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# Kluwer Patent Blog

## Transfer of rights in patent application filed by party not entitled to do so – Higher Regional Court reluctantly follows Federal Court of Justice

Thomas Musmann (Rospatt Osten Pross) · Monday, November 4th, 2013

by Stephan von Petersdorff-Campen

Under section 7 (1) of the Law on Employee Inventions (ArbErfG), all the rights in an invention made by an employee in the context of his employment relationship pass to the employer by virtue of law as soon as the employer announces his claim to the invention. With its “Initialidee” (Initial idea) judgment of 12.04.2011 (case X ZR 72/10), the BGH (Federal Court of Justice) ruled that the rights in a patent which the employee has already filed in his own name contrary to this statutory transfer of rights are not covered by the statutory transfer of rights. Before that, this had been treated differently by the courts. Until then, all that was needed was a correction in the Patent Office Register by an entry transferring the patent to the entitled party. Now, the entitled party must if necessary file suit to compel the proprietor entered in the Register to transfer the legal position he has wrongfully acquired. Practical consequence: the claim to transfer of title lapses after the expiry of a period of 2 years after publication of the mention of grant of the patent; PatG (German Patent Act) section 8 sentence 3.

The ruling by the BGH has attracted criticism by some of the authorities and now also in a judgement recently delivered by the Düsseldorf OLG (Court of Appeal). The OLG had to rule on the converse case. Here, the employer had applied for a utility model in his own name for an invention which the employee had previously released. The court had doubts, for legal reasons, whether the requirement of a separate transfer of the legal position was even necessary. In particular, considering the constellation that the employee was forced to file suit against his employer under the pressure of the approaching deadline, the court questioned whether the consequences of the BGH ruling were justified from the point of view of a balancing of interests and reasonableness.

In the end, the Düsseldorf OLG followed the BGH. In view of the fundamental nature of the “Initialidee” decision, the court saw no reason to differentiate according to whether the entitled party was the employee or the employer.

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