

Patent Litigation in Germany, Japan and the United States

Pitz / Kawada / Schwab

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The main advantage of preliminary injunction proceedings concerns the aspect of 9
time. Preliminary injunctions may be granted within only a few days after having filed
the corresponding request or even within a couple of hours in specific situations. Given
the fact that they may even be issued without the involvement of any oral court hearing
(so called “ex parte” injunction) or any other prior notification they can deploy a
surprising effect upon the respondent. Under Articles 936, 925 ZPO, the court can make
the issuance of a preliminary injunction dependent upon the condition that the Plaintiff
provides a security and that thus Defendant’s interests are protected.

bb) Procedural principles in PI proceedings. (1) *Competence of patent chambers.* 10
The German Code of Civil Procedure contains general provisions in §§ 935 et seqq
ZPO, as to when preliminary injunctions may be issued. These provisions also apply to
patent matters. According to § 937(1) ZPO, each court with competence for patent
matters has jurisdiction to issue preliminary injunctions, that means, that any court
with which a main action for patent infringement can be filed can issue a preliminary
injunction. In case of a prior pending main action the court handling the main action
has exclusive jurisdiction to issue a preliminary injunction. Both actions may be
initiated in parallel. Not accepted is, however, a parallel filing of several PI requests
before various courts¹².

(2) *Two instances.* The Federal Republic of Germany does not have a uniform case 11
law regarding the prerequisites for the issuance of preliminary injunctions, and there-
fore the regional differences are to be considered when choosing a court in Germany.
That is because PI proceedings are two instance proceedings before the District court
(1st Instance) and the Higher District court (2nd Instance). There is no 3rd Instance
before the FCJ which may establish uniform case law. Oral proceedings are not
mandatory under § 937 (2) ZPO, and therefore the issuance of a preliminary injunction
is legally admissible upon an ex parte request. In patent matters, an injunction request is
normally dealt within oral proceedings, because often the legally and technically difficult
fact situation can be discussed and assessed best in a hearing. A subsequent main action
is not mandatory. However, according to § 926 ZPO, the Defendant can request that a
term for a main action by the Plaintiff be set. If the preliminary injunction or is reversed
because no action was filed following the term set under § 926(2) ZPO the party which
has obtained the preliminary injunction is liable to compensate the Defendant for all
damages suffered from enforcement.

(3) *Arms equality.* In 2020, the German Federal Constitutional Court (FCC) con- 12
firmed its former case law concerning arms equality in preliminary injunction proceed-
ings¹³. According to this principle, a preliminary injunction (PI) can only be granted if
the respondent had the opportunity to respond to the PI request. In principle, this also
applies to cases where a decision might be granted without prior oral hearing because of
specific urgency of the matter.

The FCC’s decision concerned a dispute between two police labour unions (GdP and 13
DPoIG) about an allegedly wrong statement in the context of delegate elections. A
preliminary injunction (cease and desist order) was granted by the Regional Court of
Berlin without prior oral hearing. Upon a constitutional complaint of the DPoIG, the
granted PI was annulled by interim order of the FCC on the ground of infringement of
the right of procedural arms equality (Arts. 3 (1) and 20 (3) German Constitution).

¹² LG Mü I, InstGE 11, 112 (gleichzeitig mehrfacher Verfügungsantrag).

¹³ see BVerfG, decision of June 3, 2020, NJW 2020, 2021; BVerfG, decision of September 30, 2018, NJW
2018, 3631.

