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Requirement of irreparable harm: Swiss Federal Supreme Court puts spokes in appellants' wheels in appeals against decisions in summary proceedings

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Although this is a patent law blog a recently published decision of the Swiss Federal Supreme Court in an appeal against a dismissed request for a preliminary injunction in the copyright sector is worth being discussed in more detail here. It will make life harder also for petitioners who see their hopes dashed before the Swiss Federal Patent Court and consider filing an appeal.

In its recently published [decision dated November 27, 2014](#) the Swiss Federal Supreme Court made it substantially harder for parties who succumb in summary proceedings to appeal their cases to the Federal Supreme Court. This recent decision concerns a copyright case but it has a significant impact on Swiss patent litigation as well so it is well worth discussing the decision here.

The background of the Supreme Court decision is the following: The Austrian author [Thomas Brunnsteiner](#), who published reportages under the title „[Bis ins Eismeer](#)“ in 2007, requested on August 22, 2014 that the Court of Commerce of Zurich render a preliminary injunction against the promotion, offer for sale, and sale of the book written by the Swiss author [Urs Mannhart](#) called „[Bergsteigen im Flachland](#)“.

According to the plaintiff the Swiss author Urs Mannhart borrowed ideas, characters and text fragments from “Bis ins Eismeer”. Despite an act of solidarity of numerous Swiss authors with Urs Mannhart the Court of Commerce granted the injunction on September 18, 2014. In the view of the Zurich Court the plaintiff made a plausible showing that Urs Mannhart’s publication is a plagiarism of Brunnsteiner’s book, i.e. it infringes Thomas Brunnsteiner’s copyrights.

Urs Mannhart and [his publishing house](#) filed an appeal against this decision with the Federal Supreme Court. The Federal Supreme Court dismissed the appeal on procedural grounds because the appellant **did not make a showing of irreparable harm**.

The Federal Supreme Court’s decision concludes that the challenged preliminary injunction is an interlocutory judgment which must be confirmed in proceedings on the merits. Thomas Brunnsteiner must have the preliminary injunction confirmed in ordinary proceedings on the merits and seek a permanent injunction within a court determined deadline. Otherwise, the preliminary injunction will cease to apply. Also, such interlocutory judgments can only be appealed to the Federal Supreme Court if they are likely to cause irreparable harm for the concerned party.

According to the Federal Supreme Court irreparable harm is established if the disadvantage of the party affected by the preliminary injunction cannot be overcome or compensated for if the preliminary injunction is not confirmed and replaced by a permanent injunction in the proceedings on the merits.

The Federal Supreme Court is of the opinion that in the case at hand the granting of the preliminary injunction does not create irreparable harm for the concerned author and his publishing house.

This decision was not clearly anticipated although the Federal Supreme Court announced a stricter practice regarding the interpretation of “irreparable harm” in its decision [BGE 137 III 324](#) on June 28, 2011.

In [another case dated June 26, 2012](#) concerning the protection of Nespresso’s coffee capsules the Federal Supreme Court agreed to review an appeal by Ethical Coffee, the manufacturer of biodegradable coffee capsules, which alleged irreparable harm as a result of the granting of a preliminary injunction by the Cantonal Court of the Canton of Vaud in favor of Nestlé.

The Federal Supreme Court explains the difference between the two decisions as follows: In the coffee capsule case the preliminary injunction had been granted even before the Ethical Coffee capsules could have been launched on the Swiss market. In such a situation the concerned company not only suffers a financial loss but is completely prevented from engaging in commercial activities in Switzerland. Such harm is considered irreparable by the Federal Supreme Court. In the copyright case on the other hand, the promotion and sale of the concerned book was prohibited four months after the launch. Those four months of commercial activity allow the calculation of a financial loss if the preliminary injunction is not confirmed in proceedings on the merits. In addition, the Federal Supreme Court is of the opinion that a negative impact on Urs Mannhart’s reputation can be restored with suitable publications. Furthermore, the Federal Supreme Court holds that unlike in the Nespresso capsules case the book of Urs Mannhart has not been in direct cutthroat competition with other similar products.

Based on the aforementioned arguments the Federal Supreme Court concludes that “it cannot be excluded” that Urs Mannhart’s losses can be compensated if the injunction is not made permanent in proceedings on the merits.

Although some arguments of the Federal Supreme Court concerning the distinction of the two recent cases are comprehensible, the result seems rather artificial.

If in the future the Federal Supreme Court does agree to review appeals concerning the granting of preliminary injunctions only if it can be completely excluded that a possible loss can be financially compensated for, it will be difficult for the losing party to have the preliminary injunction reviewed by the Federal Supreme Court.

The strict approach of the Federal Supreme Court is a major problem for the losing party in all summary procedures in IP cases because it precludes an opportunity for review by another court. In Swiss IP proceedings the only second instance is normally the Federal Supreme Court. This also applies to patent cases because the Swiss Federal Patent Court adjudicates civil law disputes concerning patents as the patent court of first instance at the federal level. It renders its decisions as a lower court of the Federal Supreme Court. If the Federal Supreme Court will not review a decision rendered by the Federal Patent Court in summary proceedings then there will be no review at all.

Although the standard of review of the Federal Supreme Court in summary proceedings (e.g. in preliminary injunction cases) is limited to the violation of constitutional rights anyway (e.g. the violation of the right to be heard or the prohibition of arbitrary decisions) the recent decision of the Federal Supreme Court significantly influences the legal protection of the concerned parties.

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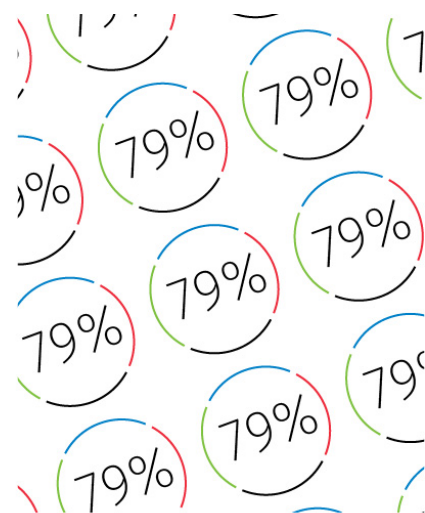
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