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Troublesome Times for the Enforcement of IPR at German Trade-fairs?

Thorsten Bausch (Hoffmann Eitle) · Friday, March 30th, 2012

An article in the well-known IP magazine GRUR last year carried the heading “Do exhibitors at trade fairs in Germany enjoy immunity from the courts?” The author came to the conclusion that this question had to be answered in the affirmative after he had read the Federal Court of Justice decision “[Pralinenform II](#)” (a trademark case decided on 22 April 2010, docket I ZR 17/05) and the decision of the Regional Court Mannheim “Sauggreifer” (a patent case of 29 October 2010, docket 7 O 214/10).

In “Pralinenform II”, the Federal Court of Justice decided that a Turkish company had exhibited and therefore “advertised” at the International Sweets and Biscuits Fair in Cologne sweets that were protected as to their shape by a three-dimensional trademark. According to the Court, it was of no relevance that the sweets were wrapped in a foil which was clearly non-infringing. Surprisingly the Court, however, denied that there was an “offer” of the sweets pursuant to the German Trademark Act since the plaintiff had not submitted evidence that the Turkish company had “invited customers to purchase”.

In “Sauggreifer”, the Regional Court Mannheim denied that there was an “offer” of a patent-infringing machine. According to the Court, the plaintiff had failed to prove that the fair was organized for the sale of products and was not an exhibition organized exclusively for information regarding new technological developments. It was therefore not clear whether the defendant had intended to invite customers to purchase his products for purchase. The Court further decided that the defendant’s presentation of the patent-infringing machine in its catalogue was not evidence of an “offer” since it was conceivable that the defendant had for economy reasons refrained from preparing a separate catalogue specifically for the fair in Germany, and had used its general catalogue, including the patent-infringing device, and had not actually intended to offer this device at the fair.

Should it now be concluded from these two decisions that the presentation of IPR-infringing goods (as such or in a catalogue) at a trade fair, if there is not an “invitation to purchase”, does not constitute an “offer” under the German IP laws, despite the vast amount of court decisions to the contrary in the last decades?

We do not think so. First of all, the decision of the Federal Court of Justice that an exhibitor must “invite to purchase” is not a new interpretation of the concept of “offer”. The “invitation to purchase” as a condition for an “offer” under IP law has been applied for a long time in court

decisions and also long accepted as such in the literature.

The concept of “invitation to purchase” is to be understood such that in those very rare cases where products are presented at an exhibition fair exclusively organized for informational purposes as to new technological developments, an “invitation to purchase” should be denied (see the Court’s decision of 18 December 1969 “Heißläuferdetektor”).

Further, should goods be used to equip the booth, for instance to welcome visitors (conference chairs, tables, IT equipment), or for decorative purposes, the exhibitor has not “invited to purchase” these goods (see the decision of the Higher Regional Court Dusseldorf, published in GRUR 1983, at 760).

However, neither the Federal Court of Justice nor the Regional Court Mannheim decided that as a rule, the presentation of products at a trade fair does not constitute an “offer” under the German IP laws, but that the plaintiffs in the specific cases have not submitted sufficient evidence that the goods were meant as an offering for purchase and that the fair was a merchandising fair. Further, the decision of the Regional Court Mannheim was rendered in provisional injunction proceedings and the court mentioned that “the decision on the infringement, i.e. on “offering” can be decided differently”. Therefore the courts still have room to decide whether the presentation of goods at a trade fair in Germany constitutes an offer infringing IP rights if no other circumstances are presented.

Two recent decisions show that the courts are accepting the understanding that the presentation of goods at trade fairs constitutes an “offer” according to Germany’s IP laws:

1. The Higher Regional Court Cologne on 11 November 2011 (docket 6 U 43/11) set out in the obiter dictum that it must be concluded from the plaintiff’s presentation of goods at a trade fair three years in a row that the plaintiff wants to sell these goods. The Court pointed out that it must be considered (under the Copyright Act) that an offer constitutes an infringement even if the product will only be delivered to countries where there is no copyright protection.

2. The Regional Court Hamburg decided on 14 September 2011 (docket 315 O 264/11) that the presentation of products at a trade fair for commercial purposes constitutes an “offer” under the German Patent Act. The presentation is meant and is qualified to draw the attention of possible customers to the product and to enable business transactions.

As a result, the “invitation to purchase” as required by the Federal Court of Justice and also by the Regional Court Mannheim must be understood such that an exhibitor must actually intend to sell the products to customers. This is, of course, usually the case if the products are presented at a trade fair. According to prevailing court decisions, it is of no relevance whether the goods are offered only to customers from those countries where the product is not protected by IP rights (FSC 19 January 1989, I ZR 217/86 – Kronenthaler). The plaintiff must first of all prove that the fair is a trade fair and not an exhibition for recent technological developments without sales activities. For instance, oftentimes the purposes of the trade fair, e.g. to “conclude sales contracts” are explicitly indicated at websites. Further, it would be best if the plaintiff can clarify that the goods were not meant as decoration, giveaways, for booth equipment purposes or the like (even though, in our view, the burden of proof lies with the exhibitor). We therefore think (and hope) that IP-right holders will continue to be able to enforce their rights as in the past at German trade fairs. Those recent decisions of the Higher Regional Court Cologne and the Regional Court Hamburg

allow us to be optimistic.
Anja Petersen-Padberg

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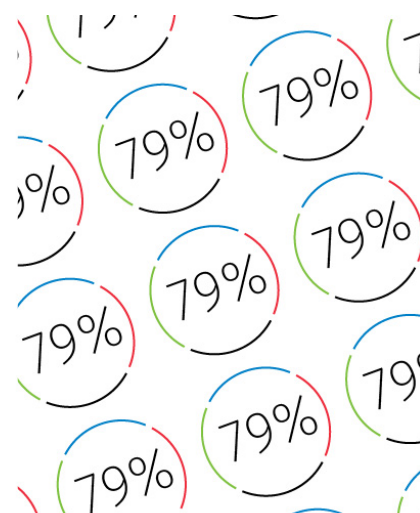
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