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Use Patents under German Law – Manifest Arrangement

Thomas Musmann (Rospatt Osten Pross) · Monday, June 23rd, 2014

by Dr. Simon Klopschinski

The Karlsruhe Higher Regional Court has found direct infringement of a use patent by manifest arrangement even though the product was not marketed together with an instruction manual or product information encouraging the buyer towards the patented use.

Use patents protect the use of an already known product in relation to a novel and inventive purpose. The scope of protection is, however, not limited to the use itself. To the contrary, it also extends to preliminary activities concerning the protected use. According to German court practice already the “manifest arrangement” or “obvious preparation” of a substance constitutes direct use. This applies for instance to formulating and making up a medicament, preparing dosages and packing them ready for use. This practice is not restricted to the field of pharmaceuticals but extends to use patents of all kinds. Case law provides that the scope of protection of a use patent also covers a product which has been manifestly arranged in the form of the provision of an instruction manual (Haedicke/Timmann, in: Haedicke/Timmann, Patent Law, 2014, § 8 para. 71).

In the case decided by the Karlsruhe Higher Regional (judgment of February 26, 2014, court docket: 6 U 50/12, German-language version [here](#)) the defendants manufactured insulation material made of glass fibres and sold it to the building industry in Germany. The patent in suit claimed the use of glass fibres, which have a specific glass composition and diameter, as glass fibres which exhibit no carcinogenic potential. The patent’s scope was not restricted to a specific use of the glass fibres, e.g. as insulation material. In fact the patent protected all uses of the specific glass fibres where a carcinogenic risk shall be avoided.

The Karlsruhe court found direct infringement since the defendants had made manifest arrangements for the use of the glass fibres in their products as glass fibres which exhibit no carcinogenic potential. Firstly, the defendants’ products contained glass fibres which displayed the specific glass composition and diameters protected under the patent. Secondly, they were designed and marketed as insulation material for the building industry where the cancer risk has to be excluded with a high degree of probability by statutory requirements. Therefore, the court did not require further manifestations, e.g. in form of instruction manuals or specific product information indicating the exclusion of a carcinogenic potential.

The Karlsruhe court has allowed an appeal on legal issues to the Federal Court of Justice since in the court’s opinion the court practice on infringement of use patents by manifest arrangement is not yet comprehensively settled.

The decision exemplifies that use patents are a potent instrument. Even though they are characterized as method patents, court practice has aligned their scope of protection with the scope of product patents, subject to a specific purpose. This is even more true for broadly drafted use claims like in the present case. Therefore, the potential of use patents should already be taken into account when formulating the patent claims, in order to facilitate subsequent enforcement.

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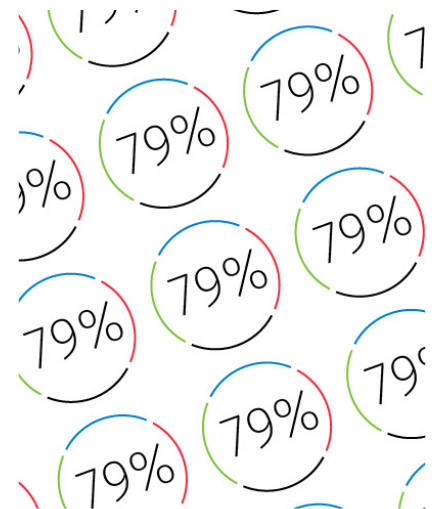
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