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Cross-Border Contributory Patent Infringement in Germany

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CROSS-BORDER CONTRIBUTORY PATENT INFRINGEMENT
IN GERMANY

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ABSTRACT

This Article examines recent German court decisions analyzing Section 10 of the German Patent Act (“PatG”), which governs cases of contributory patent infringement, focusing in particular on the implications of recent decisions on potential cross-border infringement. The Article offers recommendations on how judicial scrutiny of contributory infringement in Germany may be streamlined in light of potential evidentiary problems and concludes with a case study of how German courts might analyze a situation like that faced by the United States Court of Appeals for the Federal Circuit in AT&T v. Microsoft.

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TABLE OF CONTENTS

I. Direct Patent Infringement: PatG Section 9	137
II. Contributory Patent Infringement: PatG Section 10.....	138
A. Defining “Essential Elements” of an Invention	139
B. The Subjective Requirement of PatG Section 10.....	140
C. Intention for Use and Knowledge of Intent	142
D. Presumption of “Obviousness” of Suitability and Intended Purpose	143
E. Effects of Actions Taken Outside Germany	144
III. Case Study: <i>AT&T v. Microsoft</i>	145
Conclusion.....	147

INTRODUCTION

The “Funkuhr (Radio Clock) II” decision by the Federal Court of Justice of Germany (“BGH”) concerned whether supplying a customer in a different country with a watch work manufactured in Germany constituted contributory patent infringement (which is governed by Section 10 of the German Patent Act, or “PatG”), when the act at issue did not involve any direct patent infringement (which is governed by PatG section 9). The decision was reprinted in GRUR 2007, 313 ff., for example, and once again focused the attention of specialist circles on the PatG provisions regarding contributory patent infringement, especially in the case of cross-border activities. Particularly in view of recent developments in international court decisions on the question of cross-border patent infringement (in the United States, for example, *NTP v. Research in Motion*¹ and especially *AT&T v. Microsoft*,² spring to mind), it is appropriate to offer a summary review of the consequences of the recent case law on PatG section 10 with regard to the patent-infringing nature of cross-border activities from the point of view of German legal practice.

It is nevertheless difficult to deal satisfactorily with the field of contributory patent infringement by cross-border activities without

¹ *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005).

² *AT & T Corp. v. Microsoft Corp.*, 414 F.3d 1366 (Fed. Cir. 2005) *rev'd*, 550 U.S. 437, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007) and *order recalled and vacated*, 227 F. App'x 920 (Fed. Cir. 2007).

first—at least briefly—recalling the legal situation regarding direct patent infringement by cross-border activities, as developed by the case law on PatG section 9.

I. DIRECT PATENT INFRINGEMENT: PATG SECTION 9

In this context, we should first bear in mind that a link to Germany is an indispensable prerequisite if there is to be any *direct* infringement of a German patent, whether it has been obtained nationally or via the European Patent Convention (EPC). This is the case, for example, in the following situations in particular. Let us assume that an apparatus is manufactured in Germany and is designed in such a way that there is no patent infringement—for example by having an additional part fitted that “provisionally” overcomes the patent-infringing nature of the apparatus, or by the omission of a particular element that would need to be added to the other parts of the apparatus to make it patent-infringing. If it is then exported to another country, where the patent does not apply, and where the apparatus is then completed in accordance with its intended *use* in a form that would constitute patent infringement if used in Germany,³ this action amounts to direct patent infringement in Germany.³ According to the above-mentioned decision, the elements of infringement are already present even if only the act of offering the apparatus in a form which is “not yet” patent-infringing occurs in Germany, at least if the addressee is shown how to make the change or is clearly aware of the corresponding intended purpose. In this respect, there is no need to rely on the provisions of PatG section 10, with its somewhat “jumbled” mixture of objective and subjective elements, which were only recently the subject of a comprehensive analysis by Mr. Rauh.⁴

As an introductory remark to be borne in mind before turning to the question of contributory patent infringement by cross-border activities, it is also interesting to note that the act of offering a patented item in Germany that is to be delivered from one foreign

³ LG Düsseldorf [Regional Court] 2005, 4 ENTSCHIEDUNGEN DER INSTANZGERICHTE ZUM RECHT DES GEISTIGEN EIGENTUMS [INSTGE] 90 (Ger.) (*Infrarot-Messgerät*).

