

# Kluwer Patent Blog

## Action by stages: Swiss Federal Patent Court streamlines requirements for disclosure of information and financial accounting

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As in other jurisdictions patentees in Swiss patent disputes often rely on the so called action by stages approach, which allows patentees to demand disclosure of information and financial accounting before the proceedings progress to the actual claim for lost profits, infringer's profits or a royalty fee.

In a [recently published decision](#) dated 25 August 2015 the Swiss Federal Patent Court had to decide inter alia what preconditions have to be fulfilled before the patentee can succeed with his demand for information and financial accounting.

The Swiss Federal Patent Court ruled that the patentee only has to establish the infringement of his patent and that it is not necessary to prove fulfilment of all other preconditions to establish the financial liability of the infringing party (e.g. a causal connection between the infringing activities and the claimed profits, infringer's fault for lost profits or at least infringer's bad faith for infringer's profits).

The background of the Swiss Federal Patent Court decision is the following:

The patentee filed a lawsuit against the Swiss manufacturer of spray guns in the form of an action by stages and sought – inter alia – a permanent injunction, the disclosure of information and financial accounting regarding the allegedly patent infringing spray guns and financial compensation (lost profits or infringer's profits).

The plaintiff showed that its patent was valid and infringed but it provided no further assertions or specific evidence regarding the basis for the claimed financial compensation.

At the main hearing the defendant argued inter alia that the plaintiff had neither sufficiently substantiated nor proven all preconditions for a financial liability. Therefore, according to the defendant, also the claim for information and financial accounting had to be dismissed given that the conditions for financial compensation had not been established by the plaintiff.

However, the Swiss Federal Patent Court did not dismiss plaintiff's claim for information and financial accounting. The Swiss Federal Patent Court held that the substantive duty for the disclosure of information and financial accounting directly results from the Swiss Patent Act and

only required the establishment of patent infringing activities by the defendant. All other preconditions for the financial compensation are to be dealt with in the second stage.

The Court stated that the plaintiff does not have to prove all requirements for the damage for which it seeks compensation, but that rather, the defendant has to disclose the required information if the patentee can establish patent infringing activities in Switzerland.

From a patent law perspective it is interesting that the German part of the same European patent was litigated in German courts with a different outcome.

Claim 1 of the European patent as confirmed by the Swiss Federal Patent Court reads as follows:

*An apparatus (20) for use in applying coating material to an object comprising a spray gun (24) having a handle portion (26), an extension portion (28) which is connected with the handle portion (26), a nozzle (42) connected with the extension portion (28), an electrode (46) disposed adjacent to the nozzle (42) and away from which electrostatically charged coating material flows toward the object, a coating material flow control member (74) connected with the handle portion (26) and manually operable to an actuated condition to initiate a flow of coating material from a coating material passage (62) in said extension portion (28) through the nozzle (42) toward the object,*

*characterised in that*

*the spray gun (24) also has a purge air flow control member connected with the handle portion (26) and which is manually operable to initiate a flow of air from the coating material passage (62) in the extension portion (28) through the nozzle (42) to remove coating material from the spray gun.*

In its [decision 4 Ni 26/13 \(EP\)](#) dated 29 April 2015 the German Federal Patent Court came to the conclusion that claim 1 of the patent is invalid insofar its scope goes beyond the following version:

*An apparatus (20) for use in applying powder coating material to an object comprising a spray gun (24) having a handle portion (26), an extension portion (28) which is connected with the handle portion (26), a nozzle (42) connected with the extension portion (28), an electrode (46) disposed adjacent to the nozzle (42) and away from which electrostatically charged coating material flows toward the object, a coating material flow control member (74) connected with the handle portion (26) and manually operable to an actuated condition to initiate a flow of coating material from a coating material passage (62) in said extension portion (28) through the nozzle (42) toward the object, and a coating material passage (62) in said extension portion (28),*

*characterised in that*

*the apparatus has a valve (94), a conduit (98) and a controller (70) which, simultaneously with opening of a valve (54) and closing of a switch (78), operates the valve (94) to an open condition to enable electrode wash air under pressure from a source (96) of electrode wash air to flow through the conduit (98) to the handle portion (26) and from the handle portion (26) of the spray gun (24) through the extension portion (28) of the spray gun (24), the spray gun (24) also has a purge air flow control member (110) connected with the handle portion (26) and which is manually operable to initiate a flow of air from the coating material passage (62) in the extension portion (28) through the nozzle (42) to remove coating material from the spray gun.*

The District Court of Dusseldorf ruled in its [decision 4b O 25/13 – Spritzpistole](#) dated 12 June 2014 that claim 1 of the concerned patent is not infringed by offering and/or selling the spray guns of the defendant in the Swiss proceedings.

The Swiss Patent Court was aware of the German decisions and explained why the outcome of the Swiss proceedings was different. One of the reasons is that the District Court of Dusseldorf based its decision on the German translation of the patent and for the Swiss Federal Patent Court the English version is relevant. With regard to a specific feature the two versions had slightly different meanings.

The Decision of the Swiss Federal Patent Court has been appealed to the Swiss Federal Supreme Court. A final decision may be expected within 6-8 months.

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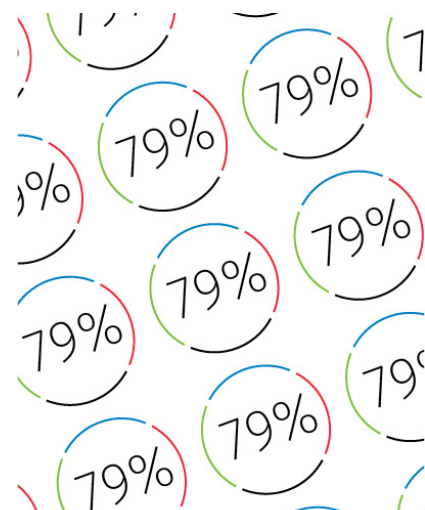
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