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## Delivery within a foreign country as a patent infringement in Germany

Thomas Musmann (Rospatt Osten Pross) · Friday, May 13th, 2016

by André Sabellek

In a recent judgment the Higher Regional Court of Karlsruhe (OLG Karlsruhe) had to decide on the extent of the liability of a foreign supplier for a patent infringement in Germany (judgment of October 7, 2015, court docket: 6 U 7/14 – Abdichtsystem [sealing system]).

In the present case, the defendant, an Italian company, had delivered tyre sealing systems which infringed the patent in suit directly to Germany. Consequently, the court of the first instance, the Regional Court of Mannheim (LG Mannheim) had sentenced the defendant i.a. to desist from placing the infringing products on the market in Germany. Furthermore, the defendant had to render account for sales of the infringing product in the past.

During second instance proceedings, the question arose whether and to what extent the Defendant also had to render account for shipments to customers domiciled outside of Germany if these customers resold the infringing products to Germany. The Defendant had indeed sold the tyre sealing system to the Italian car manufacturer Fiat. It is generally known that Fiat sells its cars also to Germany.

The claim for accounting serves to the preparation of claims for damages and requires – as these damage claims – a culpable patent infringement. Thus, a supply relationship outside of Germany can only be regarded as a patent infringement in Germany if the supplier causes the infringement in Germany with knowledge and consent. According to the OLG Karlsruhe, this condition is only satisfied if the foreign supplier has positive knowledge that its foreign customer will deliver the infringing products to Germany.

The burden of proof that the defendant has this positive knowledge lies with the claimant. In the present case, the OLG Karlsruhe decided that the claimant failed to prove that the defendant had positive knowledge of Fiat delivering the infringing tyre sealing systems to Germany. It cannot be concluded from the generally known fact that Fiat sells its cars in Germany that also the tyre sealing system is sold in Germany. It well could be that there are differences between the countries regarding the special equipment of a car model.

It should be noted that foreign suppliers cannot generally exonerate themselves by denying positive knowledge of deliveries to Germany by their customers. It might prove hard to impossible

especially for automotive suppliers who provide components which are used in the standard configuration of a model series which is also sold in Germany to avoid liability.

Dr. André Sabellek, B.Sc.

rospatt osten pross – Intellectual Property Rechtsanwälte

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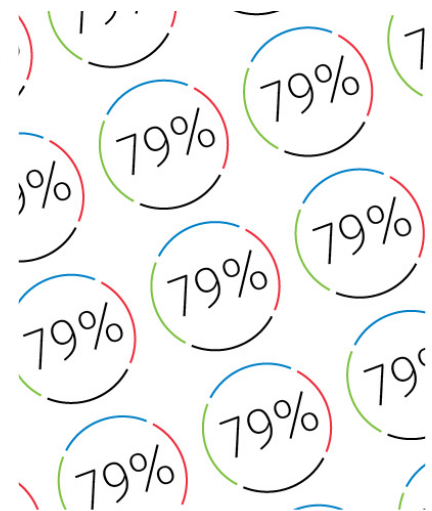
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