⁴ Rauh GRUR Int. 2008, 293 ff.

country to another is regarded as a case of direct patent infringement, as is the act of placing the product in circulation in Germany by exporting it to another country.⁵ The important point to remember when analysing the above-mentioned case law on PatG section 9 with regard to cross-border activities, which of course can only be examined briefly here, is that the act of offering in Germany is at any rate regarded as an independent use action in its own right, which is subject to the exclusive rights of the patent proprietor pursuant to PatG section 9. In other words, if an offer is made to someone in Germany from another country, or from Germany to someone in another country, this also constitutes (direct) patent infringement in Germany, without the need to have recourse to PatG section 10. There ought to be no doubt in this context that in the entire sphere of the case law on PatG section 9, an infringing “patented item” is always understood to be an item that is either covered by the literal meaning of the claim of the patent in suit or that makes use of the teaching of the claim, or of one of the independent claims, in an equivalent manner.

II. CONTRIBUTORY PATENT INFRINGEMENT: PATG SECTION 10

If we now turn to PatG section 10, we find first of all that it defines a separate element of infringement that is independent of PatG section 9,⁶ namely that of *contributory* patent infringement. Third parties are prohibited, without the consent of the patent proprietor, from offering or supplying means relating to an essential element of the invention to persons other than those entitled to make use of the patented invention so that those persons can use the invention in the purview of the PatG, *i.e.* in Germany.⁷ This

⁵ Benkard/Scharen, PatG, 10th edition 2006, section 9 no. 40; Busse/Keukenschrijver, PatG, 6th edition 2003, section 9 no. 133 and 135 with further references.

⁶ BGH GRUR 2004, 758, 760 – *Flügelradzähler* (Impeller Flow Meter); Busse/Keukenschrijver, PatG, 6th edition 2003, section 10 no. 13; Kühnen/Geschke, Die Durchsetzung von Patenten in der Praxis [The Enforcement of Patents in Practice], 3rd edition 2008, no. 113; Mes, PatG, 2nd edition 2005, section 10 no. 1; Osterrieth, Patentrecht, 3rd edition 2007, no. 255; Schulte/Kühnen, PatG, 8th edition 2008, section 10 no. 5.

⁷ BGH GRUR 2007, 313, 315 – *Funkuhr II*; Schulte/Kühnen, PatG, 8th

prohibition is not unconditional, however, but is subject to the proviso that certain subjective definitional elements must be present, which will be discussed below.

The objective definitional elements referred to above, which are defined in the first part of PatG section 10 para. 1, can be summed up briefly: when means relating to an essential element of the invention are offered and supplied in Germany, this act constitutes contributory patent infringement provided that the subjective definitional elements which are then defined in PatG section 10 para. 1 are present as well.

A. Defining “Essential Elements” of an Invention

The case law of the BGH has in recent years clarified what are to be regarded as “essential elements of the invention” for the purposes of PatG section 10 para. 1. These are either elements contained in the claim of the patent, or elements that co-operate functionally with such elements “contained” in the claim.⁸ We may refer to the observations by Peter Meier-Beck on this subject in GRUR 2007, 913 ff., especially 917/918.

However, an additional question arises that should not be disregarded in the context of the present study: what is to be understood by the statement in the BGH “Flügelradzähler” decision⁹ that an element is essential to the invention if it is suitable for co-operating functionally with one or more features of the claim in implementing the protected inventive idea? In the opinion of this author, it means that those elements which co-operate functionally with an element of the invention that is covered by the claim—not necessarily literally, but possibly only in the context of the equivalent scope of protection—are also essential elements of the invention and can thus establish contributory patent infringement in certain circumstances.¹⁰

edition 2008, section 10 no. 10.

⁸ BGH GRUR 2004, 758, 761 – *Flügelradzähler*; BGH GRUR 2005, 848, 849 – *Antriebsscheibenaufzug* (Driving pulley lift); BGH GRUR 2006, 570, 571 – *extracoronales Geschiebe* (Extracoronaral attachment).

