

Newsletter November

ISSUE 3/2021

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Preu Bohlig takes over the trademark representation of TSV München von 1860 GmbH & Co. KGaA.

From now on, one of Munich's famous soccer clubs, the „Löwen“ (lions) will rely on Preu Bohlig in trademark matters. Under the leadership of its Munich partner Dr. Alexander Bayer, the law firm Preu Bohlig will take over the legal trademark representation of TSV München von 1860 GmbH & Co. KGaA.

Since July 2021, Dr. Alexander Bayer has strengthened Preu Bohlig's trademark and cyber team. Dr. Bayer had already advised and represented TSV München von 1860 GmbH & Co. KGaA in his previous law firm in obtaining and enforcing its trademark rights, which included sponsorship agreements as well as the representation of almost the entire trademark portfolio in the context of the commercialisation of the trademarks.

“As a member of the firm, I am honoured to serve the „Löwen“ and thus bring our expertise to bear,” said Dr. Bayer.

1860 (another shortcut for this club) managing director Marc-Nicolai Pfeifer is pleased to be able to build on Dr. Bayer's expertise and also to have the law firm Preu Bohlig as a Löwen partner. "We appreciate the work of Dr. Bayer and consider ourselves to be in the best hands with him and his team regarding our trademark issues, which naturally always occur at such a large club as the Löwen."



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Hohenloher Landschwein



In a recently published judgment, the Federal Court of Justice ruled on the relationship between the protection of geographical indications as collective marks under the Trademark Act on the one hand, and the protection of geographical indications and designations of origin under the Regulation on Quality Schemes for Agricultural Products and Foodstuffs, on the other (Regulation No. 1151/2012 of 21 November 2012, hereinafter "Regulation 1151/2012") (Case No. I ZR 163/19 of 29 July 2021).

Background

The background was as follows: The plaintiff, the "Bäuerliche Erzeugergemeinschaft Schwäbisch Hall" is the owner of the German collective marks "Hohenloher Landschwein" and "Hohenloher Weiderind", registered for meat, among other things. The names are not registered as protected geographical indications or designations of origin based on Regulation 1151/2012. Members of the plaintiff can use the designations provided they adhere to the producer guidelines established by the plaintiff, which stipulate requirements for animal breeding, animal husbandry, feeding and the like.

The defendants, a rural butcher's shop and its manager (hereinafter: defendants), do not belong to the

plaintiff. The defendant advertised its meat inter alia with the claims "Hohenloher Landschwein", "Hohenloher Weiderind" as well as "Zartes Schweinefilet - Das 'Beste vom Hohenloher Landschwein'" (= "Tender pork fillet - The 'Best of the Hohenlohe Country Pig'").

After an unsuccessful warning, the plaintiff filed an action requesting, inter alia, that the defendants be prohibited from using the designations "Hohenloher Weiderind" and/or "Hohenloher Landschwein" for meat.

The Regional Court had dismissed the action; the Court of Appeal had sentenced the defendant as requested; the Federal Supreme Court dismissed the defendant's appeal.

Injunctive relief affirmed

The Federal Supreme Court found that the defendant was entitled to injunctive relief pursuant to sect. 97 (2) MarkenG (Trademark Act) in conjunction with sect. 14 (5) sentence 1, sect. 14 (2) sentence 1, no. 1 Trademark Act. The defendants used the signs at issue in the course of trade for the same goods for which the collective marks enjoyed protection, without fulfilling the conditions contained in the plaintiff's trade mark statutes or being members of the plaintiff themselves.

The defendant could also not successfully rely on the protective bar of sect. 100 (1) sentence 1 Trademark Act. According to this provision, the registration of a geographical indication as a collective mark does not grant its proprietor the right to prohibit a third party from using such indications in the course of trade, provided that the use is in accordance with public morality and does not infringe sect. 127 Trademark Act. In particular, according to sect. 100 (1) sentence 2 Trademark Act, such a trademark cannot be held against a third party who is entitled to use a geographical indication.

According to the Federal Supreme Court, the use by the butchery was contrary to "good morals" within the meaning of sect. 100 (1) sentence 1 Trademark Act, i.e. to honest practices in trade and commerce. It was true that the defendants were generally allowed to use descriptive terms for the marketing of their products and that the plaintiff made the selection of suitable designations more difficult by applying for a large number of collective marks; however, the defendants had used the signs in identical form without making it clear to the consumer addressed by means of an indication that their products did not originate from a member of the plaintiff and did not fully comply with its producer guidelines. The protection granted by the collective marks at issue encompassed all the legally protected functions mentioned in sect. 97 Trademark Act (guaranteeing the commercial or geographical origin, the type, quality or other characteristics of the goods or services). The plaintiff's collective marks had a good reputation; the defendants would exploit this and use the mark to promote their sales.

Different structure of the protection of geographical collective marks and protection of geographical designations under Regulation 1151/2012

In this context, the Federal Supreme Court held that the application of sect. 100 (1) Trademark Act was not excluded by Regulation 1151/2012. This resulted from the structure of the relationship between the protection of collective geographical marks and the protection of geographical designations under Regulation 1151/2012.

The designations "Hohenloher Landschwein" and "Hohenloher Weiderind" were protected under national law as collective geographical marks. Pursuant to sect. 99 Trademark Act, collective marks may also consist exclusively of signs which may serve the public to designate the geographical origin of the goods or services. The national protection of collective marks complies with the requirements of Directive No. 2015/2436 (Trade Marks Directive).

The applicant had not filed an application under Regulation 1151/2012 for registration of the designations "Hohenlohe Landschwein" and "Hohenloher Weiderind". Accordingly, the plaintiff could not rely on the protection provided for in this regulation.

However, the Federal Court of Justice pointed out that collective marks consisting of signs or indications which may serve in trade to designate the geographical origin of goods and services, on the one hand, and indications of origin and geographical indications, on the other, are not only subject to different legal rules but also pursue different objectives.

While the main function of the collective mark (also geographical) is to guarantee the commercial origin of the goods or services from an undertaking of the association, the main function of appellations of origin and geographical indications is to guarantee the

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Peter von Czetztritz is named as „Thought Leader“ – Germany – Life Sciences 2021

geographical origin of the products and the specific characteristics based thereon.