- 14 The general principles defined in the decision are also relevant in PI proceedings in the field of intellectual property.
- 15 In its decision, the FCC pointed out that in PI proceedings the respondent's right to be heard has to be respected. A preliminary injunction without hearing the respondent can only be granted in exceptional cases, i.e. in cases where the hearing would completely thwart the purpose of the PI. This is for example true in cases of arrest procedures or apartment searches¹⁴.
- 16 In its decision, the FCC further underlined that in specific circumstances it might be sufficient if the respondent had at least the chance to reply to a warning letter of the applicant. According to the recent FCC decision, this, however, applies only in cases where the warning letter and the injunction request are identical, and deal with one and the same object under dispute. Against this backdrop, pre-trial warning letters – though not mandatory – get increasing importance in IP disputes.
- 17 **cc) Requirements.** Requirements for getting a PI to cease and desist are the injunction right (risk of repeated/continued infringement of patent claims by competitor's activities or danger of first infringement), the injunction ground (high likelihood of validity of the patent as well as urgency of the matter) and a prevailing interest of the applicant. Sufficient is a prima facie case (§§ 920 (2), 294 ZPO). Full prove of facts is not necessary.
- 18 (1) *Infringement.* The applicant has to furnish prima facie evidence of the fact of infringement. Such prima facie evidence is limited to evidence which the court can evaluate immediately either based on the written request or the oral presentation in case of a court hearing. Such prima facie evidence can be for example a sworn affidavit, a sample of the alleged infringing product, a private expertise or a witness or an expert which is present during the hearing. The fact of infringement must be shown in such a way as to enable an assessment of the scope of protection and the infringement form in summary proceedings. The applicant has to show the actual nature of the challenged embodiment and its subsuming under the patent claim and provide prima facie evidence. In the case of non-identical infringements, this proof may become difficult to provide depending on the technical field. In the case of equivalent infringement forms, equivalence must be plain to the court too. Hence, in the case of difficult technical questions, it is advisable to submit a private expert opinion. Generally applicable criteria as to when prima facie evidence of the infringement must be submitted cannot be phrased, just as in the case of the assessment of protectability. A reliable assessment of the infringement issue is often not possible in summary proceedings because of the technical complexity of the matter. This is all the more so as in summary proceedings the court cannot appoint a court expert but has to rely on the means of evidence procured and presented by the parties.¹⁵
- 19 (2) *Validity of the patent of disposal.* A necessity to enforce the injunction claim by means of a preliminary injunction is only given if the validity of the patent is sufficiently clear which is to be shown by the applicant.
- 20 Contrary to the main proceedings, the Court has no means to stay the proceedings in order to wait for the decision in opposition or nullity proceedings since this would interfere with the accelerative character of preliminary proceedings.
- 21 In the event that the patent has been or is likely to be challenged in opposition or nullity proceedings in near future, it remains to be shown by the applicant that the

¹⁴ see BVerfG, decision of September 30, 2018, NJW 2018, 3631.

¹⁵ See OLG Karlsruhe GRUR 1982, 169, 171 – Einhebel-Mischarmatur.

objections raised against the patent are not justified and that the patent will be upheld. In case the patent has been declared void at first instance an injunction may in rare cases nevertheless be granted if the decision is evidently incorrect which needs to be shown by the applicant.¹⁶

According to the Düsseldorf practice based on the principles of the so called “Harnkatheter-Set-decision”¹⁷ a preliminary injunction can only be granted if the patent in suit has “survived” a bilateral opposition or nullity proceedings. If this is not the case it has to be shown that specific facts and circumstances speak in favor of validity of the patent in suit and that therefore the interests of the patent owner prevail over the interests of the defendant. The following circumstances have been considered to be relevant:

- defendant took already part in the examination procedure, or
- patent in suit is respected by competitors in the market, or
- extraordinary market circumstances are given which give reason not to wait until the outcome of an opposition or revocation proceeding, for example in cases of infringement by manufactures of generics or cases where patent in suit is to lapse soon with the consequence that main proceedings may come late

The court practice in Munich¹⁸ was more liberal rather than the Düsseldorf court and allowed the grant of PIs in cases where the applicant could that validity of the patent in suit seemed to be sufficiently secured even if the specific circumstances as described above did not exist. Therefore, an injunction was granted, if the applicant in parallel pending inter partes proceedings or with a protective letter could invalidate alleged infringers arguments concerning invalidity.

With its decision dated 12 December 2019¹⁹ the Higher Regional Court Munich has explicitly given up its former case law and instead shared the opinion of the Düsseldorf courts as defined in the “Harnkatheter-Set-decision”. As a consequence, PIs in patent matters may also in Munich principally only be granted if validity of the patent in suit was confirmed in opposition or revocation proceedings, except there are the named exceptions (in practice rarely accepted) and clear indications which speak in favor of validity. The court pointed out that PI proceedings are not appropriate to evaluate the validity of patents with a complex technical background with an efficient degree of certainty. Freshly granted patents should therefore principally no longer be enforceable by way of PIs. The Munich District Court does not share the opinion of the Higher Regional Court and referred a similar case for preliminary ruling to the CJEU²⁰ with the question whether the approach of the Higher Regional Court is in accordance with Art. 9 (1) of the Directive 2004/48/EC which ensures the order of PIs against patent infringers.

