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Munich District Court on The intrinsic entitative elements of bulk containers

Thomas Musmann (Rospatt Osten Pross) · Tuesday, June 22nd, 2010

Control question: remember what this was?



You certainly knew the answer had you read [Max's post on Patent Law and Philosophy](#): this is not just an IBC (Intermediate Bulk Container) for acids and toxins; this is a modern embodiment of an ancient Greek paradoxon. Remember: "cage + bottle = IBC". This much is clear enough, even to patent lawyers. But how about: "old cage + new bottle"? Does that now equal "old IBC" or "new IBC"? Too much for a lawyer to answer precisely, unless the answer is "it depends..."

And, tellingly, a great deal depends on the answer. "Old IBC" would mean "no patent infringement". As a consequence, collecting and equipping old cages with new bottles and then selling the hybrid product (so called "rebotling") would qualify as a repair of the old IBC and would not, therefore, interfere with the (exhausted) patentee's rights. By contrast, "new IBC" would mean "patent infringement" and would grant the patentee far-reaching means for controlling the after-market (see [Brian's post Bottling the After-Market](#)). As a result, he could legally prevent competitors from equipping his old cages with their new bottles.

On 20 May 2010, the Munich District Court pronounced two judgments on this question (docket nos. 7 O 19419/08 and 7 O 14224/09). The outcome: "old cage + new bottle = old IBC". Replacement of the bottle was considered a repair of the original IBC and not a change of its identity. Hence, patent infringement of the company doing the rebotling was denied and the actions were dismissed. Both judgments are not published yet and may still be appealed. The outcome is in a line with judgments of the Hamburg District Court of 31/08/2007, docket no. 315 O 543/07, and the London High Court of Justice [2010] EWHC 660 (pat) in re. Schütz v. Werit of

31/03/2010.

Now back to the crucial question: on what does the answer depend? The court determines those parts of the IBC in which the entitative elements of the invention are embodied. The qualification depends on the teaching of the patent in suit. Does it improve only the cage or also the function of the bottle? Is the bottle nothing more than a mere object of the improved cage? The patent in suit in both judgments was different, but the court in both cases held that the entitative elements of both inventions were not embodied in the bottle; only in the cage. Thus, replacement of the old bottle by a new bottle left the identity of the old IBC untouched.

This approach is of wider general interest. Depending on the patent's teaching, replacing the same element of the same object could, in principle, be both repair of the old or the making of a new object. Philosophy according to lawyers would conclude: identity is relative.

Rüdiger Pansch

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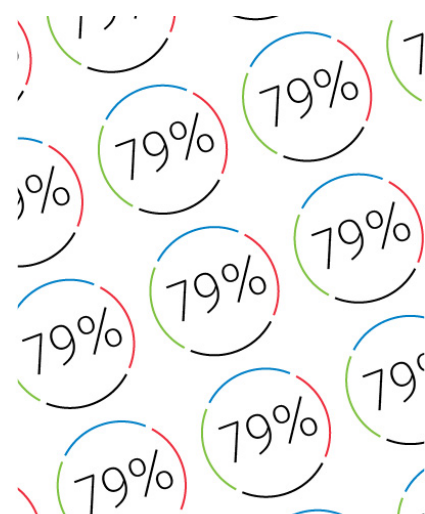
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