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Federal Court of Justice lifts the gathering curtain

Markus Lenssen (Rospatt Osten Pross) · Tuesday, March 29th, 2011

The German Patent Act (sec. 145) provides for a special limitation of further actions on account of the same or similar act based on different patents. Such actions shall only be admissible if the plaintiff was not in a position to assert a patent in an earlier suit without his own fault.

The landmark decision on this issue is "Kreiselegge II" dealing with agricultural cultivators known as "power harrows". In this case the Federal Court of Justice ruled that an earlier suit concerning the arrangement of the tines did not hinder a further suit based on the identical embodiment and dealing with the arrangement of special screening plates. Although the patent owner raised two separate suits against one identical embodiment, also the second suit was held to be admissible as there was no close technical relation between the precise infringing actions.

Recently, the Federal Court of Justice has confirmed this ruling in a case of patent protection for a gathering curtain (judgement of 25.01.2011, docket no. X ZR 69/08). The "same or similar act" as addressed by sec. 145 of the Patent Act has been confirmed as only the precisely specified infringing part of the device as a whole. Whether two acts are same or similar has to be determined by balancing the protective interests of the defendant not to be sued successively on the one hand and the problems arising by including a variety of patents into one court action on the other hand. In effect, only acts characterised by further or modified features and patents being in close technical connection to each other can force the plaintiff to have them combined in one suit.

In this particular case the attacked embodiment comprised one single part fulfilling all features of the first patent (turning around the pull cords) as well as all but different features of the second patent (guidance elements for the pull cords). The elements being characterised by turning around the pull cords did function as guidance elements at the same time. A close technical relationship as requested by sec. 145 Patent Act was nevertheless denied as the question of infringement of the second patent did not depend on the turning function according to the first patent. Therefore, the plaintiff was not precluded from suing the defendant for a second time on the basis of the second patent.

Dr. Markus Lenßen, LL.M. (Cantab.)
rospatt osten pross – Intellectual Property Rechtsanwälte

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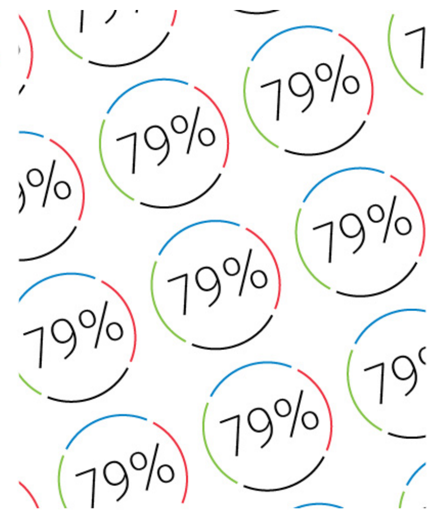

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