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Inspection Orders Against Third Parties

Thomas Musmann (Rospatt Osten Pross) · Friday, February 15th, 2013

In a recent decision (BGH X ZR 7/12) the Bundesgerichtshof had to decide whether the Appeal Court violated its general obligation to elucidate the facts relevant for the decision by not ordering the inspection of a machine by an expert. The underlying case concerned a claim for patent infringement by use of a patented process.

The BGH found that in principle the Infringement Courts can have the legal obligation to order an inspection under the Rules of Civil Procedure (ZPO) if the prerequisites for such an (ex officio) order are fulfilled. The BGH clarified that such an ex officio order under § 144 ZPO against the defendant (or even a third party) was admissible under the same prerequisites as an inspection order requested by a party pursuant to § 140c Patent Act (PatG), i.e. a “certain probability of infringement”, the necessity and suitability of the inspection, and proportionality and adequacy vis à vis the interests of the defendant (or the third party).

In the decided case the BGH agreed with the Appeal Court that the requirement of a “certain probability of infringement” was not met because the plaintiff had failed to present facts based on which such probability could be established.

The decision is of general interest because it encourages the lower Infringement Courts to issue inspection orders even without an according request by a party and because it clarifies that the test for inspection orders against third parties is the same as against the alleged infringer.

Max v. Rospatt

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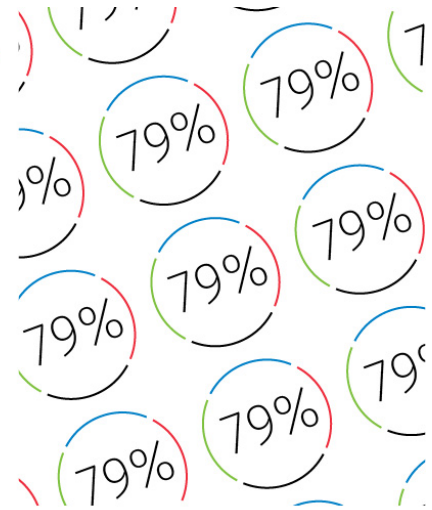
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