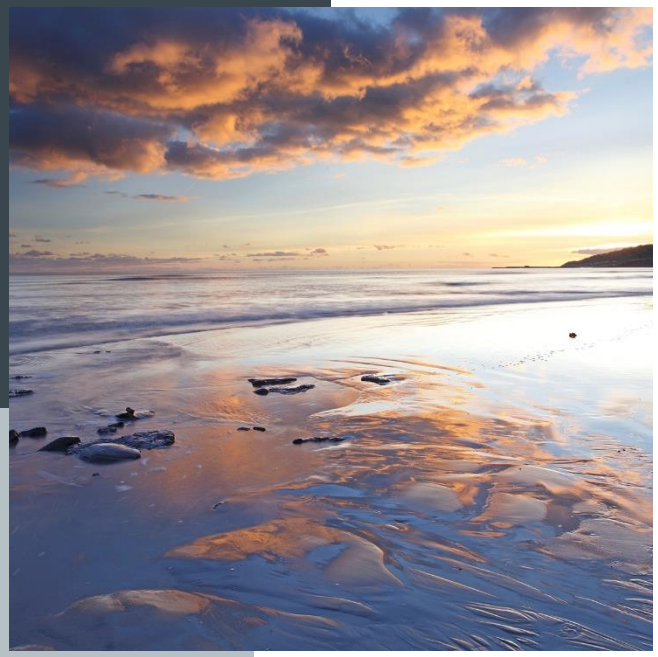
IP issues on trade fairs in Europe

在欧洲参展相关的知识产权问题



International trade fairs in Germany
德国的国际展会

- Germany is an important venue for international trade fairs
  德国是国际展会的聚集地
- Examples: 例如

CeBIT – Hannover
汉诺威消费电子、信息及通信博览会

Photokina – Cologne
科隆世界影像博览会

IFA – Berlin
柏林国际电子消费品展览会

IAA – Frankfurt/Hannover
法兰克福/汉诺威汉诺威国际商用车展览会

DRUPA – Düsseldorf
杜塞德鲁巴印刷展览会

Industrial Technology Fairs – Hannover
汉诺威工业技术展览会

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On trade fairs (1/4)
在展会上（1/4）

- There is a high density of competitors from all over the world offering their innovative products in one location within a short period of time
  来自世界各地的同行在同一地点短时间展示其最新产品
- In case of IP infringement, IP owners are often in need of urgent relief
  如果存在知识产权侵权，权利人通常需要紧急权利救济
- German law provides IP owners with several legal options to enforce IP rights on trade fairs in Germany
  根据德国法律，在德国展会上权利人有数种法律途径以主张其知识产权

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On trade fairs (2/4)
在展会上（2/4）

- Mainly 3 possibilities 三种主要途径
  - ✓ Obtain a preliminary injunction (proceedings on the merits would take too much time)
    获取临时禁令（实质性程序需要太长时间）
  - ✓ Have a border detention order in place (to be requested well prior to the beginning of the trade fair)
    获取边境查扣命令（应当在展会开始前获得）
  - ✓ Start criminal action
    启动刑事程序

Possibilities to quickly enforce IP rights
迅速主张知识产权的途径

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On trade fairs (3/4)
在展会上（3/4）

- In particular, main purpose of IP owners is the seizure of the allegedly IP-infringing goods
  知识产权所有权人的主要目的是扣押侵权货物
- Access can only be denied to a limited extent
  上述途径仅会在有限的范围内被拒绝

Your rights as IP right owner
知识产权所有人的权利

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On trade fairs (4/4)
在展会上（4/4）

Counter-measures 应对措施

- Different views of courts whether German courts have competence: in patent cases yes, in trademark cases exposition at trade fairs is not enough 关于德国法院是否有管辖权的不同的法院观点：在专利案中有管辖权，在展会商标案中管辖权并不充分
- Protective letter: general principles apply → protective letter needs to be well prepared
  保护性文件：总的原则性申请 → 完备的保护性文件
- Criminal law actions are limited to evidence-taking → one sample should be enough/have replacements available
  启动刑事程序需先取得证据 → 一个样品已足够/有可用的替代品
- Practical tips 实践小贴士
  - Be aware of test purchases 留意测试性购买
  - Be careful what is shown openly at the booth 谨慎对待展位公开展品
  - Be aware of “tours” by trade fair organizer/customs authorities before the trade fair starts 留意在展会开始前展会组织者或海关的“来宾”
- Key: preparation 关键：做好准备

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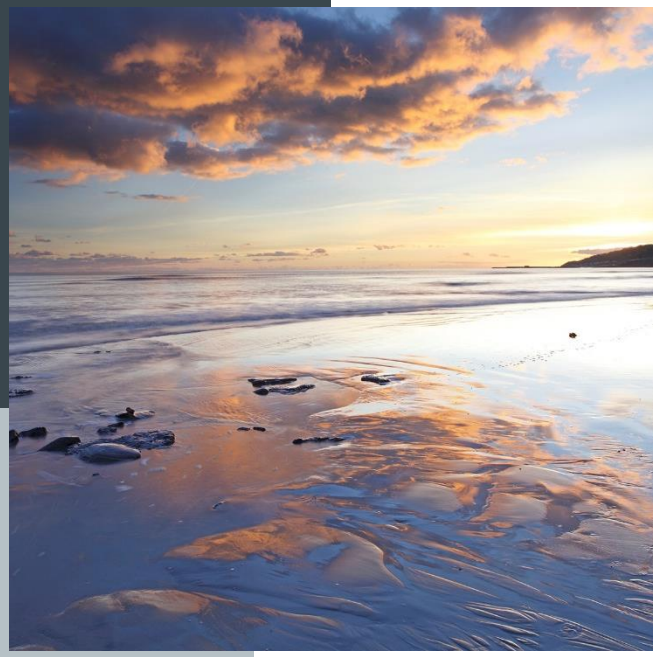
Conclusions
结论



Conclusions (1/2)
结论（1/2）

- Strategic patent filing in Europe is key
  在欧洲战略性专利布局是关键
- Filing in Europe is not a cost factor but saves costs and can generate profit
  在欧洲申请专利不但不是增加成本项，相反整体上会节省企业成本和提高利润
- IP infringement in Europe is a high risk for companies operating in Europe
  知识产权侵权是在欧洲经营业务的公司面临的高风险事项
- Avoid infringement
  避免知识产权侵权
  - Contact IP specialists in the process of product development
    在产品开发的过程中应当有知识产权专业人士参与
  - IP research 知识产权分析
    - ✓ Which IP rights do exist in the relevant field of business?
      公司相关业务领域即存的知识产权有哪些？

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Conclusions (2/2)
结论（2/2）

- ✓ Check public databases
  数据库检索
- ✓ Research by professionals (patent attorneys, professional researchers)
  专家分析（专利律师、专业分析师）

– Establish your own international IP strategy as the ultimate solution
  制定公司国际知识产权战略作为根本方案

- Future uncertainties: UPC/Brexit
  未来的不确定性：欧盟统一专利法院/英国脱欧

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