Companies seeking to enforce their intellectual property rights are increasingly looking to preliminary injunctions as effective tools. Courts in the U.S. have rarely granted preliminary injunctions in patent infringement cases, and the Federal Circuit has recently raised the bar for plaintiffs even higher. In its 2011 decision, *Robert Bosch LLC v. Pylon Mfg. Corp.*, the court ruled that there is no longer a presumption for irreparable harm, even if a patent is found to be valid and infringed. ¹

In Germany, on the other hand, courts are more open toward granting preliminary injunctions. In 2011, for example, Apple obtained a preliminary injunction against a small German company that distributed tablet computers that looked similar to the iPad.² The decision was based on infringement of one of Apple's design patents (Geschmacksmuster) and is an excellent example of the effectiveness of preliminary injunctions under German law. Apple filed a motion for a preliminary injunction with the Regional Court of Düsseldorf (Landgericht Düsseldorf) on March 7, 2011. The next day, the court issued the preliminary injunction. This extraordinarily swift reaction was possible because the German Code of Civil Procedure does not provide for a mandatory hearing nor discovery.

**Preliminary Injunctions Under German Law**

Preliminary injunctions can be issued under German law even if principal proceedings are not pending. The plaintiff has to credibly show infringement of its patent and the necessity for a preliminary injunction. Preliminary injunction cases cannot be appealed to the Federal Court of Justice (Bundesgerichtshof), the highest court for civil matters in Germany. Therefore, the Higher Regional Courts (Oberlandesgerichte) are the final arbiters in these cases, leading to different case law in their respective districts.

German courts usually require that infringement can be established "without difficulty," or they use similarly restrictive language. For this reason, it is unlikely that a preliminary injunction will be issued, if infringement can only be established by expert testimony which is usually the case when only equivalent infringement is alleged. As a general rule the infringement has to be obvious from the accused device itself. It is, however, permissible (and in many cases advisable) to provide the court with expert reports in order to illustrate the infringement and the technical background of the invention.

In determining the necessity for a preliminary injunction, German courts consider a variety of factors: First, there must be an urgent need for the preliminary injunction. The injunction will be denied if the infringed party unduly delays its motion for a preliminary injunction. There is no fixed deadline, but a delay of one month for example, starting from the date on which the patent holder becomes aware of the infringement, will usually not be considered excessive.

When determining the necessity for a preliminary injunction, German courts will also, among other factors, consider the validity of the patent. This requirement, while seeming fairly straightforward from an American perspective, constitutes an exception from one of the basic tenets of German patent law: the separation principle. According to this principle, German courts generally have to treat patents as valid, unless they are declared void in a separate proceeding. The separation principle does not fully apply in preliminary injunction cases, because it would effectively prevent the alleged infringer from making a defense. The courts cannot invalidate the patent in preliminary injunction cases, but they can refuse to grant the preliminary injunction based on doubts about the validity of the patent. Because of the separation principle, however, there has been some confusion as to what standard the courts should apply when reviewing the validity of a utility patent in the course of a preliminary injunction proceeding. Many courts require the plaintiff to merely show that there are no substantial doubts about the validity of the patent. But there are also decisions that call for a stricter standard and will only allow
preliminary injunctions if the patent has survived an opposition or invalidity proceeding.

**Strategic Considerations**
There are disadvantages in seeking a preliminary injunction. If the preliminary injunction is later found to be unjustified, the plaintiff has to pay damages to the defendant. To mitigate this risk, it may be appropriate for the plaintiff to provide the defendant only with an informal copy of the injunction instead of formally serving it to him. This might pressure the defendant to comply with the injunction, even though it is technically not enforced (and will, therefore, not cause the plaintiff to be liable in the event the preliminary injunction is found to be unjustified).

As discussed above, German courts are not obligated to hear the defendant before they issue a preliminary injunction. Businesses that fear becoming the subject of a preliminary injunction are not defenseless, however. They can preemptively file a protective brief (Schutzschrift) with the court(s) where they suspect the motion to be filed to argue their side of the dispute before a decision is cast.

**Conclusion**
Preliminary injunctions in Germany can be used to the advantage of the plaintiff in international patent disputes. The motion for a preliminary injunction may be filed early to gain momentum for proceedings in other countries. Alternatively, an injunction can be pursued concurrently with U.S. litigation to gain leverage.

1 - 659 F.3d 1142, 1149 (Fed. Cir. 2011).
2 - Landgericht Düsseldorf (Regional Court of Düsseldorf), GRUR-RR 2011, 358.