The Federal Supreme Court refers to art. 14 of the Regulation, which regulates the relationship between trademarks, designations of origin and geographical indications. According to this provision, geographical collective marks applied for, registered, or established by use if that possibility is provided for by the legislation concerned, in good faith within the territory of the Union, before the date of filing an application for protection of a corresponding appellation of origin with the Commission, may continue to be used even if a corresponding appellation of origin or geographical indication is registered at a later date and the use of the mark conflicts with the protection of these appellations of origin or geographical indications pursuant to Art. 13 (1) of Regulation 1151/2012. In such cases, the use of the protected designation of origin or protected geographical indication shall be permitted as well as use of the relevant trademarks.

The protection of geographical collective marks therefore exists independently of the protection of geographical indications and designations of origin under Regulation 1151/2012.



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Anti-suit injunctions and their consequences



In addition to FRAND issues, a special feature of patent litigation that continues to be contested is increasingly establishing itself in the form of anti-suit and anti-anti-suit injunctions by foreign and German courts.

In essence, it is a matter of the domestic claim to the grant of justice that is to be safeguarded. For a long time, it has been considered a violation of sovereign rights if a foreign court prohibits parties to a case pending before a domestic court from continuing that case and/or prohibits the parties from bringing a case before domestic courts (so-called anti-suit injunction).

Courts have now moved to safeguard the right to justice with a so-called anti-suit injunction. This prohibits a litigant, usually the infringement defendant, from applying to a court abroad for such an anti-suit injunction or from continuing the proceedings. What is remarkable here is that the courts do with their antidote exactly what they forbid a foreign court to do, namely to intervene in and

terminate pending proceedings of another court. This is virtually turning into a race between courts, with the number of preamble "anti" escalating.

According to LG München I, the applicant for such an anti-suit injunction can be prohibited in injunction proceedings from applying for an anti-suit injunction (ASI) or from continuing such proceedings except for the purpose of withdrawing the application. This is an encroachment on another right under Section 823 (1) of the German Civil Code (patent), which can be countered with a (preventive) injunction.

According to the OLG Munich, the issuance of a preventive injunction (Anti-Anti-Suit-Injunction, AASI) is the only effective defence against an anti-suit-injunction, by means of which the exercise of the legal position of patent owners in patent infringement proceedings pending in Germany can be secured until the conclusion of the US proceedings conducted between other parties.

¹ OLG Düsseldorf, decision of 10 January 1996 - 3 VA 11/95 -, juris concerning a US antisuit injunction.

² LG München I concedes in a decision 7 O 14276/20 (see below) that its own decision may not be recognisable and enforceable there due to a violation of Chinese ordre public.

³ LG München I, judgment of 02 October 2019 - 21 O 9333/19 -, juris, also LG München I, judgment of 30 August 2019, 21 O 9512/19.

⁴ OLG Munich, judgment of 12 December 2019 - 6 U 5042/19 -, GRUR 2020, 379

It is also and in particular disputed how the cause for such a preventive injunction and thus the question of the need for legal protection is to be assessed.

According to LG München I, there are different grounds for justifying the interest in legal protection of a preventive injunction AASI. The theoretical possibility of an ASI is not sufficient for a first risk. Rather, there must be regular conduct on the part of the claim debtor from which an imminent and concrete act of infringement in the near future results.

- This may be the case if the claim debtor invokes the existence of a certain right and "threatens" to file an ASI or has already done so.

- However, this is also the case if a patent user has filed or threatens to file a main action for the grant of a licence or for the determination of a reasonable global royalty for such a licence in a jurisdiction that generally provides ASIs.

- Furthermore, there is a risk of a first action if the patent user has threatened to issue an ASI to other (third) patent owners or has already applied for such an ASI and there is no indication that the patent user, recognisable to the patent owner, has renounced this practice for the future, at least in relation to the patent owner.

- Furthermore, even silence constituted a risk of first infringement if the patent user did not declare in text form within the short time limit set by the patentee, for example in the context of the first infringement notice, that he would not file an application for an ASI.

Effective legal protection could only be achieved by a "moderate advance in time" in favour of the patent proprietor. The patent user's interest in being spared from costly preliminary injunctions to defend against feared ASI applications was taken into account by the fact that the alternatives establishing the risk of first infringement were all based on the patent user's actions. Accordingly, the patent user and his group companies would have it in their own

hands to prevent or eliminate the risk of first mention by making suitable declarations.

But not only an (announced) ASI would trigger a preventive injunction. An action for the granting of a licence or an action for the determination of a FRAND licence could also result in a preventive injunction. The applications for an ASI that have become known so far were justified by the need to protect an action on the merits pending in the issuing state. These main actions were directed at the conclusion of a FRAND licence agreement or at the abstract determination of FRAND licence conditions, detached from a concrete conclusion of a contract. However, both types of action had in common the argumentation that the patent user was willing to license and that the absence of a licence agreement legitimising the already performed and continued worldwide acts of use was solely attributable to the patent proprietor.

If the patent user were truly willing to license, he would refrain from further unlawful interference with the patentee's property-like protected legal positions beyond the acts of use already committed and continuing.

According to this decision of the LG München I, a patent user who files an application for an ASI or threatens to do so cannot generally be considered sufficiently willing to grant a licence (see above). Consequently, the patent user could also be required to declare not only his qualified willingness to license after receiving the infringement notice, but also that he will not request an ASI.

The case law and creation of law in the field of ASI and AASI etc. is likely to continue to escalate in the coming years and will possibly grow into a regular companion in patent law disputes. In particular, the deduction that foreign proceedings simultaneously preclude domestic FRAND defences does not seem self-evident under Art. 102 TFEU, if the core issue is that the foreign proceedings are intended to clarify the "correct" FRAND terms, in particular the amount of the royalty. After all, this speaks for the "willingness to license", but only at prices other than those demanded. This dis-

⁵ LG Munich I, Judgment of 25 February 2021 - 7 O 14276/20 -, juris.

