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Protection of Technical Products after Expiration of the Patent

Thomas Musmann (Rospatt Osten Pross) · Wednesday, November 24th, 2010

Patent protection for technical products expires after 20 years. However, there is no rule without exception. In its recent decision “Femur-Teil”(judgement of 15 April 2010, [I ZR 145/08](#)), the German Federal Court granted protection against an (almost) identical copy of a femoral element for a hip joint endoprosthesis, although patent protection had already expired in 2001:



Original

The court based its decision on Section 4 No. 9 (b) German Unfair Competition Act. According to this provision, offering of replicas which impair the assessment of the original is an act of unfair competition. In this case, the original was still a successful product which achieved best results in long-term studies. The design of the original femoral element for a hip joint endoprosthesis was caused by technical requirements; however it was not mandatory for technical reasons to design the product in exactly this manner. According to the court, expectations regarding the quality of the original are under these circumstances linked to its design. If the quality of the identically designed replica does not meet the high expectations set by the original, negative experiences regarding the quality of the replica could be transferred to the original. This would impair the assessment of the original. Even if the purchaser of the replica distinguishes the replica from the original (e.g. because of further circumstances such as labelling), such a negative image transfer is not excluded.

Stephan von Petersdorff-Campen



Replica

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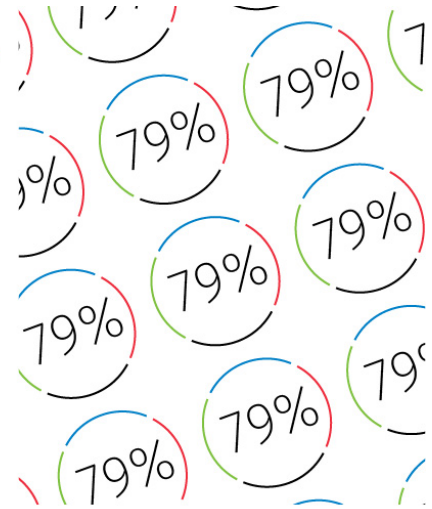
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