

# Kluwer Patent Blog

## There's Life in the Old Dog Yet – Ex Parte Injunctions in Switzerland

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Ex parte measures are rather difficult to obtain in patent matters in Switzerland (except from evidence-protection measures). Nevertheless, the Swiss Federal Supreme Court had the opportunity to opine on this subject in a [recent decision](#) dated 21 August 2013. Although this case will become better known because it was the first time that the first instance, the Swiss Federal Patent Court, had to deal with the doctrine of equivalence (and affirmed an infringement by equivalent means, see the preliminary decision of the Federal Patent Court [here](#)), it is also worth to analyze the requirements of ex parte measures in Switzerland.

In the case at hand, the patentee was informed in December 2012 by the Swiss customs authorities that products infringing its patent regarding drospirenone (a compound which is used in contraceptives), had been stopped at the Swiss border. On 7 January 2013, the patentee requested an ex parte injunction from the Swiss Federal Patent Court, demanding that the import and the distribution of the allegedly infringing products be prohibited and that the products be further retained by the customs authorities. On 9 January 2013, the Federal Patent Court issued an ex parte injunction for the retention of the products by the customs authorities until further notice by the Court.

After the other party had been given the opportunity to submit a statement of defense, a hearing took place on 31 January 2013, during which the patentee orally provided its reply and the counterparty its rejoinder. At the hearing, one of the two technical judges presented his preliminary technical opinion that came to the conclusion that the seized drospirenone products infringe one of two patents of the patentee by equivalents means. However, no judgment was rendered after the hearing, but the protocol of the hearing was served on both parties for further comments.

In the days following the hearing, the patentee noticed that the counterparty not only advertised its products (as before) but was also distributing them in the German part of Switzerland. Obviously, not all products had been withheld at the border. On 7 February 2013, the patentee thus applied for another ex parte injunction within the already pending injunction proceedings, demanding the prohibition of the distribution of the infringing products and a call back by the counterparty of the products already on the market. The Federal Patent Court once again granted the ex parte injunction and prohibited the distribution of the infringing products and ordered the call back of infringing products already on the market.

The Federal Patent Court confirmed the issuance of this ex parte injunction and held in a later

decision dated 21 March 2013 (without prejudice) that the import and distribution of infringing products by the counterparty remains prohibited and that the customs authorities are still to withhold the infringing products until further notice by the Federal Patent Court.

The counterparty appealed that decision to the Swiss Federal Supreme Court, arguing that the decision infringed its right to be heard and that it was arbitrary (in preliminary injunction proceedings the Federal Supreme Court's jurisdiction to review decisions of the Federal Patent Court are limited and the standard for arbitrariness is rather high). The Federal Supreme Court rejected the appeal on 21 August 2013.

This case shows that ex parte injunctions – even though they are rare – can still be effective instruments when it comes to patent litigation in Switzerland. The new Swiss Federal Patent Court appears willing to grant – in specific cases – ex parte injunctions if this seems necessary to keep infringing products from entering the Swiss market. Other cases where ex parte measures are still possible are evidence-protection measures and descriptions of presumably patent infringing devices and processes.

Ordinary proceedings on the merits are still pending before the Swiss Patent Court in the case at hand. Since the author of this post represents the patentee you will be kept informed of the developments as they occur.

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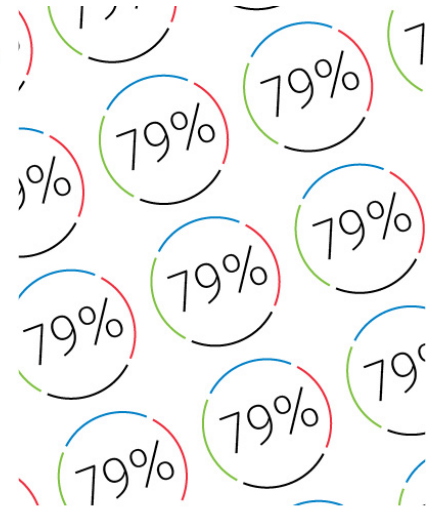
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This entry was posted on Saturday, September 28th, 2013 at 11:07 am and is filed under [Enforcement](#), [literally fulfil all features of the claim](#). The purpose of the doctrine is to prevent an infringer from stealing the benefit of an invention by changing minor or insubstantial details while retaining the same functionality. Internationally, the criteria for determining equivalents vary. For example, German courts apply a three-step test known as [Schneidmesser's questions](#). In the UK, the equivalence doctrine was most recently discussed in [Eli Lilly v Actavis UK](#) in July 2017. In the US, the [function-way-result test](#) is used.”>[Equivalents, Injunction, Switzerland](#)  
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