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UEFA v Ballino – PI Refusal Reasons Now Published

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The reasons for the decision are now available in the case of *Ballino v UEFA and others*, following an oral hearing on 3rd of June 2024 in the Hamburg local division. As was previously known, the panel comprising Presiding Judge Sabine Klepsch, Judge-rapporteur Dr. Stefan Schilling, and legally qualified Judge Samuel Granata dismissed the application for provisional measures and ordered Ballino to pay costs, including those incurred by the defendants in filing the protective letter.

The case relates to an EP patent covering a method and system for detecting an offside situation – the “connected ball technology” – which was due to be used in the Euro championship starting on 14 June 2024. There had been no challenge to the patent prior to these proceedings, although there is now a revocation acting action pending before the Paris central division of the UPC (ACT_27358/2024 UPC_CFI_230/2024).

Urgency

Ballino’s predecessor wrote to the Kinexon Defendants in October 2023 to allege infringement (it was undisputed that this knowledge was attributable to Ballino). They responded in November 2023, explaining the basis on which they did not infringe (namely that no sound vibration sensor was used, as required by the patent). A further letter was sent by the Claimant in February 2024, following which the Kinexon Defendants filed a protective letter on the 4 March 2024 at the UPC. Ballino then filed proceedings for preliminary relief preventing direct, indirect, literal, and equivalent infringement of the patent in Germany and the Netherlands; requested an interim costs award and an order the defendants pay a penalty of €100,000 per day in the event of a breach of the requested order. It later supplemented that request with conditional auxiliary requests. The Defendants requested refusal of the application or alternatively a security payment of in excess of €1,000,000 for the enforcement of the preliminary injunction; and an order for its costs including in filing the protective letter.

Applying the approach to urgency adopted in *10x v Curio*, the Hamburg Local Division determined that the application lacked urgency. In the circumstances, it would have been clear to the Claimant following the Kinexon Defendant’s response in November that judicial recourse would be necessary to settle the matter. The Local Division was not aware of any further steps taken by the Claimants at that time to investigate the facts or technology, including obtaining a sample of the balls which it knew were used in the FIFA 2022 World Cup. Nor did the Claimant contact UEFA at all in advance of issuing proceedings. As such, the Claimants did not “diligently initiate and

complete the required steps” at an early enough stage and the claim lacked urgency.

Infringement

To evidence infringement Ballino relied on the Defendants’ web pages, a presentation describing connected board technology which was uploaded on the YouTube channel of FIFA and evidence of experiments conducted by an expert in inertial sensors (Dr Bosch) And an affidavit from Prof Babuška. Perhaps unsurprisingly, the Hamburg Local Division allowed late filed evidence where the evidence in question was a full or complete version of evidence previously filed.

On the substantive question of infringement, the Hamburg Local Division was not convinced with sufficient certainty that the Defendants infringe the patent in suit. On a summary examination there is no direct/indirect literal infringement, and the argument of infringement by equivalent means was not sufficiently demonstrated.

The Hamburg Local Division construed the claims (applying the standard for the interpretation of patent claims detailed in *10x Genomics v Nanostring* at the Court of Appeal) to require the sensing of acoustic sound waves in air; rather than in a broader sense to include vibrations. They found that the patent’s own dictionary differentiated between sound produced by the ball and vibrations in the ball, and that the claims relate only to sound signals produced by the ball and the detection and processing of the same.

The Local Division then considered the expert evidence of both parties, and ultimately determined that, even if the accelerometer in the ball were capable of detecting sound, it did not process it as required by the patent (by comparison of sound signals) in order to infringe. Having made such findings, it did not need to decide whether the system satisfied all other claim integers.

On the question of infringement by equivalents, the Local Division noted:

“For the assessment of an infringement by equivalent means it is not sufficient to reduce the question of equivalence just to the effect, being to determine whether there is a contact with the ball by the first player. Decisively is how this effect is achieved.”

On that basis, the Local Division concluded that there was no infringement by equivalents as processing acceleration is not equivalent to processing sound.

Concluding comments

This decision demonstrates that Hamburg Local Division is seeking consistency – applying the jurisprudence of the Court of Appeal and other local divisions in reaching its conclusion.

It also gives some, albeit limited, insight into how the UPC will address the issue of infringement by equivalents. While the analysis is cursory, it does not (at this stage at least) appear that the UPC will be adopting an approach that represents a significant departure from national equivalence tests, which often require a consideration of whether the alleged infringement achieves the same result in substantially the same way.

The Local Division confirmed that based on these findings, it was not necessary to consider questions of indirect infringement or validity, nor to balance the parties interests. This, along with it not opining on some the infringement of some integers, raises questions as to how the Court of

Appeal, if asked, might assess such integers/claims where it to overturn the Local Divisions' findings on the aspects that it did consider.

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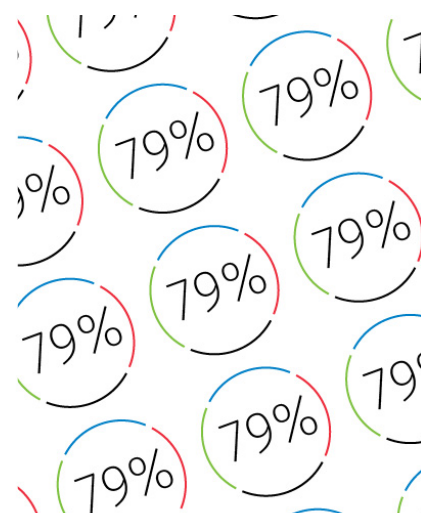
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This entry was posted on Friday, July 5th, 2024 at 10:15 am and is filed under literally fulfil all features of the claim. The purpose of the doctrine is to prevent an infringer from stealing the benefit of an invention by changing minor or insubstantial details while retaining the same functionality. Internationally, the criteria for determining equivalents vary. For example, German courts apply a three-step test known as Schneidmesser's questions. In the UK, the equivalence doctrine was most recently discussed in *Eli Lilly v Actavis UK* in July 2017. In the US, the function-way-result test is used.">Equivalents, Infringement, Injunction, Patents, UPC

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