(3) *Urgency*. The applicant must furthermore demonstrate the “urgency” of the matter. This requirement concerns the necessity to enforce the injunction claim by means of a preliminary injunction.

Whether the requirement of temporal urgency is met can not be answered by referring to fix time limits but must be assessed by evaluating the circumstances of each individual case. The PI request has to be filed without undue delay after getting

¹⁶ OLG Düsseldorf GRUR-RR 2008, 329 – Olanzipin; OLG Düsseldorf InstGE12, 114 – Harnkatheterset.

¹⁷ OLG Düsseldorf InstGE 12, 114 – Harnkatheterset; OLG Düsseldorf, GRUR-RR 2020, 240 – MS Therapie.

¹⁸ As defined in the judgement of the Higher Regional Court Munich dated 28 June 2012 – BeckRS 2014, 18450.

¹⁹ OLG München, GRUR 2020, 385 – Elektrische Anschlussklemme.

²⁰ Decision of January 19, 2021, File No. 21 O 16782.

notice of the infringing acts. There is no obligation to start PI proceedings based on the danger of first infringement; the applicant may wait until an actual infringement takes place. Time consuming negotiations with the alleged infringer in order to come to a settlement may have an urgency-destroying effect²¹.

- 27 The relevant time span varies between the relevant litigation courts in Germany and lies approximately between 1–6 months starting from the moment when the right holder got positive knowledge of the infringement and the identity of infringers. There is no obligation to observe the market, however, there is an obligation to investigate facts in case of clear indications. Gross negligent lack of knowledge triggers the time limit.
- 28 The right holder, once he obtains the infringing product, must rapidly initiate examinations as to whether the product infringes or not. A delay may be justified in the event that the assessment of infringement requires complex and time-consuming investigations or analyses.
- 29 According to current Court practice it shall not speak against urgency if the patentee, despite having knowledge of the infringing product, retards the filing of the request until the patent has been upheld in pending opposition proceedings²².
- 30 (4) *Proportionality*. In PI proceedings the court has a certain discretion in deciding on the grant of an injunction. In this context a balance of interests has to be made where the effect of the alleged infringement on the patent holder has to be weighed against the harm to the accused infringer, should the preliminary decision be in error. In this context aspects of extreme urgency in case of trade fair activities, irreparable harm, short lifetime of the patent and other economic circumstances may be relevant. The District court Düsseldorf rejected the request for a PI to cease and desist by taking into account that the applicant was a NPE (non practicing entity) which did not use the technology but was seeking primarily for high license fees²³.
- 31 **dd) Enforcement and remedies.** (1) *Opposition*. German Law provides several remedies for parties against whom a court has granted an ex parte PI. In particular, the defendant might consider filing an opposition against the decision (§ 924 ZPO). The aim of opposition proceedings is to have the Court's decision on the preliminary injunction revoked. After an opposition has been filed, the Court having granted the preliminary injunction will schedule an oral hearing. During the oral hearing, both parties can bring forward their arguments and the court will then either revoke or affirm the preliminary injunction by way of a judgement which can be appealed. Since the opposition does not suspend the effect of the preliminary injunction the defendant is obliged to comply with the obligation until it has been revoked by the Court. In the event that the Court deems the injunction to have been unjustified the defendant is entitled to claim reimbursement of all damages suffered as a result of the enforcement and execution of the injunction.
- 32 (2) *Constitutional interim order*. In cases of “ex parte” injunctions the defendant may also file a constitutional complaint based on the right of procedural arms equality (Arts. 3 (1) and 20 (3) German Constitution) and request cancellation of the injunction before the Constitutional Court by way of interim relief (§ 32(1) BVerfGG)²⁴.
- 33 (3) *Request to bring main action*. As an alternative and/or in parallel to opposition against the preliminary injunction the respondent may request a court order according

²¹ OLG Karlsruhe, InstGE 11,143; OLG München, InstGE 3, 301 – Fälschungsverdacht II.

²² OLG Düsseldorf InstGE 10, 124 – Inhalator.

²³ GRUR 2000, 692 – NMR-Kontrastmittel.

