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Swiss Federal Patent Court adopts Dusseldorf rules for preliminary taking of evidence

Simon Holzer (MLL Meyerlustenberger Lachenal Froriep Ltd.) · Monday, September 10th, 2012

In a decision dated 14 June 2012, the Swiss Federal Patent Court granted a patent holder's request for preliminary taking of evidence by means of the creation of a precise description of an allegedly infringing process.

The Patent Court ordered that the description shall be carried out at defendant's premises by a technically trained judge assisted by a court clerk and in presence of defendant's representatives as well as applicant's attorney and patent attorney. To protect defendant's business and manufacturing secrets, the Patent Court excluded the applicant itself from participating at the preliminary taking of evidence and prohibited applicant's attorney and patent attorney from communicating to applicant any details of which they would become aware of during the description process.

The Patent Court further stated that defendant will be given the opportunity to acknowledge the accuracy and completeness of the description the day it is carried out, to subsequently comment on the results of the description process, and to request the correction of the description if it unnecessarily discloses its business or manufacturing secrets. The Court will then decide in consideration of each party's interest to what extent the applicant shall be given access to the results of the description. Applicant's attorney and patent attorney will be released from their obligation of confidentiality after notification of the description results to the applicant by the Court, but only with regard to facts that are disclosed in the description. Applicant's attorney and patent attorney will remain bound to maintain confidentiality regarding all other facts they become aware of during the description process which will not be reflected in the court's report.

The possibility of requesting a precise description of an allegedly patent infringing product or process is referred to as "saisie helvétique". There is not much case law yet on this process and the procedural details of the "saisie helvétique" are not entirely clear. In this decision, the Swiss Federal Patent Court followed the practice of the Dusseldorf courts regarding the preliminary taking of evidence.

In order to resolve the conflict between defendant's right to preserve its trade secrets that may be disclosed as part of the description and the right of the applicant to take evidence of a product or process that is likely to infringe its patent, the Dusseldorf courts prohibit the patent owner from attending the description process. Only the attorney and/or the patent attorney of the patent owner are present during the preliminary taking of evidence and are strictly obligated to keep the results

of the description confidential. The patent owner only has access to the results of the final description.

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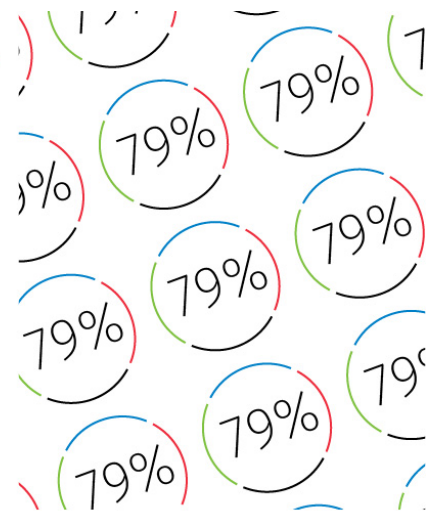
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