⁶ Also LG Munich I, judgement of 24 June 2021, 7 O 36/21

pute about the "right" licence fee, which is conducted in a different field, has a conspicuous connection to the unwillingness of German courts to get involved and concentrate on the rocky road of calculating the FRAND licence fee, as is easily done in the USA, UK and PR China. Instead, German practice often seeks another way out and conspicuously avoids the core of the dispute - the amount of the fair royalty. Here, too, a clarification of the issues involved under European law would be overdue and all the more urgent as the injunction proceedings will not be referred to the BGH.



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⁷ The LG München I considers submission decisions also possible in injunction proceedings, decision of 19.01.2021 - 21 O 16782/20

WHO'S WHO LEGAL – Germany 2021

Preu Bohligh & Partner ist listed at Who's Who Legal Germany 2021.

Peter von Czettritz in the category: „Life Sciences“ – Most highly regarded

Astrid Gérard in the category: „Trademarks“

Andreas Haberl and Dr. Axel Oldekop in the category: „Patents“

Labelling requirements in influencer marketing



1. The question of whether influencer posts must be regarded as entrepreneurial activity within the meaning of Sec. 2 (1) no. 6 of the German Unfair Competition Act ("UWG") and thus qualify as advertising and, if so, whether and how the posts must be labelled, has been occupying courts for several years. A uniform line had not yet emerged, which has led to considerable uncertainty in the influencer scene and also among advertisers. Now, in three decisions published on 9 September 2021, the German Federal Supreme Court ("Bundesgerichtshof", "BGH") has provided clarity at least for some constellations.

2. The starting point of the disputes is the so-called separation requirement (prohibition of surreptitious advertising), which is enshrined in a number of regulations. In the area of influencer marketing, Sec. 5a para. 6 UWG and Sec. 6 para. 1 no. 1 German Tele Media Law ("Telemediengesetz"/"TMG") are particularly relevant. According to Sec. 5a para.6 UWG, anyone who fails to identify the commercial purpose of a business act is acting unfairly, unless this purpose is immediately apparent from the circumstances. Specifically for the area of the Internet, Sec. 6 para.1 No. 1 TMG stipulates that commercial communication must be clearly recognisable as such, however, statements relating to goods and services of a company that are made independently and without financial consideration are not deemed to be commercial

communication in this sense under Sec. 2 No. 5 lit. b TMG. Comparable regulations can be found in No. 11 of the Annex to Sec. 3 para.3 UWG and in the Media Services Treaty ("Mediendienstestaatsvertrag"/"MStV"; previously the Interstate Broadcasting Treaty – "Rundfunkstaatsvertrag"/"RStV").

The application of these provisions to influencer posts in social media, in particular posts that link to the accounts or websites of the manufacturers of the products depicted in the posts by means of "tap tags", was unclear and hotly disputed for a long time. A uniform line of the courts dealing with the increasing number of lawsuits against influencers could not be discerned.

The dispute essentially revolved around three questions:

1. When is a post that links to a company's website by means of so-called "tap tags" to be considered advertising (as opposed to editorial content)?
2. When is it sufficiently clear from the circumstances surrounding the post that a commercial purpose is being pursued so that labelling is unnecessary?
3. If labelling is required, how should it be done?

While with regard to the last question there was already broad agreement that labelling as advertising must be made clearly at the beginning of the post and must cover the post as a whole, not just individual contents, representations or text sections (OLG Braunschweig, GRUR-RR 2020, 452), the opinions of the courts as to when a post is to be regarded as advertising and when labelling is dispensable because the commercial purpose is clear differed widely.

a. On the question of whether there is an advertising subject to labelling, there was broad agreement only in the case of posts for which the influencer received a direct consideration from the linked company. These were generally considered by the courts to be advertising subject to labelling requirements (e.g. KG, GRUR-RR 2018, 155; OLG Frankfurt, MMR 2020, 43; OLG Karlsruhe, GRUR 2021, 88, 1474; OLG Cologne, GRUR-RR 2021, 167, 168). If, on the other hand, there was no consideration by the linked company, the courts' opinions have so far differed.

On the one hand, the OLG Karlsruhe (GRUR-RR 2020, 452), for example, considered the mere "tagging" of photos to be advertising, even if there was no consideration (MMR 2021, 159). The OLG Braunschweig (GRUR-RR 2020, 452) went even further and held that, in case of doubt, all posts in a social media account were to be regarded as advertising subject to labelling requirements as soon as there were only one individual posts for which the profile owner had received consideration or in which he advertised his own commercial activity.

On the other hand, the OLG Munich (GRUR 2020, 1096), for example, did not consider the mere "tagging" of products and the forwarding to the Instagram accounts of the respective manufacturers to be advertising subject to labelling requirements. The information on products, including the attached tags and links, rather belonged to the "editorial part" of the posts and thus primarily served other purposes than influencing the business decision of consumers.

b. The opinions in the case law also differed widely on the question of when labelling is dispensable because the advertising character of a post is clearly and unambiguously recognisable. While the OLG Hamburg (MMR 2020, 767) and the OLG Munich (GRUR 2020, 1096) had assumed that in the case of a verified account and a considerable number of followers, the advertising purpose of all posts was obvious to users, the KG (GRUR 2019, 543) had taken the view, that precisely the mixing of editorial statements and tags and links that qualify as advertising, which is typical for influencers, gives rise to the risk of misleading users and the need for clarification because advertising and editorial content blur.

3. In three proceedings, the German Federal Supreme Court has now for the first time dealt with the classification of postings as commercial communication and possible consequences, in particular the extent to which influencers, each with a high number of followers and regular posts, have violated the duty to label advertising with their Instagram posts. In all three proceedings, the plaintiff, an association for the protection of the commercial interests of its members (Verband Sozialer Wettbewerb e.V.), had filed claims against the influencers for injunctive relief and reimbursement of costs due to unlawful surreptitious advertising based on posts that were not labelled as advertising. In detail:

a. Case I ZR 90/20 - Influencer I (Luisa-Maxime Huss)

Here, the court had to shed light on the question of the extent to which a posting on an Instagram account in favour of a third-party company had to be regarded as advertising and thus had to be marked as such. Insofar as a consideration is paid for the posting of the contribution (as in the present case), the question can be answered unambiguously: such a posting is to be qualified as advertising and must be marked as such accordingly (Sec. 5a para. 6 UWG/Sec. 3a UWG in conjunction with. Sec. 6 para. 1 no. 1 TMG as well as Sec. 58 para. 1 sentence 1 RStV or Sec. 22 para. 1 sentence 1 MStV).

