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Even if you outsource production to a third party, you could still be regarded as the manufacturer

Miquel Montaña (Clifford Chance) · Friday, January 8th, 2016

On 30 November of 2015, the Barcelona Court of Appeal handed down a judgment which has further confirmed that a company outsourcing the production of a product to a third party is subject to the “strict” liability rule applicable to “manufacturers”, even if the actual product is manufactured by another company.

This judgment has resolved a dispute between Nestec®(an affiliate of Nespresso®) and a Spanish company that was selling capsules allegedly to be compatible with the famous Nespresso® machines. In the first instance, Barcelona Commercial Court No. 5 found that one of Nespresso®’s patents had been infringed and ordered the defendant to compensate the damages caused.

For the reader’s benefit, it should be clarified that Article 64 of the Spanish Patent Act reads as follows:

- 1. Whosoever, without the consent of the patent holder, manufactures or imports objects protected by the patent or uses the patented process, will be obliged in any case to assume liability for the loss and damage caused.*
- 2. Any party performing any other act of exploitation of the object protected by the patent will only be obliged to indemnify the loss and damage caused if they have been warned by the holder of the patent, suitably identified, of its existence, and of its infringement, with the request that they cease such infringing acts, or if their actions have been intentional or negligent.”*

In the appeal, the defendant argued that Paragraph 1, which enshrines a “strict” liability obligation, was not applicable to them, because in practice the capsules were produced by a third party contracted by the defendant. As did the Court of First Instance, the Court of Appeal rejected this argument, after noting that the defendant was mentioning its own name on the packaging of its capsules under the heading “Manufacturer.” The Court of Appeal also relied on the agreement entered into between the defendant and the third party that was producing the capsules, which established that the latter had the obligation to manufacture the capsules following the precise instructions of the former.

All in all, this recent judgment has further confirmed that a company which, “*de facto*“, is not a manufacturer of the product, could still be subject to the “strict” liability rule applicable to manufacturers, if it directs and controls the production of a product manufactured by a third party.

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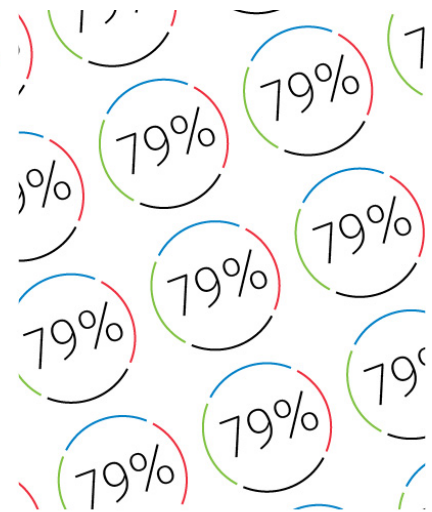
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