IP Lawyer

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Apple v Samsung: the German Tab Decision

Although a court's decision to prohibit the sale, production and possession of the Samsung Galaxy Tab 10.1 in Germany created news headlines across the world, it was not a surprise

On 9th August 2011 the Düsseldorf Regional Court made international headlines when it issued a decision forbidding the sale, production, advertisement, import or possession for any of these purposes of Samsung's Galaxy Tab 10.1 for violation of an industrial design of Apple Inc. This injunction, which entered into effect immediately, covered all of Europe except for the Netherlands, where a parallel case was pending. It was subsequently restricted to Germany.

The injunction was obtained in accelerated proceedings known as interim legal protection. Hence, the injunction is preliminary and subject to review in the main proceedings, which have not yet begun in earnest. As of now, however, the decision continues to stand. The decision was a shot heard around the world, but – for anybody acquainted with the gun that fired it – was as predictable as it gets.

Usually, the legal decisions that are most sensational are those which set a precedent or overturn a longstanding legal tradition. There is even more excitement when the decision comes as a surprise.

This case may indeed have set a legal precedent by being the first industrial property dispute in which a science-fiction movie about the future was relied upon as prior art. Samsung argued that Apple's industrial design was anticipated by the touchscreen-only computers briefly seen in Stanley Kubrick's *2001: A Space Odyssey*.

Apart from this bit of trivia, what is truly remarkable about the Düsseldorf Regional Court's decision is that it is anything but. All the judges did was to play it by the book – the book in this particular case being the German laws on industrial property rights.

Thus, while the decision is unremarkable from a legal point of view, it does attest to the strength of German IP rights by illustrating some specific cases in point.

Perhaps the most important is that in Germany, all industrial property rights – whether patents, trademarks, utility models, copyrights or even lowly industrial designs, as in the case at hand – explicitly confer to their proprietor the right to seek injunctive relief against infringers. The scope of injunctive relief is comprehensive and covers all conceivable business-related activities.

In patent infringement cases in the United States, infringers are regularly sentenced to pay significantly higher damages than those which would be awarded by a German court in an analogous situation. However, the immediate and lasting consequences of a shutdown of all sales in at least Europe's biggest market are often just as costly to an infringer as any spectacular award of punitive damages, even if that shutdown does not come with an official price tag the way that an award of punitive damages does. To properly estimate these costs, logistics, storage, liability and the damage to market and investor confidence must all be taken into account.

The right to seek injunctive relief is perhaps the most fundamental claim provided by an industrial property right in Germany. There are few circumstances – in essence, exclusively based on antitrust laws – in which this right is curtailed.

The right to seek injunctive relief also in no way depends on the rights holder's production, sale or other involvement with a corresponding physical product. It is well-established case law in Germany that in almost all cases it is perfectly legitimate to use a patent to block all infringing products without having any obligation to produce or being active in another way.

Moreover, the rights holder may also obtain injunctive relief against an infringer very quickly. Besides the fact that even the schedule of regular proceedings usually sets a brisk pace, accelerated proceedings are also available to a plaintiff when urgency can be shown. The classic situation in which urgency is regularly recognised is that of a trade fair at which infringing products are sold or presented. However, interim legal protection is also available in cases where, for example, the introduction of the infringing product threatens permanently to diminish the price of the product in question.

Perhaps the most memorable and controversial German patent infringement decision in recent history was the ruling in which the Düsseldorf Higher Regional Court granted injunctive relief based on a patent that had already been revoked by the German Patent Court in the parallel nullity proceedings, even though an appeal in the nullity proceedings was still pending. The decision granting injunctive relief was founded on the reasoning that if the infringing product – a generic variety of a pharmaceutical product – remained on the market, the price of the product would plummet and not recover by the time the appeal proceedings would conclude. The Düsseldorf judges also saw flaws in the nullity proceedings that led to revocation of the patent.

The punchline was, of course, that the appeals court in the nullity proceedings upheld the patent, thus vindicating what some legal analysts thought was a prank on the part of the higher regional court.

Returning to our example at hand, the battle between Apple and Samsung also shows that when injunctive relief is granted, it is not easily circumvented. In the present case Samsung tried to avoid the injunction by attaching stickers to infringing products presented at a German trade fair. The stickers read: "Not for sale in Germany." However, this manoeuvre proved unsuccessful and Samsung retracted the products despite the stickers.

The bottom line is that the German legal system takes industrial property rights very seriously. There was nothing unusual about the injunction against Samsung's Galaxy Tab 10.1. Anyone seeking to enforce their industrial property rights need look no further.

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