

EIP



EX PARTE PI GRANTED

Ortovox Sportartikel GmbH vs Mammut Sports Group AG and Mammut Sports Group GmbH

Düsseldorf Local Division

Order of 11 December 2023^[1]

Introduction

Ortovox Sportartikel GmbH (in the following “Applicant”) owns the EP 3 466 498 B1 which relates to a “Search device for avalanche victims and method for operating a search device for avalanche victims”. The patent is currently in force in Austria, Germany and Switzerland. No opposition was filed against the patent in suit. A Nullity Action against the Swiss part of the patent is pending at the Federal Patent Court of Switzerland.

The Mammut Sports Group AG exhibited their avalanche victim search device “Barryvox S2” (in the following “attacked embodiment”) at the “ISSW” trade fair in Bend, Oregon (USA), from 8 to 13 October 2023, where it was examined by employees of the Applicant. At the beginning of November 2023, the Applicant received information from a dealer that the attacked embodiment could be pre-ordered via the B2B platform for 2024. Furthermore, the Mammut Sports Group AG was present as a co-exhibitor at the “ISPO Munich 2023” trade fair, which took place in Munich from 28 to 30 November 2023. The attacked embodiment was also exhibited at this trade fair.

The Applicant did send a warning letter to Mammut Sports Group GmbH and Mammut Sports Group AG (in the following “Defendants”) on 28 November 2023.

On 1 December 2023 the Applicant requested a provisional injunction against the Defendants concerning the avalanche victim search device “Barryvox S2” which the Düsseldorf Local Division granted ex parte on 11 December 2023 (ORD_592936/2023 re

Decision

Infringement

The Local Division Düsseldorf stated that it is convinced with sufficient certainty (R. 211.2 RoP) that the Applicant's rights are infringed by the offer and distribution of the attacked embodiment. The Court also made clear that in principle the prosecution file is not to be taken into account when interpreting the patent. Art. 24 (1) (c) UPCA in conjunction with Art. 69 EPC conclusively determine which documents are to be used in the interpretation of the patent claims determining the scope of protection, namely the patent description and the patent drawings. Mere statements made during the grant procedure do not initially have any significance in terms of limiting the scope of protection (in contrast to the Local Division Munich in its case SES-imagotag SA v Hanshow Technology Co. Ltd. and others UPC_CFI_292/2023, in which they did consider the prosecution history).

Validity

Düsseldorf's Local Division found that the validity of the patent in dispute is secured to the extent required for the ordering of provisional measures. Even if the patent in dispute has not yet undergone adversarial first-instance validity proceedings, the validity may be secured to the extent necessary for the ordering of interim measures (following UPC_CFI_177/2023 [LD Düsseldorf], order of 22.06.2023). The Court stated that, if the patent in dispute is subject to an attack on validity, this does not preclude the ordering of provisional measures. In such a case, it is rather the task of the Court to assess whether the validity is sufficiently secured despite such an attack. This is the case if the objections raised against the validity of the patent are not such as to give rise to justified doubts as to the validity of the patent.

For the present case, the Court considered that the patent in question was published many years ago (2019), but its validity was not challenged, and the opposing party has not been able to present the relevant prior art either in pre-litigation correspondence or in a protective letter.

The Local Division noted that on summary examination – based on the arguments brought by the Defendants in the Swiss Nullity Action – the argumentation does not give rise to any justified doubts as to the validity of the patent in dispute.

Urgency

Further, the Court explained that a lack of urgency can only be assumed if the infringed party has been so negligent and hesitant in pursuing its claims that, from an objective point of view, it must be concluded that the infringed party is not interested in enforcing its rights quickly, which is why it does not appear appropriate to allow it to seek interim legal protection. The CFI made clear that there were no indications of these circumstances in the present case. Even if the Applicant was already able to inspect the attacked embodiment at a trade fair in the USA at the beginning of October 2023, it first became aware of its offer within the Contracting Member States on 3 November 2023. Only slightly less than a month then passed before the application for interim measures was filed. The Court stated that “against this background, there can be no question of delayed action”.

Balancing of interests / ex parte

The probability of irreparable damage occurring on the Applicant's side, which is required for the ordering of interim measures without hearing the defendant, may be given if the attacked embodiment is exhibited at a leading trade fair that is important for the entire industry (following UPC (UPC_CFI_177/2023 (LD Düsseldorf), order of 22.06.2023). Even if such a leading trade fair has already ended at the time the application is filed, the issuance of an ex parte order may be justified if a significant number of business transactions can be expected following the trade fair, a large proportion of these transactions are concluded in the period immediately following the trade fair and the parties' products are substitutable, directly competing products. All of these circumstances were present in this case so that the Court decided that the order for interim measures is necessary, appropriate and required due to the damage suffered by the Applicant.

The Court also considered that the Defendants failed to file a protective letter and stated that a hearing of the Defendants promise at best a limited gain in knowledge, since the Court already considered all documents filed in the Swiss Nullity action.

Security

Pursuant to R. 211.5 RoP, the Court ordered the provision of a security (500k EUR). Regarding the amount, the Court stated that it is difficult to estimate the amount of possible enforcement damages at the time this order is issued. Against this background, the security set is based on the amount in dispute. Even if the amount in dispute does not necessarily correspond to the risk of damage, it does provide an indication of the economic importance the Applicant attaches to the matter.