The posting in question was not marked as advertising. After the lower courts had upheld the action, the appeal was unsuccessful.

b. Case I ZR 125/20 - Influencer II (Cathy Hummels)

In the second case, the dismissal of the action by the OLG Hamburg (Case No. 15 U 142/19) was confirmed by the Federal Supreme Court. Here, the constellation was such that no consideration was paid by the manufacturer whose products were "advertised" in the 'context of the posting.

In such a case, the post would only be regarded as advertising and labelled as such for reasons of fairness "if the post is excessively promotional according to its overall impression, for example because it solely praises the advantages of a product of this company without any critical distance in such a way that the presentation leaves the frame of factually prompted information". According to the BGH, it is not decisive for this whether product images are provided with so-called "tap tags", which merely identify the manufacturer's products. However, there was an advertising surplus if, in addition to the "tap tag", there was a link to the website of the manufacturer of the product depicted, as in the present case. However, this had no effect on the labelling obligation. For as far as statements promoting sales - be it for one's own company or for third parties - are clearly recognisable as commercial communication or advertising in a posting and no consideration is given, the conduct (in the case) of the posters satisfies the aforementioned labelling provisions of Sec. 6 para.1 no. 1 TMG. The provisions under the TMG are sector-specific special provisions that limit the scope of application of the provision under Sec. 5a para. 6 UWG. Cathy Hummels' Instagram account is operated – recognisably for consumers due to her high profile and high number of followers – for image cultivation and therefore for purely commercial reasons. There was no consideration for the third party products shown and linked in the posting. Therefore, no separate labelling was required.

c. Case I ZR 126/20 - Influencer III (Leonie Hanne)

In this case, the dismissal of the action by the lower courts (lastly OLG Munich, Case No. 29 U 2333/19) was confirmed. Although the postings of the Instagram account holder, similar to the aforementioned facts, constituted business acts in favour of her own company and, possibly, also in favour of other companies, the commercial purpose of the postings were clearly recognisable from the overall circumstances. As far as the commercial acts in favour of third party companies are concerned, the assumption of a violation of Sec. 5a (6) UWG was ruled out, since - as in the BGH decision Influencer II - no consideration was received, the postings complied with the overriding special provisions of Sec. 6 para.1 no. 1 TMG, Sect. 58 para. 1 sentence 1 RStV and Sec. 22 para. 1 sentence 1 MStV and no other violation of UWG provisions could be established.

4. Seemingly private posts in social media can certainly be of a business nature and qualify as entrepreneurial activity. This is not changed by the fact that otherwise only private posts are published on an Instagram account. Posts by a person working as an influencer with a higher number of followers will, in case of doubt, always be qualified as business activities for the benefit of one's own company. This is because marketing and expanding one's own reach increases the market value for third-party companies that see and use influencers as a marketing tool.

While the German Federal Supreme Court did not deal with the question of when the line between an activity as a private person and an activity as an entrepreneur is crossed, at least a few parameters are now fixed regarding the question under which conditions posts are to be marked as advertising for one's own or another's business activity, especially if the primary purpose of a post is to promote the sales of a third-party company. For the viewer of a post, any commercial purpose pursued with an act of communication must be clearly and unambiguously recognisable.

5. On the basis of the regulatory proposal published by the German Federal Ministry of Justice and Consumer Protection ("BMJV") on 13 February 2020 on the delimitation of non-commercial communication for information and opinion forming from commercial acts (influencers), a government draft was published on 20 January 2021 replacing Sec. 5a para.6 UWG, which is primarily applicable to such circumstances, with a Sec. 5a para. 4 UWG ("Draft Act to Strengthen Consumer Protection in Competition and Trade Law"). According to this, only posts that are made in return for payment or other consideration must be marked as "advertisements". This is intended to prevent over-obligatory labelling of posts in social media. Such labelling is seen as a danger for the consumer: If all posts of an influencer - even those without any product reference, which clearly originate from the private sphere - were declared as "advertisement" or had to be declared as such, consumers would no longer take the intended warning against advertising content seriously and would find it more difficult to distinguish between editorial and advertising content. One would then have deception through over-labelling. However, this law will not come into force until May 2022.

6. Since the aforementioned decisions of the German Federal Supreme Court are landmark decisions, they will continue to apply even after the amendment to the German Unfair Competition Act comes into force. Essentially, the regulations already implemented under telemedia law will be incorporated into the UWG.

In the case of postings about products for which there was a consideration from the manufacturer, the posting must therefore always be marked as advertising, and in such a way that is obvious at first glance and beyond doubt. We recommend the permanent display of the designation "Advertisement" or - depending on the choice of language and, if applicable, the target audience - the equivalent word in that language in a font size that can be read on the usual end devices and in an appropriate contrasting colour to the background. If the notice is only given when one clicks on a "tap tag", this is too late. A labelling obligation is only dispensable when only the services/products of the influencer, i.e. the influencer's own business, are promoted.

Insofar as third parties profit from the posting and no consideration is given, a distinction must be made from a competition law perspective as to how far this is obvious to the consumer due to the overall circumstances. Insofar as this is not obvious, but there is a direct link to the offer of the third party company by means of tap tags, a corresponding labelling as advertising would also have to be made in accordance with the provisions of the German Unfair Competition Act. This is only unnecessary in the case of completely obvious advertising for third parties. However, the aforementioned labelling obligation does not apply under the TMG, which is primarily applicable, due to the lack of consideration.