⁹ BGH GRUR 2004, 758 – *Flügelradzähler*.

¹⁰ On equivalence, cf.: Busse/*Keukenschrijver*, PatG, 6th edition 2003, section 10 no. 19; *Keukenschrijver*, Festschrift 50 Jahre VVP, 2005, pp. 331, 345; *Nieder*

B. The Subjective Requirement of PatG Section 10

PatG section 10 requires that in addition to the presence of the above-mentioned objective definitional elements, namely prohibited offering or prohibited supplying in Germany in order to use the invention in Germany,¹¹ subjective criteria must also be present. Namely, a third party must know, or it must be obvious on the basis of the circumstances, that the means concerned are suitable “and intended” for using the invention¹² (*i.e.* surely: in Germany!¹³).

In the case of “obviousness” as an alternative to “knowledge” by the third party, the above-mentioned subjective additional requirement also presupposes that the means concerned are objectively suitable for being employed in order to use the invention (in Germany). This implies that any means are covered which are suitable for using the invention in Germany. As was the case with the above discussion of the objective definitional elements, this includes both means which fall within the scope of the literal meaning of the claim and the elements mentioned there, and those that co-operate functionally with such elements.

In addition to the elements mentioned in the claim, equivalent elements must also be taken into account, meaning that those elements also constitute “prohibited” means because they are “suitable” for using the invention, in addition to those elements which are neither included literally in the claim, nor constitute equivalent modifications of the elements of the claim, but which merely co-operate functionally with such features as a whole for the purposes of the invention.

In the essay by Rauh, the view is put forward that even the

GRUR 2006, 977, 978; *Schramm*, Der Patentverletzungsprozess (The Patent Infringement Trial), 5th edition 2005, chapter 7 no. 37.

¹¹ Kühnen/*Geschke*, Die Durchsetzung von Patenten in der Praxis, 3rd edition 2008, no. 123.

¹² BGH GRUR 2001, 228, 231 – *Luftheizgerät; Osterrieth*, Patentrecht, 3rd edition 2007, no. 259.

¹³ In line with BGH GRUR 2001, 228, 231 – *Luftheizgerät* (Air Heater); *Keukenschrijver*, FS 50 Jahre VVP, 2005, pp. 331, 337 and 347; Kühnen/*Geschke*, Die Durchsetzung von Patenten in der Praxis, 3rd edition 2008, no. 123; Schulte/*Kühnen*, PatG, 8th edition 2008, section 10 no. 29.

question whether the means concerned are suitable for being employed in order to use the invention should be included among the subjective definitional elements, at least to some extent.¹⁴ This can hardly be the case, however. The decision on that question, namely the suitability of the means relating to an essential element the invention for using the invention must be made objectively from the point of view of the person of average skill in the art at the priority date of the patent.¹⁵

If the elements of contributory patent infringement are to be present, however, PatG section 10 para. 1 requires not only that the means referred to must be objectively suitable for being employed in order to use the invention (in Germany), but also either that the third party must know of that suitability or that the suitability must be obvious from the circumstances.¹⁶ This is indeed a subjective definitional element, disregarding the second alternative of “obviousness.”

The question occurs to the author whether, whenever means are objectively suitable for being employed in order to use the invention in the sense discussed above, a person offering or supplying those means in Germany (in order to use the invention in Germany) should not simply be presumed to know that the means concerned are suitable for being employed in order to use the invention in Germany. Putting it simply, an obvious move here would be to dispense with any “subjectivization” of the suitability aspect and instead to adopt the line of the BGH case law on the question of distinguishing between the production of something new and repairs in the context of the discussion of the exhaustion of a patent (as in

¹⁴ *Rauh* GRUR Int. 2008, 293.

