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## You Shall Not Lie! – Cost Risk in Patent Proceedings

Eike Schaper · Tuesday, August 17th, 2010 · Landmark European Patent Cases

The Duesseldorf Court of Appeal referred in a recent decision to the commandment “You shall not lie!” – with severe consequences as to the cost risk of patent proceedings (court order of 15 April 2010 – ref. I-2 W 10/10; InstGE 12, 107 – Du sollst nicht lügen!).

Under German law, the losing party has to bear the court fees as well as the statutory attorney fees of the winning party. Both fees are calculated according to a fee scale based on the value in dispute. The value in dispute is set by the court – usually in accordance with the plaintiff’s suggestion.

When filing its patent infringement action with the Duesseldorf District Court, the patentee had suggested a value in dispute of EUR 200,000. The alleged infringer did not object (given the uncertain outcome of the proceedings), and the court set the value in dispute accordingly. After the patent infringement action was finally rejected by the Court of Appeal, the attorneys of the defendant filed a complaint, arguing that the value in dispute was in fact EUR 30 million – which would trigger much higher statutory attorney fees.

The Duesseldorf Court of Appeal confirmed that such a motion may be filed within six months after final judgement, even if the relevant facts are submitted after the court has rendered its final decision. The value in dispute is set at the free discretion of the court, taking into account the objective economic interest of the plaintiff. The value of an injunction for patent infringement corresponds therefore with the disadvantages the patentee suffers if the patent infringement continues. An indication for the value of an injunction can be the license fee which would be payable during the remaining lifetime of the patent(s) in dispute. If the patentee further claims damages and detailed account for infringements incurred in the past, this amount must also be estimated by the court and added to the value in dispute.

In application of these principles, the court estimated the applicable license fees and deduced after detailed calculation that the value in dispute must be increased from EUR 200,000 to EUR 2,050,000. As consequence, the court fees payable by the losing party increased by the factor five (from approx. EUR 10,000 in two instances to over EUR 50,000). The statutory attorney fees increased similarly.

It does not matter whether the patentee stated the lower value in dispute negligently or intentionally in order to “save” court fees (given the uncertain outcome of the proceedings). In both cases there are no legitimate expectations to be protected at the expense of the state which would receive less court fees than entitled. The Duesseldorf Court of Appeal reminded the parties

therefore that they shall not lie with respect to the real value in dispute. Also attorneys should remember that it pays off to stay with the truth.

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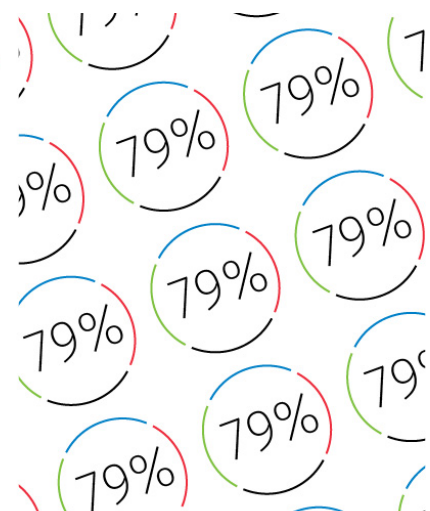
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