²⁴ BVerfG NJW 2020, 2021.

to which the applicant has to file the main action against the defendant within a reasonable period of time (§ 926 ZPO). In case the main action is not filed, the injunction will be cancelled upon request of the defendant.

(4) *Final Statement*. A possible way to render a preliminary injunction final and hereby avoid initiation of main proceedings is to ask the defendant to issue a final statement²⁵. Such declaration needs to encompass a material acknowledgement of the provisional court order as well as a waiver of all potential legal remedies against the injunction (i. e. opposition, § 924 ZPO; request to bring main action, § 926 ZPO; revocation due to changed circumstances, § 927 ZPO). If the defendant agrees the dispute is permanently settled, if not, the applicant is free to file a lawsuit.

(5) *Request to cancel the PI*. In case of changing circumstances the preconditions for granting a PI may no longer exist. In such a case a request to cancel the PI can be filed without time limit (§ 927 ZPO).

(6) *Judgement and Appeal*. The court may schedule an oral hearing in order to decide on the injunction request. As a rule, the applicant is informed about this intention by the judge and may withdraw the PI request. In case of an oral hearing the court will decide by way of judgement which can be appealed before the Higher District Court. Further appeal is not available.

ee) Damages. The applicant has to pay damages, irrespective of whether or not he is at fault, if the preliminary injunction was unjustified from the very beginning or if the preliminary injunction was reversed in opposition proceedings. The unjustified nature of the injunction must have existed from the beginning, that is at the time the preliminary injunction was issued. This precondition is met for instance if the patent is retroactively revoked or declared null and void “ex tunc”. The applicant even has to reimburse the defendant for any expenses necessary to avert or mitigate the consequential damages of the wrongly issued preliminary injunction.

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DIE FACHBUCHHANDLUNG

2. Japan

a) Warning

If a patent holder believes that products or processes of a competitor should infringe his patent, a patent holder may immediately file an action with the alleged infringer. A patent holder, however, normally send a warning to an alleged infringer before taking a legal action. If he files a legal action immediately, it will result in significant costs and take up a great deal of time for the patent holder. He rather wants to seek an amicable settlement with the alleged infringer so that he could get economical benefits without incurring the costs of litigation. Furthermore, it is often difficult even for an expert to determine whether products or processes of a competitor infringe his patent or not. The validity of a patent is always not so clear, because a patent could be invalidated. It is unpredictable whether the patent holder could win the infringement suit in the end. Moreover, there are neither any legal disadvantages nor sanctions for a patent holder, even if he does not file an action immediately after a warning. That is why a patent holder often chooses to send a warning at first.

A patent holder often has an interest to negotiate with an alleged infringer about a license agreement. In such a case, a patent holder only specifies the patent number in a

²⁵ BGH GRUR 1991, 76 – Abschlusserklärung.

warning and indicates the relevance between his patent and some products and processes of a competitor and asks a response of an alleged infringer within two weeks or so. If a patent holder does not have any interests in licensing the patent at all, the patent holder clearly makes a demand in warning to stop the infringing activities immediately. It is, however, not so often that a patent holder clearly asks an alleged infringer to stop the infringement activities immediately.

- 40 The reaction of an alleged infringer and the proceeding of negotiation between the parties vary. However, there are typical situations. An alleged infringer often asks to postpone his response for one month or so to research the possibility of the infringement and the patentability of the patent indicated in the warning. In the investigation, an alleged infringer seeks the reason why his products or processes should not infringe the patent and consults some experts. An alleged infringer normally answers that there should be not an infringement and/or the patent should be invalid.
- 41 Against such a response, the patent holder asks the alleged infringer to specify the reasons why the products or processes could not infringe the patent or why the patent could be invalid.
- 42 The negotiation between a patent holder and an alleged infringer sometimes comes to the end immediately after the exchanges of some letters. It sometimes continues a few years during which they have meetings repeatedly. If such a negotiation stagnates, the patent holder decides whether a judicial action should be taken or not. There are not any restrictions for the timing when a patent holder should take a judicial action. A patent holder may file an infringement action in anytime, if the patent right does not expire and the infringement activities continues. A patent holder has enough time to consider whether he files a legal action or chooses not to enforce his patent right.