¹⁵ Similarly regarding the objective suitability of the means: BGH GRUR 2005, 848, 850 – *Antriebsscheibenaufzug*; BGH GRUR 2007, 679, 683 – *Haubenstretchautomat* (Hood-stretching automat); Busse/*Keukenschrijver*, PatG, 6th edition 2003, section 10 no. 19; Kühnen/*Geschke*, Die Durchsetzung von Patenten in der Praxis, 3rd edition 2008, no. 124; *Nieder* GRUR 2006, 977, 978; *Nieder*, Die Patentverletzung (Patent infringement), 2004, no. 61; Pierson/*Ahrens/Fischer/Ahrens*, Recht des geistigen Eigentums (Intellectual Property Right Law), 2007, p. 87; *Scharen* GRUR 2001, 995; *Schulte/Kühnen*, PatG, 8th edition 2008, section 10 no. 26.

¹⁶ BGH GRUR 2001, 228, 231 – *Luftheizgerät*.

“Flügelradzähler”¹⁷) and to regard the totality of the “essential elements” as “obviously” suitable for using the invention. This stance would render it superfluous to devote any argumentative and, especially, practical effort to determining the “knowledge” of the third party with regard to “suitability.”

C. Intention for Use and Knowledge of Intent

The question of something’s being “intended” for using the invention and of the knowledge thereof will, however, require a separate examination, which is provided below. What makes this issue more difficult is that the above-mentioned “intention” is subjective in the way it deals with the elements, not just in one respect, but in two. The first decisive point here, as Rauh explains in detail,¹⁸ is the intention of the recipient of the offer or delivery at the time of the delivery.¹⁹ One precondition for this first subjective definitional element, therefore, is that it is “somehow” established what was going through the mind, as it were, of the recipient of the offer or delivery at the time of the delivery.²⁰ In a country like the Federal Republic of Germany, where there is no “discovery,” except to a minimal extent, proving such an intention is simply impossible, in the author’s opinion.

However, even if it can “somehow” be established, or if it can be assumed “quasi-objectively,” namely according to the intention of the recipient of the offer or delivery, that the means concerned are intended for using the invention in Germany, further evidence still needs to be provided—unless the existence of “obviousness” is confirmed—since the patent proprietor still has to prove that the third party offering or supplying in Germany actually knows of the corresponding quasi-objective “intention for use,” which is based on

¹⁷ BGH GRUR 2004, 758 – *Flügelradzähler*.

¹⁸ Rauh GRUR Int. 2008, 293, 294.

¹⁹ BGH GRUR 2001, 228, 231 – *Luftheizgerät*; BGH GRUR 2005, 848, 851 – *Antriebsscheibenaufzug*.

²⁰ BGH GRUR 2001, 228, 231 – *Luftheizgerät*; BGH GRUR 2006, 839, 841 – *Deckenheizung* (Ceiling heating); BGH GRUR 2007, 679, 684 – *Haubenstretchautomat*.

the intention of the recipient of the offer or delivery.²¹ This is in effect the second stage of the process of subjectively determining the factual elements in accordance with PatG section 10 para. 1. Here too, we find an insuperable obstacle to furnishing evidence!

*D. Presumption of “Obviousness” of Suitability
and Intended Purpose*

In order to avoid the difficulties discussed above in establishing the intended purpose of the means, on the one hand, and in proving knowledge of the suitability and the intended purpose of the means concerned, on the other hand, it would be worth considering whether, in the case of the objective suitability of the means concerned, it would not be preferable to presume the “obviousness” of the suitability and the intended purpose. It should be borne in mind in this context that, on closer inspection, even the term “obviousness” has both a quasi-objective and a quasi-subjective meaning. “Objectively,” suitability and an intended purpose are obvious whenever someone, *i.e.* the general public, would more or less inevitably be forced to draw the conclusion, when considering the overall circumstances, that the means were objectively suitable and subjectively intended for the illicit use. Adopting a narrower interpretation of the word “obvious,” which would nevertheless not involve distorting the wording of PatG section 10, the only decisive issue would then be whether the suitability or intended purpose were “obvious” to the third party. At least in this latter, narrower, sense, there would be no harm, in the opinion of the author, in presuming this “obviousness” until evidence to the contrary is furnished by the third party.

