



EU-China Project  
on the  
Protection of Intellectual  
Property Rights (IPR2)  
中国-欧盟知识产权保护  
项目（二期）

EU-China Workshop on Protection of Trade Secrets  
中国-欧盟 商业秘密保护研讨会

CLIFFORD  
CHANCE

高伟绅  
律师事务所

Protection Channels  
Germany  
保护渠道 德国

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## Administrative protection 行政保护

### General/ 总论

- Protection of business secrets is normally no administrative task since administrative authorities are not competent (lack legal basis)

保护商业秘密通常不是行政机关的职能——因为行政机关不适格（缺乏法律依据）

### Protection in the course of administrative proceedings 行政诉讼程序保护

- Generally, business secrets should be protected in the course of administrative proceedings

一般而言，行政诉讼程序中应当保护商业秘密

- However, scope of protection does depend very much on the specific administrative laws

然而，保护范围并不大取决于具体的行政法规

- Administrative authorities often have discretion regarding the protection  
行政机关对于保护有自由裁量权

- Third parties might even have a right to claim certain information, e.g., according to the Consumer Information Law (*Verbraucherinformationsgesetz*)

第三方甚至有权要求某些信息，例如，根据消费者信息法（*Verbraucherinformations - gesetz*）

# Civil protection 民事保护

## General/总论

- In practice, the civil protection is the main route for the protection of business secrets/ 在实践中，民事保护是保护商业秘密的主要途径
- Different options to use the civil protection exist/ 可以选择不同的民事保护

Between the parties involved by way of a so-called cease and desist declaration  
当事人之间所谓的停止和终止声明

- Reasonable contractual penalty for future violations (out of court)  
对将来侵权的合理的契约性惩罚（庭外）

Interim injunction proceeding/ 临时强制令程序

- Pros/ 优点
  - Duration/ 期限
  - probability sufficient to “prove” / 足以“证明”的可能性
  - ex-parte option/ 单方选择权
- Cons/ 缺点
  - “only” cease and desist claim/“仅仅”是停止和终止声明
  - full liability for damages suffered by the respondent if an interim injunction should turn out to be incorrect  
如果临时强制令错误，要对被申请人遭受的损害承担全部责任

## Civil protection / 民事保护

### Proceeding on the merits/ 就案情进行诉讼

#### ■Pros/ 优点

- final judgment/ 终审判决
- all claims can be raised/ 可以提出各种要求
- no liability in case of incorrect judgment, however, security might be lost in case a judgment which is not final and binding is enforced  
如果判决错误，不承担任何责任，但是如果具有约束力但并非最终裁判的判决被强制执行，将失去安全性
- no urgency requirement/ 没有紧迫性要求
- better alignment with penal proceeding  
可以更好地与刑事诉讼程序保持一致

#### ■Cons/ 缺点

- Duration/ 期限
- Costs/ 费用
- full evidence required/ 要有充分的证据

## Civil protection/民事保护

### Burden of proof/举证责任

■ Irrespective of the type of proceeding the general rule is that the plaintiff/ appellant has the burden of proof/ 无论何种诉讼程序，原则上都是原告/上诉人承担举证责任

- a civil court does decide the case solely based on evidence provided by the parties of the proceeding/ 民事法庭完全根据诉讼当事人提供的证据对案件进行审理
- a lack of (sufficient) evidence normally leads to a negative decision for the plaintiff/appellant (action/request for interim injunction dismissed)  
缺乏（足够）的证据通常都会导致对原告/上诉人不利的判决（诉讼/临时强制令请求被驳回）

■ However, precedents and the Code of Civil Procedure (*Zivilprozess-ordnung*, “ZPO”) provide certain possibilities to modify/shift the burden of proof

然而，先例和民事诉讼法（*Zivilprozess-ordnung*, “ZPO”）规定了更改/转移举证责任的可能性

- a court can request from a party to a proceeding or from third parties to provide documents in its possession, provided that a party to the proceeding did refer to the documents (section 142 ZPO)  
只要诉讼当事人或第三人持有的文件被诉讼的一方当事人提及，法院可以要求其提供该文件（ZPO第142条）
- a court can request from a party to a proceeding to provide files in its possession, provided the file contains information relevant for the proceeding and the decision (section 143 ZPO)  
只要诉讼当事人持有文件的内容与诉讼和判决有关，法院可以要求其提供该文件（ZPO第143条）
- generally, the burden of proof changes from the plaintiff/appellant to the defendant/ respondent if evidence cannot be provided by the plaintiff/appellant but can be provided easily by the defendant/ respondent since it is in his sphere of influence  
一般来说，如果原告/上诉人无法举证，而被告/被上诉人可以轻易举证（因为证据在其控制范围之内），则由被告/被上诉人承担举证责任

# Civil protection 民事保护

## Specification of request (section 253 ZPO) 请求( ZPO第253条)

■ Irrespective of the type of proceeding a cease and desist request has to be very specific so that the

无论何种诉讼程序，停止和终止请求必须非常具体，以便

- defendant/respondent and the court know what shall be subject of the proceeding and / 被告/被上诉人及法院可以知道诉讼标的
- the scope of a judgment shall not be determined by the court enforcing the judgment/ 审理范围不由执行判决的法院决定

