

# Kluwer Patent Blog

## Who's the skilled sausage-maker? It's a team, decrees Germany's Federal Court of Justice

Thorsten Bausch (Hoffmann Eitle) · Thursday, April 12th, 2012

As in other jurisdictions, German Courts try to determine whether an invention is patentable over the prior art by looking at it through the eyes of the notional skilled person at the effective filing date of the patent at issue. In a decision pronounced on March 6, 2012 ([docket X ZR 78/09](#)), the German Federal Court of Justice (Bundesgerichtshof) refined its case law on the definition of the skilled person, this time on a case to do with sausage making.

The case concerned a process for manufacturing meat products such as sausages, by stuffing a certain type of tubular casing which is delivered to the stuffing plant on a roll. The casing is called reel stock.

The use of reel stock in the prior art, for it to be stuffed or filled with meat, was known per se. However, the prior art reel stock was a simple, flattened tubular casing. It was delivered by a converter to a stuffing plant. In the stuffing plant, it was pulled off the reel, moisturized in a bath, opened from its flattened state to a more or less circular cross-section, pulled over one of several filling horns (which is like a nozzle for injecting the meat into the casing), clipped just in front of the filling horn, and then cut. Upon operating the filling horn, the meat is pressed against resistance of the clip. Continued operation (stuffing) results in the “building” of a sausage of increasing length. A second clip then marked the end of the sausage and the completion of the process.

The patent at issue proposed to dispense with the first clip and to instead use pre-fabricated transverse closures in the casing, for instance in the form of transverse sewn seams. The reel stock delivered to the stuffing plant was thus no longer a simple, flattened tubular casing, but such a casing which was additionally equipped with transverse closures at regular intervals. The following drawing from the patent is illustrative of the situation in the stuffing plant. In the drawing, the reel stock is indicated with 3, the seams with 2, the moisturizing bath with 4, the filling horns with 15, and the meat is contained in 10.



An additional piece of prior art had put endless casings for foodstuff having transverse closures into the public domain, but without providing much more context.

The question for the court was whether the skilled person would have used the prior art casing in the prior art process, without the exercise of inventive step.

The fact-finding process uncovered that prior art industry practice distinguished between stuffing plants on the one hand and converters on the other hand. The converters were traditionally used to prepare the casing so that the casing could be filled or stuffed by the stuffing plant as delivered. Each, the converter and the stuffing plants had their own area of expertise. On the basis of these facts, the court decided that in such cases, where a patent concerns a multi-stage production system, the stages typically not being concentrated in only one plant or enterprise, the notional skilled person can be a team composed of persons having skill in each of the stages. The combined skills are then the yardstick for assessing obviousness.

This recent decision seems to confirm that the pendulum in Germany is swinging back to normality. After some decisions confirming the patentability of seemingly miniscule steps forward, more often than not because of failure to identify an incentive for the skilled person to combine prior art teachings, the German courts appear to return to a real-life assessment of what industry practice at the priority date was like. If this return is continued, the traditionally proprietor-friendly claim construction by German infringement courts would again be balanced by a less academic assessment of the validity of patents.

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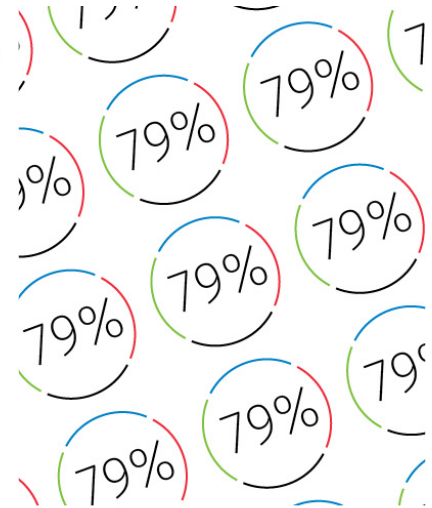
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