

Recent Case Law in German Patent Law



2017



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FOREWORD

Last year saw little in the way of unexpected or momentous decisions. Established supreme court practice appears instead to have been continuously developed and consolidated in many fields. Examples include the decisions on equivalence and contributory patent infringement on which we have already reported. On the whole, they build consistently on what had previously been elaborated in jurisdiction.

'Disclosure' is still a perennial issue in validity matters, but here as well there are signs of German and European law converging (namely in respect of undisclosed disclaimers). One focus of this year's case law review is therefore decision G 1/16 of the Extended Board of Appeal of the European Patent Office, which has received much attention.

Nonetheless, there are also two prominent decisions by the Federal Court of Justice that stand out: in **Raltegravir**, a compulsory licence (for an HIV drug) was awarded by the supreme court for the first time ever. In **Sektionaltor II**, the Federal Court of Justice finally had an

opportunity to specify in greater detail the conditions under which a co-inventor can claim financial compensation from the other inventors, thus correcting the very unwieldy ruling applied in the previous instance. The crucial factor on which entitlement to compensation depends is the situation of the beneficiary – if he can easily exploit the invention in his own establishment, then he has also to do so as a priority. It is not enough to approach co-owners, but remain personally inactive on the market.

What about FRAND? The courts in Mannheim and Düsseldorf continue to develop their case law. Both venues are converging on some key issues, with the 'requirement for transparency' (involving the disclosure of licensing agreements already concluded) increasingly becoming a major irritant for patent proprietors. We are still waiting with bated breath on an appeal decision from the Upper District Court in Karlsruhe and above all a decision from the Federal Court of Justice in an appeal decision on points of law.

April 2018

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