与贸易有关的知识产权协定 TRIPS
临时措施 Provisional Measures



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Franklin Pierce Law Center, Concord, New Hampshire, USA

民事规定的基本原子

U.S. Rules of Civil Procedure

- Justice 公正

民事规定的基本原子

U.S. Rules of Civil Procedure

- Justice 公正
- SPEED 快速

民事规定的基本原子

U.S. Rules of Civil Procedure

- Justice 公正
- Speed 快速
- ECONOMY经济

宪法的基本原则

Constitutional Standard of“Due Process”

- Notice to affected parties通知有关各方

"正当程序"的宪法标准

Constitutional Standard of "Due Process"

- Notice to affected parties
- 通知有关各方
- Opportunity to be heard
- 让各方均有机会陈述

美国司法临禁止令准则
Preliminary Injunction Standards

Showing of irreparable harm if injunction not issued

原告必须表明如果不及时下达禁止令将会造成无法弥补的伤害。

美国司法临禁止令准则

Preliminary Injunction Standards

Showing likelihood of success on the merits of the dispute

原告必须表明有可能查明纠纷双方孰是孰非

美国司法临禁止令准则

Preliminary Injunction Standards

Showing that damage to other party caused by injunction is less than damage to applicant if no injunction

原告必须表明禁止令给对方造成的损失小于申请人因没有禁止令而将承受的损失

美国司法临禁止令准则

Preliminary Injunction Standards

Public interest favors Injunction in most IP cases

在多半知识产权案件中，公众舆论倾向下达禁止令。

TRIPS 临时措施
Provisional Measures

TRIPS Agreement Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

2.第五十条

1. 司法当局有权命令采取迅速有效的临时措施。

TRIPS 临时措施
Provisional Measures

TRIPS Agreement Article 50.1

(a)to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(a) 司法当局有权阻止任何侵犯知识产权行为发生，尤其是阻止有关货物进入其管辖下的商业渠道，包括刚结关的货物。

地区法院的规定

U.S. District Court Civil Procedure Rule 65

65(a) Preliminary Injunctions

临时禁止令

Notice to other party must be given

必须通知对方

地区法院的规定

U.S. District Court Civil Procedure Rule 65

65(a) Preliminary Injunctions

Other party must be given an opportunity to be heard

必须让对方有机会申诉

TRIPS 临时措施
Provisional Measures

TRIPS Agreement Article 50.1

(b) to preserve relevant evidence in regard to the alleged infringement.

(b) 司法当局有权保护与被指控侵权相关的有关证据。

地区法院的规定

U.S. Civil Procedure Rule 64

Seizure of Person or Property

At the commencement of…an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment are available subject to…any existing statute of the United States [which] governs.

地区法院的规定64

U.S. Civil Procedure Rule 64

Seizure of Person or Property

- 案件开始时，在符合所有美国现行适用法规的前提下，可采用一切手段扣押人员或查封货物以保证司法判决之需。

美国版权法 第502条

U.S. Copyright Law Section 502

(a) Any court having jurisdiction of a civil action arising under this title may grant temporary and final injunctions on such terms as it deems reasonable to prevent or restrain infringement of a copyright.

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美国版权法 第502条

U.S. Copyright Law Section 502

- (a)任何对有关版权民事诉讼行使司法管辖的法庭在其认为有必须采取合理措施以防止或限制侵犯版权行为时，均可发出临时或最终禁止令

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美国版权法 第503条

U.S. Copyright Law Section 503

(a) At any time while an action is pending, the court may order the impounding of all copies or phonorecords claimed to have been in violation of the owner's rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

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美国版权法 第503条

U.S. Copyright Law Section 503

- (a)在诉讼尚未结案之前，法庭可随时下令扣押所有被指控为侵犯版权持有人权利的拷贝或唱片，以及所有印版，铸模，字模，母版，磁带，底片，或任何可用以复制拷贝或唱片的器具。

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美国版权法 第509条

U.S. Copyright Law Section 509

(a) All plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which copies or phonorecords may be reproduced, and all electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies may be seized and forfeited to the United States.

美国版权法 第509条

U.S. Copyright Law Section 509

- 以及所有印版，铸模，字模，母版，磁带，底片，或任何可用以复制拷贝或唱片的器具；所有用于制造复制或装组配这些拷贝的电子，机械或其他设备均可被收缴及没收归公。

美国商标法 第34(d)条

U.S. Trademark Law Section 34(d)

Court may order seizure of goods using counterfeit mark and records of sale or manufacture of such goods

- 法庭可下令收缴使用假冒商标的货物，以及这些货物的销售或生产记录。

美国商标法 第34(d)条

U.S. Trademark Law Section 34(d)

"*Counterfeit Trademark*" defined as "a counterfeit of a mark that is registered for such goods or services and used, whether or not the person against whom the relief is sought knew the mark was registered

美国商标法 第34(d)条

U.S. Trademark Law Section 34(d)

- “假冒商标”的定义时“经注册并在适用中的货物或服务商标的伪制品，不论被追究者是否知道该商标已注册。”

TRIPS 临时措施 第50.2条
Provisional Measures

2. The judicial authorities shall have the authority to adopt provisional measures ***inaudita altera parte*** where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

2. 在适当的时候，**开庭前照一方当事人请求**司法当局应有权采取适当的临时措施，尤其当任何迟延很可能对权利持有人造成难以弥补的损害时尔或当有证据正被毁灭的明显风险时。

地区法院的规定

U.S. District Court Civil Procedure Rule 65

65(b) Temporary Restraining Order [TRO] 临时限制令

No notice required无须通知

Must be clearly immediate and irreparable injury必须时在面临显然迫在眉睫并无法补救的伤害时

Lasts for 10 days有效期十天

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)(2) Applicant must first notify the U.S. Attorney and request participation by the government.