■ Difficulty/难点

- a specific description of the infringing conduct will often lead to a disclosure of the business secret/对侵犯行为的具体描述往往会泄露商业秘密
- however, the principle to file a specific request do not require a disclosure which part of a product or method is the business secret as it is clear that at least a part of the product or method is illegal

但是，至少有部分产品或方法明显违法时，提交具体请求的原则并不需要披露属于商业秘密的产品或方法

## Penal protection 刑事保护

Public penal law enforcement authorities (public prosecutor)  
公共刑事执法机关（检察官）

Comprehensive investigation and seizure competences  
全面调查和扣押职能

Section 17 Act against  
unfair Competition/反不  
正当竞争法第17条

Normally, a request to commence an investigation/ proceeding is  
required/通常需要依请求展开调查/诉讼

If a specific public interest exists, an ex-officio investigation will be  
started/如果涉及特定的公共利益，将依据职权展开调查

- The infringer has been convicted before in connection with business crimes/侵权人曾经实施过商业犯罪
- A substantial damage can occur or occurred already/可能或已经造成重大损害
- The conduct is part of a plan to obtain business secrets from more than one company/该行为是从多个（一个以上）公司获取商业秘密计划的一部分
- The economic existence of the victim is at stake/受害人的经济利益受到威胁
- Similar circumstances/类似情况
- ...

## Penal protection 刑事保护

If a specific public interest exists an ex-officio investigation will be started (cont'd)

如果涉及特定的公共利益，将依据职权展开调查（续）

■...

■ If the conduct qualifies as a specifically severe crime the specific public interest can normally not be denied by the public prosecutor

如果行为属于特别严重的罪行，检察官通常就会认定为涉及特定的公共利益

- conduct on a commercial scale/大规模行为
- is aware that the exploitation shall take abroad/知道将在国外开发利用

### Punishment/处罚

■ For regular cases imprisonment of up to 3 years or pecuniary fine  
常规案件处以三年以下的监禁或罚金

■ For specifically severe cases imprisonment of up to 5 years or pecuniary fine/  
特别严重的案件处以五年以下的监禁或罚金

## Penal protection 刑事保护

Under German penal law a company cannot be convicted

根据德国刑法，公司不可以被定罪

However, according to the

但是，

- Regulatory Offence Law (*Ordnungswidrigkeitengesetz*) a fine of up to EUR 1 million can be rendered against a company, provided that a manager was involved in the illegal conduct (violation of organizational duty sufficient)

根据犯罪管制法（*Ordnungswidrigkeitengesetz*），如果经理涉及违法行为（违反足够的组织责任），可以对公司处以100万欧元以下的罚款

- Regulatory Offence Law and the Penal Law forfeiture of the gross proceeds obtained by the illegal conduct have to be given to the even without a manager being involved in the illegal conduct

根据犯罪管制法和刑法，即使没有经理涉及违法行为，违法行为的总收益也应当没收

## Penal protection 刑事保护

Options for third parties, in particular the violated party,  
to join the penal proceeding

第三方尤其是被侵权方参加刑事诉讼程序的权利

- Accessory prosecution

附带起诉

- Under certain circumstances private prosecution (can be filed even without public prosecution)

在某些情况下，可以自诉（即使没有提出公诉）

# Appendix I: CV

## 附录一：个人简历

## Marc L. Holtorf /郝韬福

### Fachanwalt für Gewerblichen Rechtsschutz/知识产权律师

CV/简历



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Marc Holtorf, Partner in the Düsseldorf office, advises national and international clients in and out of court in IP and IT matters, with a focus on trademark, copyright, design right and unfair competition law.

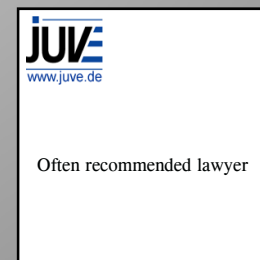
郝韬福，杜塞尔多夫办事处合伙人，为国内外客户就知识产权及信息技术事宜提供商标、著作权、设计权和不正当竞争法等法律咨询服务。

He is member of the firm's worldwide *Intellectual Property Rights* group as well as of the firm's global industry groups *Healthcare*, *Life Sciences & Chemicals*. Marc has published various articles and is co-author of various legal books regarding his areas of expertise. He is lecturer at the Düsseldorf Law School for unfair competition law and for the procedural specialities of intellectual property law. In addition, he is assistant chairman of the committee responsible for the appointment of expert lawyers in the field of intellectual property (a protected title in Germany) in the circuit of the Düsseldorf Court of Appeal. Marc Holtorf is admitted to all German local courts, district courts and courts of appeal.

他是该律所全球知识产权小组以及全球保健、生命科学、化工产品小组的成员。郝韬福是一个广受欢迎的演讲家，发表过各种文章，并就专业领域与他人合作出版了多部法律书籍。他是杜塞尔多夫法学院的不正当竞争法讲师。此外，他是杜塞尔多夫上诉法院知识产权专家律师任命委员会副主席。郝韬福可以参加德国所有的基层法院、区法院和上诉法院的诉讼活动。

For many years he is an "often recommend expert" according to the "Juve" handbook on German commercial law firms./多年来，他是德国商业律师事务所“尤文”手册经常推荐的专家。

Languages: German and English/语言：德语和英语



# Appendix II: Worldwide contact information

## 附录二：全球联系方式

## 29 offices in 21 countries/ 遍布二十一个国家的二十九个办事处

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