JUVE Handbuch Wirtschaftskanzleien 2021/2022

Preu Bohlig & Partner is named in the categories "Patent Litigation/Lawyers", „Trademark and Design Law“, „Competition Law“ as well as in Healthcare: "Pharmaceutical and Medical Device Law“

Peter von Czettritz is "Leading Advisor in Pharmaceutical and Medical Device Law“

Often recommended in the field of patent litigation/lawyers:

Dr. Ludwig von Zumbusch, Prof. Dr. Christian Donle, Dr. Christian Kau and Daniel Hoppe

In conclusion, it remains to be noted that the legal questions and pitfalls have not been completely clarified or eliminated with the aforementioned decisions; however, they have been reduced to borderline cases for which case law will certainly work out further guidelines, at least until the next amendment of the UWG or TMG, which should be initiated by a corresponding EU directive. To push forward with national regulations in a ubiquitously accessible media space would certainly run counter to an EU-wide, uniform regulation.



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Irrigation sprayer II

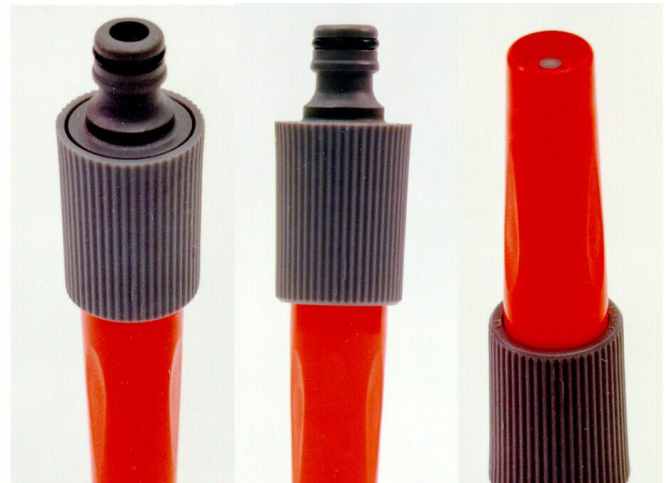
In our newsletter of 9 March 2021, we reported on the decision of the European Court of Justice on the calculation of the expiry of the five-year period for declaring revocation of an EU trademark (judgment of 17 December 2020, C-607/19 - Husqvarna).

The background was the preliminary reference of the German Federal Court of Justice on the interpretation of the revocation provisions of (new) Article 58 (1) a) EUTMR (EU Trademark Regulation No. 2017/1001).

The Federal Court of Justice has now implemented the Court's requirements in its judgment "Bewässerungsspritze II" (= Irrigation sprayer II; judgment of 22.07.2021, ref. I ZR 212/17).

Background: Husqvarna, a manufacturer of gardening and landscaping equipment, is the proprietor of a three-dimensional EU trademark (no. 000456244) registered on 26 January 2000 for "irrigation sprayers". Lidl, owner of a chain of retail shops, offered a spiral hose set between July 2014 and 2015 that consisted of, inter alia, highly similar sprayers for garden hoses. Against this background, Husqvarna filed a lawsuit against Lidl at the Düsseldorf Regional Court in 2015 for, among other things, injunctive relief and damages. In September 2015, Lidl counterclaimed for revocation of Husqvarna's EU trademark for non-use. The products protected by the trademark had not been sold since May 2012.

The question was whether the relevant date for calculating the continuous period of non-use was the date of filing the counterclaim in September 2015 or the date of the conclusion of the last oral proceedings on 24 October 2017. The goods protected by the trademark had ceased to be marketed as of May 2012.



In the "Bewässerungsspritze II" judgment, the Federal Court of Justice now applied the case law of the Court of Justice to the facts of the case. According to this case law, in order to determine whether the uninterrupted period of non-use of five years referred to in Article 58 (1) a) EUTMR has expired, the point in time at which the counterclaim for revocation was filed is relevant.

Since the requirements for revocation had not yet been met at the time the counterclaim was filed, the Federal Court of Justice dismissed the counterclaim for cancellation of the trademark.



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Goldhase III

In its judgement of 29 July 2021 in the case "Goldhase III", the Federal Supreme Court ruled that Lindt & Sprüngli (hereinafter "Lindt") had acquired a colour trade mark on the gold hue of the "Goldhase" by general acceptance in trade for chocolate bunnies under Section 4 No. 2 Trade Mark Act. The judgement is reproduced in WRP 2021, 1295.

The "gold bunny" has occupied the courts for many years (see in particular OLG Frankfurt/Main, GRUR-RR 2008, 191; BGH GRUR 2011, 148; OLG Frankfurt am Main, GRUR-RR 2012, 255; BPatG, GRUR 2011, 68; OLG Frankfurt am Main GRUR-RR 2004, 136; Austrian Supreme Court, GRUR Int 2005, 945; BGH GRUR 2007, 235; ECJ GRUR 2011, 425 and ECJ GRUR 2012, 925).

In the latter decision, the ECJ held that the shape of the "golden bunny" with a red ribbon and bell was not registrable as a Community trade mark for lack of distinctive character.

Lindt thus did not have a shape mark on the "Gold Bunny".

In the current proceedings, Lindt claimed that it had acquired a colour trade mark on the golden hue of the "Goldhase" by general acceptance in trade under Section 4(2) MarkenG. Lindt submitted that the Gold Bunny was offered as 10 g, 50 g, 100 g, 200 g, 500 g and 1 kg chocolate bunny. There were different varieties, which were distinguished externally above all by the colour of the collar. The Lindt Gold Bunny was developed in 1952 and has been offered in Germany in gold foil ever since. It has been marketed in Germany in the current gold colour since 1994. Lindt has sold more than 500 million Gold Bunnies in Germany alone over the last 30 years. The Lindt Gold Bunny is by far the best-selling Easter Bunny in Germany. Its market share in Germany in 2017 was over 40%. Lindt promoted the Gold Bunny extensively in a variety of different media before and at Easter. Furthermore, Lindt submitted a survey expert opinion from September 2018, according to which almost 80% of the consumers would

understand the golden colour as an indication of Lindt's origin.

Furthermore, it was undisputed that Lindt does not use the gold shade for all or numerous of its products and thus not as a "house colour".

