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Inspection orders and urgency – a follow-up report

Thomas Musmann (Rospatt Osten Pross) · Thursday, April 28th, 2011

by Stephan von Petersdorff-Campen

In their posts of 21 Oct. 2010 and 28 Jan. 2011, Hetti Hilge and Max v. Rospatt reported a difference of opinion between German courts on the question of whether or not there is a requirement of “urgency” in cases of ex-parte inspection orders following the so-called “Düsseldorfer Besichtigungspraxis” (Düsseldorf inspection practice). Whereas the 20th Senate of the Oberlandesgericht Düsseldorf (2nd Instance Court) in a copyright case and later the 21st Chamber/Civil Law of the Landgericht Munich (1st Instance Court) in a patent case both took the view that an inspection order may be granted irrespective of any urgency requirement, the Oberlandesgericht Cologne (copyright case) and the Oberlandesgericht Karlsruhe (patent case) – both in last instance – held that plaintiff must file the request for inspection within due time (approximately one month) after he had had knowledge of the relevant facts. By exceeding this deadline he would show that the case was not urgent for him. The court would then dismiss his request for interim relief.

In a patent infringement case, the 20th Senate of the Oberlandesgericht Düsseldorf recently confirmed that no urgency is required for an inspection order (decision of 17 March 2011, docket no. I-2 W 5/11). The reasoning for this final decision says that para. 140 sec. 3 German Patent Act must be interpreted in the light of art. 7 sec. 1 s. 1 Directive 2004/48/EC. This provision relates to measures for preserving evidence and does not establish any additional requirement as to urgency. The Düsseldorf Court found that the provisions for preserving evidence do not aim at a preliminary protection of claims. Instead, they would rather aim at preventing the alleged infringer from removing or altering his product, device, or process.

Thus, choose the right court, claimant!

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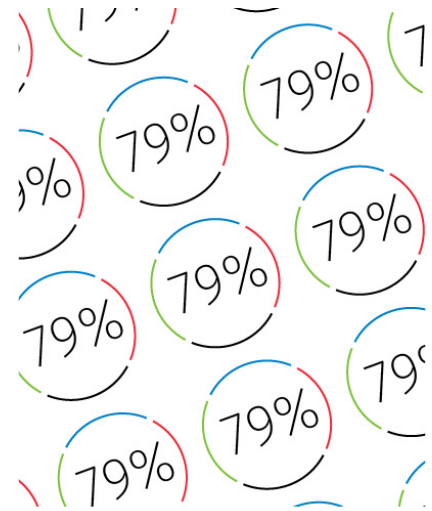
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