- 申请人必须首先通知美国检察官并要求政府干预。

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)3) The court shall not grant a seizure order unless it finds that an immediate and irreparable injury will occur if such seizure is not ordered.

- 法庭在确认若不采取收缴行动将立即发生不可补救的伤害之前，不应发出没收令

TRIPS 临时措施　第五十一条
Provisional Measures Art. 50.3

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent.

4. 3. 司法当局应有权要求申请人提供任何可合理获得的证据以使司法当局足以肯定该申请人是权利持有人并且该申请人的权利正受到侵犯或这种侵权已迫在眉睫。

地区法院的规定

U.S. District Court Civil Procedure Rule 65

65(d) Reasons for issuance of preliminary injunction or TRO must be given in reasonable detail

签发临时禁止令或临时限止令的理由必须具有适当具体的细节。

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)(3) Application for seizure order must include evidence sufficient to support that the facts are true

收缴令申请文件必须含有足以支持所陈事实确凿无误的证据。

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)(4)The court must find clear evidence that the party to be affected would destroy the goods, or move, hide, or make them inaccessible to the court.

- 法庭必须有确凿证据表明对方将会销毁，转移，藏匿货物，或使法庭无法接触这些货物。

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)(5) The application and order must show the place and time for the seizure to be held (usually at night) and describe accurately the goods to be seized.

申请书和法庭命令必须注明收缴的地点和时间，（通常是在晚上），以及准确描述应予以收缴的货物。

TRIPS 临时措施　第五十一条
Provisional Measures Art. 50.3

3. The judicial authorities shall have the authority to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

3. 司法当局应有权责令申请人提供足以保护被告和防止滥用的保证金或其他等效的保护。

地区法院的规定

U.S. District Court Civil Procedure Rule 65

65(c) Security 保证金 Applicant for Temporary Restraining Order [TRO] must pay a sum to court as security to compensate another party which is injured by the order.

申请人必须向法庭交付一定的款项作为补偿对方因收缴令而遭到损失的保证金。

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)(4) Applicant must provide adequate security to pay for damages if the order is unlawful.

- 申请人必须提供足够的保证金，以便在如果收缴令不符合法规定的情况下赔偿损失。

美国商标法 第34条

U.S. Trademark Law Section 34

34(d)(11) A person who suffers damage from a wrongful seizure will be compensated.

因不当收缴而遭受损失者可对有关收缴令之申请人提取法律眼诉讼并应得到适当补偿

TRIPS 临时措施　第五十一条
Provisional Measures Art. 50. 5

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

5. 在执行临时措施的司法当局辨认相关的货物时，可要求申请人提供其他必要资料。

美国商标法律 第34条

U.S. Trademark Law Section 34

34(d)(3) Application for seizure order must include evidence sufficient to support that the facts are true, including the nature of the goods, their location,

美国商标法 第34条

U.S. Trademark Law Section 34

(d)(3) The applicant for a seizure order must be based upon sworn testimony of a witness establishing that the facts are true.

收缴令申请人在证明所陈事实确凿无误时，必须基于证人在宣誓情况下提供的证词。

TRIPS 临时措施　第五十一条
Provisional Measures Art. 50. 4

4. Where provisional measures have been adopted ***inaudita altera parte***, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

4 在根据开庭前照一方当事人请求已经采取临措施时，则至迟应在执行该措施后即毫不迟延地通知受影响的各方。应被告的请求，应对这些措施进行审议，包括被告的陈述权，以在有关措施被告知各方后一段合理的期限内，决定这些措施是否应予以修正，撤消或确认

TRIPS 临时措施　第五十一条
Provisional Measures Art. 50.6

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

TRIPS 临时措施　第五十一条
Provisional Measures Art. 50.6

- 在不违反第４款的前提下，如在一成员的法律允许采取该措施的司法当局确定的一段合理期限内，或者如司法当局未确定时限则不超过20个工作日或31个公历日，(以长者为准)仍未能开始有关该案件的决定的审理，则依第1款和第2款采取的临时措施，应被告请求应予以撤销或以其他方式终止生效。

美国商标法律 第34条

U.S. Trademark Law Section 34

34(d)(10) The court will hold a hearing not less than 10 days nor more than 15 days after issuance of the order. If the party obtaining the order does not establish that the order needs to be continued, then the seizure order will be dissolved or modified.

法庭将在发出收缴令后不早于十天和不晚于十五天的期间内举行听证。

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TRIPS 临时措施　第五十一条
Provisional Measures Art. 50. 7

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

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TRIPS 临时措施　第五十一条
Provisional Measures Art. 50. 7

- 如果临时措施被撤销或由于申请人的任何作为或不作为而失效，或如果随后发现不存在知识产权侵权或侵权的威胁，则应被告请求司法当局应有权责令申请人向被告因这些措施遭受的任何损失提供适当的补偿。

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美国商标法律 第34条

U.S. Trademark Law Section 34

34(d)(11) A person who suffers damage from a wrongful seizure has a cause of action against the applicant for the order under which such seizure was made, and shall recover such relief as may be appropriate.

因不当收缴而遭受损失者可对有关收缴令之申出人提取法律眼诉讼并应得到适当补偿。

美国商标法律 第34条

U.S. Trademark Law Section 34

34(d)(7) the materials seized are taken into the custody of the court.

收缴的货物应置于法庭监管之下。

美国商标法律 第34条

U.S. Trademark Law Section 34

34(d)(9) The order shall be delivered by a Federal law enforcement officer or state or local law enforcement officer accompanying the trademark owner.

收缴令应由联邦执法官员或当地执法官员陪同商标持有人送达。

谢谢诸位！