The Regional Court of Munich I upheld the action on the basis of a colour mark acquired by general acceptance in trade under Section 4 No. 2 MarkenG (WRP 2019, 1625). The Higher Regional Court of Munich reversed the first instance decision and dismissed the action (WRP 2020, 1633). In its reasoning, the Higher Regional Court of Munich essentially stated that the golden hue of the Lindt golden bunny had not acquired a reputation for the product chocolate bunny. The submitted survey expert opinion did not take into account the fact that the plaintiffs did not use the golden colour for chocolate bunnies in general, but only for a very well-known and successful product. The alleged association of the golden colour with the "Lindt company" for chocolate bunnies was based solely on the extraordinary fame of the Lindt golden bunny and did not establish any market validity for the colour of the golden bunny for every form of chocolate bunny wrapped in corresponding gold foil. Accordingly, the large-scale use of the gold colour for the defendant's bunnies alone did not constitute use as a trade mark.

The Federal Supreme Court took a different view and held that Lindt had indeed acquired a use mark pursuant to § 4 No. 2 MarkenG by general acceptance in trade of the reputation of the gold colour for the gold bunny.

According to § 4 No. 2 MarkenG, trade mark protection arises from the use of a sign in the course of trade to the extent that the sign has acquired a reputation as a trade mark within the relevant public.

In this respect, the Federal Supreme Court referred to the survey expert opinion submitted by Lindt, according to which more than 80% of the respondents would consider the golden colour to be an indication of

Lindt's origin. As a rule, a degree of association exceeding 50% would be sufficient for the assumption of acceptance in the relevant public pursuant to Section 8 (3) MarkenG (e.g. BGH GRUR 2015, 581 - Langenscheidt - Gelb and GRUR 2015, 1012 - Nivea - Blau). Since the degree of association required for a reputation within the relevant public within the meaning of Section 4 No. 2 MarkenG may be lower than in the case of passing off (see Ströbele/Hacker/Thiering, on Section 4, para. 47 and Section 8, para. 665), a degree of association of more than 50% is a fortiori sufficient for a reputation.

Contrary to the opinion of the Court of Appeal, it was also not necessary for the reputation of a colour mark that it was a so-called "house colour" for all or at least for a large number of goods of the company concerned. This requirement could not be inferred from the provision of § 4 No. 2 MarkenG. The acquisition of reputation only required that the sign in question served as an indication of the origin of a product and, as explained, these requirements were met here.

The Federal Supreme Court did not rule on the merits of the case. Instead, it set aside the appeal judgment and remanded the case because the appeal court still had to make findings on the alleged infringement of the colour mark. The decision of the Higher Regional Court of Munich in the reopened appeal proceedings remains to be seen.



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Amendments to the German Law regarding International Treaties in the matter of patents (IntPatÜbkG) with a view to the entry into force of the UPCA



The start of the Unified Patent Court is now approaching. Therefore, at the end of August, the Bundestag adopted amendments to the German Law regarding International Treaties in the matter of patents (abbreviated IntPatÜbkG) which will become effective when the UPCA enters into force (Federal Law Gazette 2021 Part I No. 59, p. 3914). The amending law corresponds to the draft already presented in 2017.

In particular, there are significant changes to the prohibition of double protection (Article II § 8 IntPatÜbkG). According to its new version, the prohibition of double protection will in future only apply to European patents for which an opt-out has been validly declared (Sec. 8 (1) IntPatÜbkG new version). A parallel German patent loses its effect on the day on which the opt-out has become effective. However, if the opt-out is subsequently withdrawn under Article 83(4) EPC (so-called opt-in), the German patent which ceased to have effect will not be restored. European patents with unitary effect (EPUE) can also be accompanied by a German national patent without the latter losing its effect.

The new rules regarding the prohibition of double protection make it much more attractive not to declare an opt-out, but instead to pursue the national applica-

tion proceedings, in parallel to the European patent. It is also worth considering claiming priority for a German subsequent application if an EP application was filed first. In this way, one can preserve the possibility of proceeding against acts of infringement before the Unified Patent Court on a Europe-wide basis without giving up the option of suing before the national courts from the German patent. The strengthening of the European patent with unitary effect should also be emphasised. For the EPUE, the prohibition of double protection falls. On the one hand, the risk that an EPUE will be revoked, for all countries, within one single proceeding before the Unified Patent Court, becomes less fearful. On the other hand, this strategy enables a flexible reaction in the event of a patent infringement. The Explanatory Memorandum to the Act states: "It is therefore proposed to reorganise the relationship between a national patent and a European patent with unitary effect as well as between a national patent and a European patent. The proposed system results from a synopsis of Secs. 8, 15 (1) and 18 IntPatÜbkG. As a rule, it shall be possible to hold a national patent in addition to a European patent or an EPeW.

The provision only applies to national patents granted after the entry into force of the UPCA. Thus, it does not

depend on the application date, but only on the date of grant. German national patents that are about to be granted should therefore be checked to see whether the grant could be delayed in order to benefit from this possibility. It is excluded, however, to proceed before the Unified Patent Court and simultaneously before a national court based on one and the same infringement case from a European patent and a German patent with the same content (Article II Sec. 18 IntPatÜbkG amended, so-called defence of double attack). This does not affect the possibility to apply for preliminary relief before both courts in parallel (Article II Sec. 18 (4) IntPatÜbkG).

The law also regulates the relationship between the German part of the EP and the European patent with unitary effect (EPUE). According to Article II Sec. 15 (2) IntPatÜbkG the German part of the EP ceases to exist as soon as the unitary patent is validly granted. However, if the request for unitary effect is rejected, the German part of the EP can be restored according to Article II, Sec. 15 (3), IntPatÜbkG, the renewal fee for the German part of the EP can still be paid after the decision on the refusal of the registration of the unitary effect has become final; this prevents dangerous gaps, because it cannot be excluded that a final decision on the validity of the registration of the unitary effect is made only after the renewal fee in Germany for the European bundle patent has already become due. However, Rule 97 of the Rules of Procedure of the UPCA provides for an accelerated procedure for this purpose, which is to be decided in less than four months at second and final instance.

Caution is required with regard to the claim for compensation in the case of the unitary patent. This is because before the unitary effect is registered, it is treated like an ordinary European patent (article II § 15 (1) IntPatÜbkG with reference to article II §§ 1, 2 IntPatÜbkG). Here, too, the requirement to file a translation of the patent claims into German remains. This, once again, speaks in favour of a strategy of parallel national and European applications.