b) Preliminary injunction

- 43 If a patent holder is convinced that activities of a competitor infringe his patent, and decides to take a legal action, the patent holder has a choice whether to petition for a preliminary injunction or file an action for an ordinary injunction. There is no time limit for a petition for a preliminary injunction, insofar as the patent right is effective. Even after a few years from the end of negotiations, a patent holder may make a petition for a preliminary injunction, even if such delay could make an infringement court have some doubt about the necessity for an immediate remedy by a preliminary injunction.
- 44 If a patent holder chooses a preliminary injunction, the same court, in principle, deals with both the preliminary and ordinary injunction case, according to Article 12, Paragraph 2 of the Japanese Civil Provisional Remedies Act. In practice, infringement courts tend to deal with both procedures at the same pace and very deliberately. The patent holder, therefore, could hardly expect an immediate remedy of a patent infringement dispute with a preliminary injunction.
- 45 However, there are some advantages for a preliminary injunction. For example, the judicial costs for preliminary injunction are much cheaper than for an ordinary injunction. The petition for a preliminary injunction against one respondent costs just 2,000 Yen, i. e. around 15 Euro. Furthermore, it is quite difficult to release an alleged infringer from the execution of an order for a preliminary injunction, once a preliminary injunction is ordered, because it is not permitted for the alleged infringer to pay money for the release from the execution of the order for preliminary injunction being enforced. Regularly only the final and binding judgement on the merits can reverse an order of a preliminary injunction. Therefore, once a preliminary injunction is ordered, the order could be so burdensome for an alleged infringer that he has to stop producing the products or using the processes. If the alleged infringer does not obey the order, the

execution is compelled indirectly by an order of the court to pay to the patent holder a fixed amount of money daily until performing the ordered obligation, according to Article 52 of the Japanese Civil Provisional Remedies Act in connection with Article 172 of the Japanese Civil Execution Act.

aa) Preliminary injunction as a provisional remedy. The preliminary injunction is 46 regulated by the Japanese Civil Provisional Remedies Act. There are three categories as provisional remedies in the Japanese Civil Provisional Remedies Act, which are 1) the provisional seizure to secure a claim for payment of money, 2) the provisional disposition of a disputed subject matter to prevent the change of the existing state of such subject matter, and 3) the provisional disposition to determine the provisional status. A preliminary injunction belongs to the provisional disposition to determine the provisional status.

A preliminary injunction, however, fulfils the claim for injunction as a matter of fact, 47 even though the remedy is temporary. Therefore, infringement courts which have jurisdiction for a preliminary and ordinary injunction tend to order a preliminary injunction very deliberately. In any cases it is necessary for issuance of an order of a preliminary injunction as a provisional disposition to hold a hearing date at which an alleged infringer may be present, according to Article 23, Paragraph 4 of the Japanese Civil Provisional Remedies Act. Hearings take place repeatedly to examine the case as carefully as in the examination of the case on the merits. If an action for an ordinary injunction has also been filed parallel, dates for such hearings are normally held on the same dates as for oral proceedings.

bb) Characters of a preliminary injunction. A preliminary injunction is character- 48 ised by the quickness of remedy, the temporality of remedy, and the dependence on a proceeding on the merits.

Ideally, a petition for a preliminary injunction has to be decided so quickly as possible 49 because a preliminary injunction prevents the patent holder from suffering present risk of unavoidable damages. Therefore, the necessity of a preliminary injunction can be proven by prima facie evidence. In fact, however, the quickness of provisional remedies is not adapted to a preliminary injunction. Because a preliminary injunction could fulfil the claim of a patent holder, the disadvantages to an alleged infringer will be significant and cannot be ignored. Infringement courts, thus, are quite deliberate in dealing with a preliminary injunction and, as a matter of fact, demand the proof without reasonable doubt. Furthermore, infringement courts are obliged to hold a hearing where an alleged infringer might be present, according to Article 23, Paragraph 4 of the Japanese Preliminary Remedy Act, and often repeat hearings that could delay the procedure of a preliminary injunction.

A preliminary injunction is a temporal remedy for a patent holder until a judgement 50 for an ordinary injunction is rendered. Therefore, an order for a preliminary injunction can be revoked according to Article 37, Paragraph 1 of the Japanese Civil Provisional Remedies Act, if, on the request of the alleged infringer, the court orders the patent holder to file an action on the merits based upon the patent infringement within a certain period of time and, nevertheless, the patent holder fails to file an action within the period.