Against the background of the fact that offering a patent-infringing apparatus in Germany is already prohibited as an act of infringement in its own right because it constitutes *direct* patent infringement pursuant to PatG section 9, the conclusions already drawn or to be expected from the case law in connection with “Funkuhr II” result more or less automatically. If someone offers

²¹ BGH GRUR 2001, 228, 231 – *Luftheizgerät*; BGH GRUR 2006, 839, 841 – *Deckenheizung*; BGH GRUR 2007, 679, 683 – *Haubenstretchautomat*.

means in Germany that relate to an essential element of the invention, even if it is intended that the means concerned should be supplied to another country, or (*a fortiori!*) if he or she supplies those means in Germany in the—presumed!—knowledge that the means concerned are objectively suitable for using the invention, and if moreover it is obvious to the person concerned that the relevant means are intended to be used in another country (where the patent does not apply), *e.g.* to form complete apparatuses which are “patented items” *per se*, it is a case of contributory patent infringement. The latter condition implies that the person making the offer or delivery knows, at the time of the offer or delivery, that at least the possibility exists that the items concerned are subsequently (*i.e.* after the manufacture of the complete item in the other country where the patent does not apply) to be offered or otherwise used in Germany.

E. Effects of Actions Taken Outside Germany

As an additional point, it is worth considering the following situation: the means offered/supplied in Germany in a prohibited manner are moved to another country, where the patent does not apply. There, (a) they are “assembled” into patented items that make use of the patent, and (b) alternatively and according to the sole intention of the customer, they can be used in such a manner that the item produced with them in Germany could not establish any patent infringement under PatG section 9. In this case, *i.e.* when the means offered/supplied can be put to a dual use, the third party making the offer or supplying ought surely to be entitled, as has already been discussed by various authors,²² to escape the risk of contributory patent infringement in Germany by adopting appropriate precautions in order to prevent the recipient of the corresponding offer or delivery from using the means offered/supplied in order to use the invention in material respects.

Much the same must of course apply if it is either obvious from the circumstances or if the third party making the offer or supplying can be proven to have manufactured the “patented items” in another country, where the patent does not apply, using the means

²² Such as *Hölder GRUR* 2007, 96.

offered/supplied with the intention of supplying some of them to Germany, which would then establish the elements of contributory patent infringement once and for all, while at the same time leaving others abroad, where the patent does not apply. Suitable approaches here could range from corresponding instructions to “all and sundry,” to cautions subject to penalties, depending on the degree of risk that the infringement will be committed (as far as contributory patent infringement is concerned), a problem that the BGH has also dealt with already (as in “Deckenheizung,”²³).

Apart from that, it might be noted that the elements of the risk of contributory patent infringement set forth in PatG section 10, which, compared to the notion of aiding and abetting with regard to direct patent infringement—PatG section 9!—are of course intended to provide the patent proprietor with enhanced protection,²⁴ will inevitably remain incomplete as long as it is not possible to dispense with the need to demonstrate the existence of the subjective definitional elements under the PatG section 10, para.1 penultimate and final clauses, which is very difficult to prove,²⁵ if at all.

III. CASE STUDY: *AT&T v. MICROSOFT*

Finally, against the background discussed above, it could be an interesting intellectual experiment to consider how the German courts might decide a situation of the kind underlying the judgment of the U.S. Court of Appeals for the Federal Circuit in *AT&T v. Microsoft*.²⁶ In that case, Microsoft stored a “master copy” of a software component on a “golden disc” and sent it abroad. AT&T believed that this act infringed patent rights in the U.S. The delivery from the U.S.

²³ BGH GRUR 2006, 839 – *Deckenheizung*.

²⁴ BGH GRUR 1992, 40, 42 – *Beheizbarer Atemluftschlauch* (Heatable breathing-air hose); BGH GRUR 2004, 758, 760 – *Flügelradzähler*; BGH GRUR 2006, 839, 841 – *Deckenheizung*; *Keukenschrijver*, FS 50 Jahre VVP, 2005, pp. 331, 336.

