

Kluwer Patent Blog

You Shall Not Lie – Part 2 -Courts Can Get Nasty

Thomas Musmann (Rospatt Osten Pross) · Friday, September 30th, 2011

Part 1 of the drama with the title “You Shall not Lie” is covered by a previous post. Part 2 has been briefly summarized two weeks ago by Miriam.

It appeared to me that the potential consequences of this decision justify a further post on this matter.

Or could you imagine to go to jail just because you underestimated the value of your case? Well this might happen if the courts are provoked and really get nasty. You shall not lie -part 2 is a case with such a potential scenario.

The cost risk of patent litigation in Germany depends to a large extent on the value of the case. This value in dispute is the basis for the calculation of court fees and statutory attorney's fees. Whereas nowadays most attorneys bill by the hour, the value in dispute is the basis for the reimbursable statutory attorney's fees and the court fees. These fees ultimately have to be paid by the losing party.

It should be added that the statutory fees calculated on this basis are by law the minimum attorney's fees, i.e. the attorney is not allowed to bill less than these statutory attorney's fees, thus also the winning party has to pay the statutory fees to its attorney, even if he billed less on an hourly basis.

It follows that there is some incentive for clients to mitigate the cost risk of the litigation by suggesting rather low values.

Whereas the value in dispute is initially indicated by plaintiff, it is eventually fixed by the court. However, without a reason to the contrary courts will use the value suggested by plaintiff. Defendants usually refrain from arguing that the value in dispute is too low for several reasons, amongst them the uncertainty of the outcome.

In its first “You shall not lie”-decision the Appellate Court of Düsseldorf has confirmed that the value in dispute can be retroactively raised upon the initiative of the winning party (respectively their attorney in his own interest). The court did not consider it inappropriate that the defendant only complained about the low value in dispute once he knew that plaintiff had to pay all costs. According to the court the plaintiff deserves no protection in this respect. Already in this decision the court stressed that neither party should lie with respect to the value in dispute.

“You Shall Not Lie II” now goes much further down this road.

The parties of a lawsuit have an obligation to reveal concrete figures enabling the court to correctly assess the value in dispute.

The court may –indirectly- force the parties to comply with this obligation by fixing an extraordinarily high value (here 30.000.000. Euro) thus forcing plaintiff to provide concrete figures to justify his appeal against the court order.

In the case decided plaintiff tried to enforce standard related patents in the field of communication technology. In his complaint he indicated a value in dispute of 5 Million Euro. The first instance expressed doubts that the value in dispute correctly reflects the economic interests of plaintiff and required more information from the parties in this respect. However, neither party provided any further information. As a consequence the first instance raised the value on its own motion to 30 Million Euro, which is the highest amount relevant for the computation of fees, i.e. values above 30 Million Euro do not increase the fees any further.

Plaintiff appealed this decision. To justify the appeal plaintiff had to reveal some figures: On the basis of a settlement offer made prior to the litigation he now calculated a value in dispute of 11 Million Euro. The court dismissed the appeal because it applied a much higher royalty for the calculation of the value in dispute than offered by plain-tiff during settlement negotiations.

As a general rule the value in dispute should be calculated by multiplying estimated turnover of the infringer with the remaining lifetime of the patent (and the time of past infringement) with a reasonable royalty. For this purpose the court suggests to rather use the highest thinkable royalty and not the lowest. Although this approach is not always justified, it provides a realistic general idea of the economic value.

In the case decided the difference between the original value in dispute and the value eventually fixed by the court had a significant impact on the costs: The court fees for two instances for a value of 5 Million summed up to 115.000,00 Euro, whereas they now amount to 640.000,00 Euro for a value of 30 Million. The attorney's fees which have to be reimbursed to the winning party differ likewise.

The court took the opportunity to issue a drastic general warning to the legal community:

In its reasoning the court considers it as a known fact that some attorneys suggest very low values to minimize the court fees to be paid initially thereby gaining more flexibility for their own fees within a given budget, thereby depriving the state from the court fees it would have received otherwise.

The court explicitly considers it as a criminal offence (fraud) if one or both parties and/or their attorneys deliberately indicate values which are evidently too low. The court considers initiating criminal proceedings against the representatives and/or their attorneys, including proceedings against the lawyers for professional misconduct with the bar association.

Attorneys and clients therefore should be careful to use a reasonable basis for the assessment of the value in dispute. Otherwise the courts can get nasty, as the Appellate Court threatened in its decision.

Thomas Musmann

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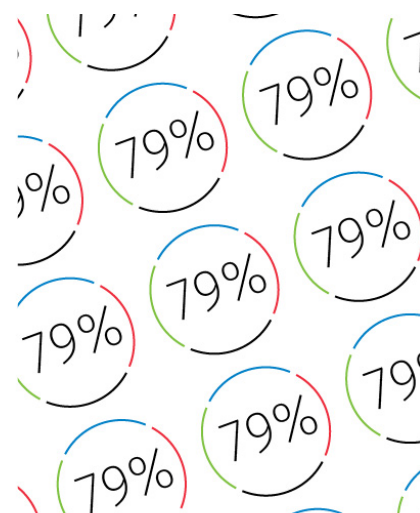
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This entry was posted on Friday, September 30th, 2011 at 3:43 pm and is filed under [Germany, Procedure](#)

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