

Fordham IP Conference Cambridge 2009

Presentation Outline

Cross Border Patent Infringement – a Comparative Analysis The German Perspective

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16 April 2009

The talk will be part of a coordinated set of three brief presentations dealing with the reach of the patent law in the UK, Germany and Italy in typical cross border scenarios. In particular, we will explore whether and to which extent the initial supplier of the infringing goods, although being located in a third country and never directly committing any infringing act in any of these jurisdictions, can be involved in infringement proceedings there.

In Germany, the courts adopt a broad concept of direct infringement. Notwithstanding the territoriality principle, a person based in a third country will be held liable for patent infringement in Germany if he delivers or offers for sale an infringing product to a customer outside of Germany as long as he knows that Germany is the final destination of the product. This liability does not depend on the precise terms of delivery (e.g. “ex works”, “fob” etc.). Arguably, this “cross-border liability” would even apply in case the infringer offers the goods only for sale after the expiry of the patent.

On the other hand, the concept of indirect infringement is explicitly limited by the double territoriality principle. If the foreign based person only sells a means that relates to the invention, he will not be held liable for indirect infringement by the German courts, unless he directly delivers the means into Germany.

In the discussion, we will explore how this result differs from the law in the other jurisdictions and debate why this is the case.