A preliminary injunction depends on the judgement for an ordinary injunction on 51 the merits. If an action on the merits for an ordinary injunction is dismissed, the preliminary injunction might be revoked by the court on the request of the alleged infringer, according to Article 38, Paragraph 1 of the Japanese Civil Provisional Remedies Act.

- 52 The secrecy of procedure which is normally a typical character for provisional remedies is, however, lacking in a preliminary injunction, because a hearing of an alleged infringer is necessary, according to Article 23, Paragraph 4 of the Japanese Civil Provisional Remedies Act.
- 53 **cc) Material prerequisites for an order of a preliminary injunction.** A preliminary injunction is ordered if there is an effective patent and a necessity to avoid any substantial and unrecoverable damages for a patent holder from patent infringement, according to Article 23, Paragraph 2 of the Japanese Civil Provisional Remedies Act.
- 54 If a patent holder is not exploiting the patented invention, damages of the patent holder from infringement activities of a third party could be limited to monetary damages equivalent to license fee. In such a case, the necessity for preserving the patent right by a preliminary injunction could be denied²⁶. However, the necessity for preserving the patent right was admitted in a case where the patent holder gave a license to a third party²⁷. In another case, the court admitted the necessity not only because there were licences with third parties, but also because the patent holder was obliged contractually to take an action against possible infringers²⁸. Whether the necessity could still be admitted is not clear if the patent holder is not exploiting the patented products itself but producing or selling products which can be competing with the allegedly infringing products. It is not unusual for a patent to be declared invalid in the trial for patent invalidation in the Japanese Patent Office or recognised as invalid by an infringement court. A preliminary injunction which is just a provisional remedy is revoked, if an invalid decision by a trial board of the Japanese Patent Office becomes final and irrevocable, or if an action for an ordinary injunction is dismissed because of invalidation of a patent finally and irrevocably. That is why infringement courts examine the necessity for preserving a patent right by a preliminary injunction very deliberately. The necessity for preserving a patent right by a preliminary injunction, therefore, may be denied, if an infringement court recognises that the allegedly infringed patent is likely to be invalidated by a trial for patent invalidation of the Japanese Patent Office²⁹.
- 55 **dd) Procedure.** (1) *Jurisdiction.* The court which has jurisdiction for the first instance of an ordinary injunction also has exclusive jurisdiction for a preliminary injunction, according to Article 12, Paragraph 2 of the Japanese Civil Provisional Remedies Act. Such courts are restricted to the Tokyo or Osaka District Court, according to Article 6, Paragraph 1 of the Japanese Code of Civil Procedure.
- 56 As a matter of fact, the same chamber of the Tokyo or Osaka District Court usually deals with both injunction procedures, if a petition for a preliminary injunction and an action for an ordinary injunction are pending at the same time. Therefore, infringement

²⁶ A decision of the Nagoya District Court on 20th May 1985, Case No.: Showa 59 (yo) 318, published in the Collection of Judgments for Civil or Administrative Cases of Intellectual Properties in the Lower Instances, Vol. 17, No. 2, pp. 239 – zen-jido datsu-bu sochi jiken (automatic rice shell threshing machine case).

²⁷ A decision of the Tokyo District Court on 16th February 1990, Case No.: Heisei 1 (mo) 7011, published in the Collection of Judgments for Civil or Administrative Cases of Intellectual Properties in the Lower Instances, Vol. 22, No. 1, pp. 1 = Hanrei-Jiho No. 1341, pp. 140 = Hanrei-Times No. 724, pp. 240 – VS-sokko jiken (variable slope side ditch case).

²⁸ A decision of the Osaka High Court on 31st July 1992, Case No.: Heisei 3 (u) 1205, published in the Collection of Judgments for Civil or Administrative Cases of Intellectual Properties in the Lower Instances, Vol. 24, No. 2, pp. 451 – kumikae hito soshiki *plasminogen* kassei-ka inshi jiken (human tissue plasminogen activator case).

²⁹ A decision of the Japanese Intellectual Property High Court on 23th July 2013, Case No.: Heisei 24 (ra) 10014 – keitai-denwa-tanmatsu (mobile phone case).