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Accounting on infringer's profit

Bernward Zollner · Friday, January 6th, 2012 · Landmark European Patent Cases

by Bernward Zollner
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In two decisions of May and September 2011 the Appeal Court Düsseldorf had to comment on various issues concerning the accounting and determination of patent infringer's profit. In the decision of May 2011 it is stated that an obligation of defendant to amend or specify an accounting cannot be assumed if defendant clearly waives the right to later use the cost positions under discussion to diminish its profit in course of the damage-litigation. This means that defendant is able to terminate an often burdensome discussion on the completeness of the accounting in cases where the amounts in question do not justify at all time and effort of such a discussion, and where plaintiff nevertheless continues the discussion in order to push defendant to a settlement agreement.

In a second decision the court takes a more relaxed position on the requirement of the direct relation between the costs which are allowed to be deducted from the turnover and the patent infringing product. Measures which were reasonably taken in order to reduce the capacity of production can be qualified as costs which are directly related to the patent infringing product if the infringing product counted for a certain portion of the total turnover or the total capacity of the company so that the capacity reducing measures appear to be reasonable. The smaller the portion of the turnover or of the capacity relating to the infringing product the less likely are such "structural" cost saving measures and the more specified the defendant has to explain the details of such measures.

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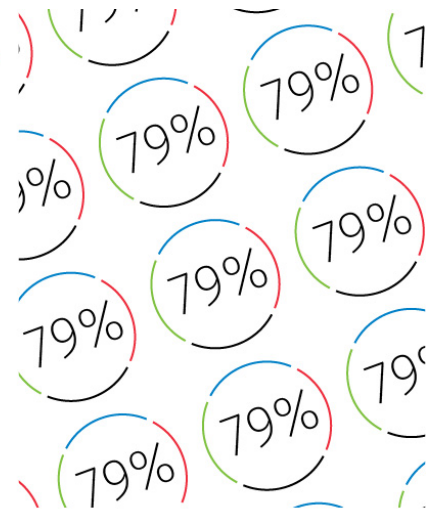
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