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## Third Party Intervention – A Multiplier for the Risk of Litigation

Thomas Musmann (Rospatt Osten Pross) · Friday, February 25th, 2011

Germany is still busy handling its first big wave of patent troll litigation. At this stage it seems that some trolls may have underestimated the power of bulk defence.

In a case concerning mobile telecommunication, a troll picked the last member of the distribution chain, a network provider, as defendant in patent infringement proceedings. As usual in the field of mobile telecommunication, the patent did not only refer to the use of network infrastructure. Instead the claims of the patent related to the communication between the mobile phone and the infrastructure. The network provider filed third party notices to several of his suppliers of network infrastructure and mobile devices. He contended that he may have damages claims against these providers should the troll win.

Some of the big suppliers decided to join the proceedings as third party interveners. This gives them the right to file their own motions and observations in the proceedings, as long as these do not contradict the main party's procedural actions.

Joining the proceedings as a third party intervener has one curious effect in Germany: The risk for the joining entity is minimal while the cost risk for plaintiff rises significantly.

According to German law, cost reimbursement is handled on a very formal basis. The losing party has to reimburse the winning party for its attorneys' costs and for court fees. The reimbursable attorneys' fees are limited to statutory fees, calculated on the basis of the value in dispute. This enables plaintiff to get a good estimate of the total cost risk before litigating his patent.

The third party intervention, however, can severely disturb this estimate. Since the third party intervener is not a party to the proceedings, he does not have to pay anything to plaintiff should plaintiff win. Plaintiff cannot even enforce the verdict against him. All the intervener has to pay in this case are his own attorneys' fees. However, if defendant wins the case, German law provides that plaintiff has to reimburse also the third party interveners for their costs. If the value of litigation is significant, as it usually is in mobile telecommunication, these reimbursable costs can reach millions of Euros.

In the case I refer to plaintiff contested that the third party interventions were admissible. He argued, inter alia, that such interventions were abusive. In an interim judgment, the district court found the interventions to be admissible. This interim judgment is currently under appeal.

One interesting point of discussion in this context is whether the value in dispute is equal for all

participants or whether this value is lower for the third party interveners as their involvement in the case is limited to a part of the matter in dispute. If the value in dispute for the interventions were lower, the interveners' reimbursable statutory fees would decrease. We are currently waiting for a decision of the court of appeal in a parallel matter in this respect, and this topic may even be subject to a decision of the Federal Supreme Court in the end.

But be it as it may be, a mass of third party interventions will multiply the cost risk for plaintiff in any case.

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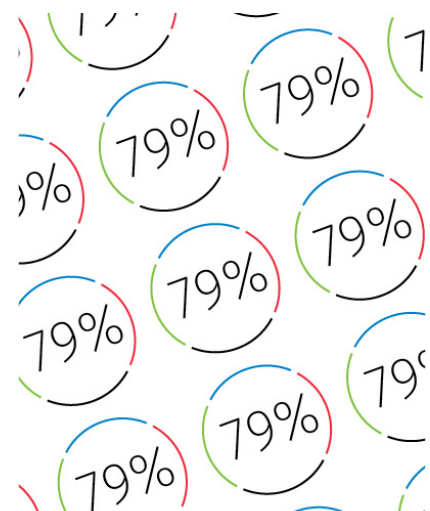
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