The newly inserted articles II §§ 19 and 20 IntPatÜbkG regulate the enforcement of judgments of the Unified Patent Court: Compulsory and summary proceedings may be instituted before the German Patent Litigation Division in whose district the defendant has his seat or in which enforcement is sought (Article II § 19 IntPatÜbkG); a separate grant of a clause is not required, see Article 82 (1) p. 2 UPCA. Sections 802a et seq. of the Code of Civil Procedure (for enforcement of pecuniary claims) apply to enforcement, as do Sections 887, 888 and 890 for enforcement of fungible acts, unjustifiable acts and obligations to tolerate or to refrain from acts. A translation of the underlying judgment into German by an authorised translator is required for enforcement (Article II § 19 (2) IntPatÜbkG).

In addition, the UPCA also opens the possibility of applying to the court of first instance for administrative and/or penalty fines, which are then imposed in accordance with Article II, Article 20 of the UPCA, and enforced by means of the Judicial Recovery Order. At least for the

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enforcement of periodic penalty payments and periodic penalty payments, this appears to be the more sensible way, since then - comparable to the current situation in Germany - the Division of the Unified Patent Court that has issued the judgment will interpret it.

Finally, the Explanatory Memorandum to the Amending Act deals with the (highly controversial) question of which law national courts must apply when a European patent is the basis of an infringement dispute for which an opt-out has been declared or in the context of the parallel jurisdiction of the Unified Patent Court and national courts. With reference to the "Interpretative Note" of the Preparatory Committee for the Establishment of the Unified Patent Court of 29 January 2014 (available on the internet at <https://www.unified-patent-court.org/news/interpretative-note---consequences-application-article-83-upca>), the German legislator takes the position that then IntPatÜbkG and PatG are directly applicable.

In the meantime, further preparations for the start of the Unified Patent Court and in particular for the phase of provisional applicability of institutional provisions are underway. At the end of September, Germany ratified the so-called PPA Protocol. With this protocol, the provisions on the institutions of the UPC will be applied in advance so that the bodies of the UPC can be constituted and, in particular, judges can be elected, the Rules of Procedure adopted and court buildings logistically set up. The IT system will also be operational by then and, in particular, will be able to receive opt-out declarations even before the UPCA enters into force as a court.

On 15 October 2021, Slovenia ratified not only the UPCA but also the PAP Protocol. Only one more state needs to ratify so that the preparatory phase can start. The most promising candidate is Austria. There, the

legislative procedure to ratify the PAP Protocol was initiated in July and is expected to be completed in December 2021 or January 2022. The PAP Protocol will enter into force on the day after the required number of ratifications is reached.



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The new German supply chain act - what to expect now



On 11 June 2021, the German Bundestag passed the Act on Corporate Due Diligence in Supply Chains - in short: Supply Chain Act or Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz, LkSG) - which will come into force on 1 January 2023. The Act obliges companies to observe human rights and environmental due diligence obligations in their supply chains in an appropriate manner.

SCOPE OF APPLICATION

The Act will apply from 01.01.2023 to all companies that have their head office, principal place of business or branch office as well as their administrative or statutory seat in Germany and employ at least 3,000 workers. Employees posted abroad are counted as well as the employees of all group companies of a parent company. The legal form of the company is irrelevant for the applicability of this law, see § 1 LkSG.

As of 01.01.2024, the threshold will be lowered from 3,000 to 1,000 employees. In 2024, it will also be discussed whether the scope of application of the Supply Chain Act should be further extended to include companies with less than 1,000 employees. This means that from 2024 at the latest, a not inconsiderable proportion of small and medium-sized enterprises (SMEs) may also be covered by the scope of application of the Supply Chain Act.

CATALOGUE OF OBLIGATIONS FOR COMPANIES

Companies that fall within the scope of the Supply Chain Act are obliged to take human rights and environmental due diligence obligations into account in their supply chains in an appropriate manner. To this end, the Supply Chain Act contains an exhaustive list of human rights and environmental prohibitions with reference to underlying conventions under international law, see § 2 LkSG. These include:

- The prohibition of child labour, forced labour and slavery,
- The prohibition of disregard for labour protection and freedom of association,
- The prohibition of unequal treatment and discrimination,
- Compliance with environmental standards and other environmental prohibitions.

The term supply chain is understood broadly in this context. It includes all products and services of a company at home and abroad, as well as in particular the actions of direct and indirect suppliers. The due diligence obligations to be complied with include in particular:

- Establishment of a risk management system,
- Conducting regular risk analyses,
- Adoption of a policy statement on human rights strategy,
- Establishing preventive measures,
- taking remedial action,
- ongoing documentation and reporting.

However, the companies concerned are not obliged to guarantee compliance with human rights and environmental prohibitions. Rather, the companies are obliged to make an effort. The requirements for the fulfilment of these due diligence obligations are subject to an appropriateness proviso. Criteria for the concretisation of appropriateness are: Type and scope of the entrepreneurial activity, the company's ability to influence the direct perpetrator of a violation, the typically expected severity of the violation, the reversibility or probability of a violation, as well as the type of entrepreneurial contribution to causation. The further the source of risk in the supply chain is away from the responsible company, the less influence the company is able to exert. Therefore, human rights and environmental risks caused by direct suppliers are subject to stricter due diligence requirements than those caused by indirect suppliers. Comprehensive due diligence obligations for indirect suppliers explicitly only apply if a company obtains sub-

stantiated knowledge of a violation of a protected legal position, section 9 LkSG. According to the explanatory memorandum to the law, such knowledge can already be considered if the respective supplier is active in a region or industry with generally existing human rights or environmental risks.

POSSIBLE SANCTIONS

Compliance with the Supply Chain Act is monitored by the Federal Office of Economics and Export Control. In the event of violations of the provisions of the Supply Chain Act, fines of several hundred thousand euros or up to 2% of the average annual turnover may be imposed. In addition, companies can be excluded from the award of public contracts for a period of up to three years.

