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Munich Appellate Court on Making vs Repair

Rüdiger Pansch · Friday, October 28th, 2011 · Landmark European Patent Cases

by Rüdiger Pansch, rospatt osten pross

And here we are again with more recent decisions on the bulk container paradox (see Brian's post *Bottling the After-Market*; Max's post on *Patent Law and Philosophy*; my post on *Entitative Elements of Bulk Containers*).

Imagine you have an IBC (Intermediate Bulk Container), just as this one:



Now, you open the upper crossbars, take out the original inner plastic bottle and re-place it with your own plastic bottle (so called “rebotling”). Do you make a new IBC, or do you just repair the old product? Do you commit a patent infringement by making a new embodiment, or do you just use the old embodiment in respect to which the patentee’s rights remain exhausted?

In two recent judgments of 28 July 2011 (docket nos. 6 U 3411/10 and 6 U 3412/10), the Munich Court of Appeal denied patent infringement. Just as in the first instance, replacement of the bottle was considered a repair of the original IBC and not a making of a new IBC.

The two judgments are applying assessment criteria as laid down in three decisions of the Federal Supreme Court on different technical items (Bundesgerichtshof: “Flügelradzähler” [2004] GRUR 758; “Laufkranz” [2006] GRUR 837; “Pipettensystem” [2007] GRUR 769). Which parts embody the entitative elements of the invention? Which parts are improved by the invention? Is the bottle nothing more than a mere object of the improved cage?

The judgments explicitly dissent from the judgment of the English High Court of Justice, Court of Appeal, [2011] EWCA Civ 303 in re. *Schütz vs Werit* of 29 March 2011. The Court of Appeal

found for patent infringement overruling the decision of the London High Court of Justice, [2010] EWHC 660 (pat) of 31 March 2010.

In both Munich judgments, leave to a second appeal was granted. Both proceedings are now pending at the Federal Supreme Court. We will keep you updated.

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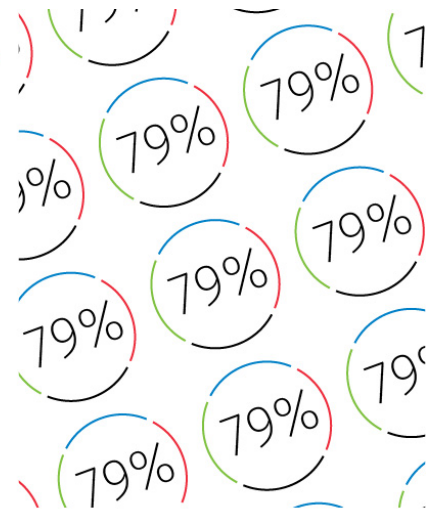
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