

# Kluwer Patent Blog

## Supply of means which relate to an essential element of an invention

Thomas Musmann (Rospatt Osten Pross) · Friday, September 28th, 2012

by Bernward Zollner

The German law on indirect patent infringement is rather strict. Particular means which are being supplied to third parties relate to an essential element of the invention if they are mentioned in the patent claim. In a decision from May 2004 called “Flügelradzähler” the Bundesgerichtshof has stated that the mere existence of a feature in a patent claim means that this feature relates to an essential element of the invention. Such a relation to an essential element of the invention is to be confirmed in cases where the means functionally cooperate with an element of the invention to reach the protected inventive concept (cf. BGH GRUR 2004, 758, 761 – Flügelradzähler).

However, if the rights of the patent owner are exhausted there is no indirect infringement. In a decision of February 2007 called “Pipettensystem” the German Bundesgerichtshof had to decide on the European patent 0 656 229. The patent owner of this patent distributed a manual pipette system for which the patent claim specifies various features which have the purpose to suggest a pipette system for the manual coupling and decoupling of a syringe without the need that the syringe is touched. The patent owner also distributed syringes which were suited to cooperate with the manual pipette system. Defendant distributed syringes which were as good as the syringes of the patent owner and which Defendant advertised as being suitable and decoupled with the pipette system according to EP 0 656 229. The action of the patent owner based on indirect patent infringement was dismissed by the District Court Düsseldorf, granted by the Appeal Court Düsseldorf and again dismissed by the Federal Supreme Court.

The Federal Supreme Court confirmed in the first part of the decision the reasoning of the former decision “Flügelradzähler”. The court in particular repeated the language that anything which is mentioned in the patent claim is already for this reason an essential element of the invention. However, the court denied the claim of patent owner for another reason. The defendant who had acquired patent owner’s manual pipette system was entitled to use the pipette system with syringes which were not supplied by the patent owner. The exclusive right of the patent owner to determine on the use of the patented pipette system was “exhausted” as soon as the unit consisting of manual pipette system and (a first) syringe was sold by the patent owner to defendant. Thus defendant was entitled to later continuously exchange the syringe.

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