Contrary to what was initially discussed in the legislative process, a breach of the provisions of the Supply Chain Act does not give rise to any civil liability of its own, e.g. of injured parties for damages. It remains to be seen whether the courts will accept this restriction or whether the Supply Chain Act will not introduce a new standard of due diligence, which will indirectly lead to a higher civil liability burden for companies.

EUROPEAN OUTLOOK

Efforts are also being made at EU level to harmonise Member State regulations on human rights and environmental protection in supply chains. In January 2021, the Legal Affairs Committee of the European

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Parliament presented a comprehensive list of demands and recommendations to the Commission and at the same time submitted a proposal for a directive. The proposal of the EU Parliament largely coincides with the LkSG, but also goes beyond it in part. According to the proposal of the EU Parliament, small and medium-sized enterprises that are listed on the stock exchange or are active in risky sectors should also fall within the scope of application. The proposal also does not distinguish between indirect and direct suppliers.

CONCLUSION AND RECOMMENDATION

The Supply Chain Act is a long-announced legislative step towards securing human rights and environmental standards in supply chains. At the same time, however, it also presents companies with challenges: For example, the wording in the LkSG, which is kept very open on several occasions - e.g. with regard to the question of whether a company has made adequate efforts to comply with due diligence obligations - is for the time being almost incalculable for the companies concerned. Clarification through official practice, administrative regulations, legal provisions and ultimately judicial decisions will gradually take place, but this makes it difficult for companies to plan ahead. In view of the high fines, specialist literature questions the extent to which the legislator has fulfilled its obligation resulting from the principle of certainty, Article 103 II of the German Constitution. Companies with a workforce of more than 1,000 employees are well advised to deal with the requirements of the Supply Chain Act now and to implement them in their compliance systems quickly. This is particularly advisable as work is already underway on an EU-wide regulation, in some cases with even stricter rules.



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Düsseldorf Higher Regional Court strengthens recall claim

According to Sec. 140a of the German Patent Act (Patentgesetz - PatG), rights holders may demand that patent infringers recall infringing products, i.e. ask their commercial customers to return infringing products.

In two recent decisions, the Düsseldorf Higher Regional Court (decision dated Sep 20, 2021, case no. I-2 W 18/21, published in GRUR-RS 2021, 28744 – Rückrufvollstreckung I and de-cision dated Sep 24, 2021, case no. I-2 W 19/21, published in GRUR-RS 2021, 28722 – Rückrufvollstreckung II) discussed the requirements for complying with the recall claim.

The Düsseldorf Higher Regional Court stated that two things are necessary to satisfy the re-call claim: First – this is nothing new – the infringer must seriously request their commercial customers to return the infringing products. Second – this is new – the infringer must prove to the rights holder that they actually carried out the recall, either by presenting all recall letters sent or by presenting a sample recall letter and a list of all recall addressees.

According to the Court, the infringer's obligation to disclose all recall addressees is an implicit part of the recall claim, which does not need to be expressly mentioned in the court's recall order and exists irrespective of whether the rights holder asserted a claim of information (Sec. 140b PatG; Art. 8 Enforcement Directive). The Court reasoned that even though the rights holder could indirectly learn about the recall addressees through the right of information – which includes information on the infringer's commercial customers –, the rights holder's right to know all recall addressees and their right of information were two independent claims, which they may assert and enforce independently from each other. Otherwise, the rights holder would always have to sue for both recall and information, just to be able to trace the fulfilment of the recall claim.

It seems that the Court awards the rights holder an independently enforceable claim against the patent

infringer to disclose all recall addressees, so that the rights holder can make sure that the infringer fulfilled their recall obligation. In the past, the Court denied the rights holder such a claim, at least in cases where (i) an obligation to disclose all recall addressees was not expressly ordered by the court and (ii) the infringer had also been ordered to give information on commercial customers who received infringing products (decision dated May 26, 2015, case no. 2 W 9/15, published in BeckRS 2016, 5567). Only when parties argued about whether the infringer had already fulfilled their recall obligation or not, the court had required the infringer to disclose all recall addressees in compulsory enforcement or appeal proceedings (Düsseldorf Higher Regional Court, decision dated May 6, 2010, case no. 2 U 98/09, published in BeckRS 2010, 15888).

Moreover, the Court discussed the "seriousness" requirement. It emphasized that the recall must not be worded as a "mere request". For a "serious" recall, the infringer (i) must communicate the reason for the recall, i.e. the patent infringement, and (ii) must neither indicate nor imply that the return is voluntary, or (iii) if they imply the voluntariness, which is usually permissible, at the same time inform the recall addressees that they infringe the patent themselves by distributing or using the recalled products and, therefore, might have to face legal action from the rights holder if they continue to do so, and that they must "expect discovery" by the rights holder, because the recall obligation requires the infringer to disclose all recall addressees to the rights holder. The infringer may leave out the information about the negative consequences under patent law in outright exceptional cases only, i.e. if the respective recall addressee is already sufficiently aware of it due to their own knowledge. However, even with companies who have an own legal department or patent department, one could neither assume detailed knowledge of patent law, nor that they are represented by or have consulted with a lawyer at the time of the recall request. The infringer must prove otherwise in case of dispute by the rights holder. Here again, the Düsseldorf Higher Regional Court seems

to be stricter than before. In its former case law (decision dated May 26, 2015, case no. I-2 W 9/15, published in BeckRS 2016, 5567), it considered recall addressees who constantly deal with patented products, such as commercial purchasers of medical-technical products, to be in the picture about patent law and the consequences thereunder, and placed the burden of proof for a possible lack of sufficient knowledge with the rights holder.

On the subject of the voluntariness of the recalled products' return, the Court further noted that where commercial customers do not infringe the patent themselves, for example because they are located in a country where no patent protection exists, the infringer must not indicate or imply that the return of the recalled products is voluntary to start with.

The decisions of the Düsseldorf Higher Regional Court make the recall claim to a more effective tool. This is in line with Art. 3 of the Enforcement Directive, according to which measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights shall be effective, proportionate and dissuasive.



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Editor: Preu Bohlig & Partner Partnergesellschaft mbB (Professional partnership with limited professional liability) based in Munich, entered in the partnership register of the Municipal Court of Munich (Germany) under PR2.

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