²⁵ Positive knowledge is difficult to argue and prove, cf. BGH GRUR 2005, 848, 851 – *Antriebsscheibenaufzug*; Benkard/*Scharen*, PatG, 10th edition 2006, section 10 no. 18; Kühnen/*Geschke*, Die Durchsetzung von Patenten in der Praxis, 3rd edition 2008, no. 135; *Schramm*, Der Patentverletzungsprozess, 5th edition 2005, chapter 7 no. 40; Schulte/*Kühnen*, PatG, 8th edition 2008, section 10 no. 30.

²⁶ U.S. CAFC GRUR Int. 2005, 948 – *AT&T v. Microsoft*.

to another country (*e.g.* Germany ...!) was clearly made with the intention that further copies should be made there, and that these should then in the other country be “integrated” into appropriate computers.

The situation to be judged in the U.S. was decided with § 271 (f) of the U.S. Patent Code in mind,²⁷ a provision which prohibits supplying unauthorized components of an invention which is patented (in the U.S.) from the U.S. to another country in the knowledge that the components will be used in that other country in a way that would constitute patent infringement in the U.S. There is of course no such regulation in Germany, but it is interesting to consider how the legal situation would have to be judged in the light of the German case law on PatG section 10.

First of all, it can be assumed—and this corresponds to the analysis of the facts by the U.S. court of first instance and by the Federal Circuit—that the software concerned, whether it was sent abroad on a “golden master disc” or by electronic means, was a “component” of the computer to be manufactured abroad, consisting of hardware components and precisely the above-mentioned software component.

If the corresponding software component had been manufactured in Germany and sent from Germany to another country, where the patent did not apply, it is the author’s opinion that this would certainly constitute a means supplied in Germany with the objective suitability for use in a complete apparatus consisting of hardware and software, which would be assembled abroad. The objective definitional elements of PatG section 10 should thus be regarded as present. In addition, considering the analysis of the facts by the Federal Circuit, the situation would have been that the person offering the software in the Federal Republic of Germany or supplying it to another country from there would have known that the invention was to be employed abroad in order to use the invention, so that, once the necessary connection with Germany had been established, this would have led to direct patent infringement in Germany. In this case relating to Germany, the software supplier would therefore have been aware of the objective suitability and also,

²⁷ U.S. CAFC GRUR Int. 2005, 948 – *AT&T v. Microsoft*.

compounding his guilt, would have known that the recipient abroad intended to use the software component in a complete apparatus which would have infringed the patent as a whole in Germany.

Considering PatG section 10, if the entire situation were “transposed” from the U.S. to Germany, it would then be necessary to examine whether the “complete apparatuses” assembled abroad, consisting of hardware and software, were expected to be offered or supplied in/to Germany according to their intended use, at least in part. Obviously, this would undoubtedly be the case if no reliable restriction were placed on the distribution of the “complete apparatuses,” which was not claimed in the U.S. anyway.

Ultimately, one arrives at the conclusion that there has been contributory patent infringement in Germany, involving the corresponding entitlements to a cease-and-desist order and claims to damages on the part of the patent proprietor (AT&T), and the fact that copies of the “master copy” of the software might have been made in the other country, which could have infringed territorial copyright and patent rights even before they were installed in countless complete apparatuses, would not alter the fact of contributory patent infringement in any way.

In this latter connection, it is incidentally difficult to understand why Judge Rader, who delivered a dissenting opinion in the above-mentioned judgment by the Federal Circuit, could take the view that something could not be regarded as infringing a patent in the U.S. (because of § 271 (f) USPC) if legal action could also be taken against it there according to local law, *i.e.* on the grounds of patent and/or copyright infringement.²⁸

CONCLUSION

As the reader will realize, as far as cross-border activities of a certain kind are concerned, PatG section 10 achieves an effect for the benefit of the patent proprietor that is certainly comparable to that of § 271 (f) USPC. This would at any rate be the case if, as far as the “obviousness test” were concerned, greater emphasis were placed in the sense suggested above on presuming at least subjective

²⁸ U.S. CAFC GRUR Int. 2005, 948, 950 – *AT&T v. Microsoft*.

obviousness of the intended use, or knowledge of the item's suitability/intention for that use, which would act to the disadvantage of the third party, and thus to the advantage of the patent proprietor.