

# Recent Case Law in German Patent Law



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# CONTENT

Foreword.....	2
I. Patent Interpretation	
1. Cited prior art.....	3
<i>Federal Court of Justice, judgment of 27.11.2018, X ZR 16/17 – Scheinwerferbelüftungssystem</i>	
II. Patent infringement / Claims	
2. Claims for damages.....	5
<i>Federal Court of Justice, judgment of 26.03.2019, X ZR 109/16 – Spannungsversorgungsvorrichtung</i>	
3. Right of prior use.....	7
<i>Federal Court of Justice, judgment of 14.05.2019, X ZR 95/18 – Schutzverkleidung</i>	
4. Cross-label use.....	10
<i>Düsseldorf Upper District Court, judgment of 09.01.2019, 2 U 27/18 – Fulvestrant</i>	
5. Derivative product protection.....	12
<i>Düsseldorf District Court, judgment of 08.01.2019, 4 c O 12/17 – Codiervverfahren</i>	
III. Validity	
6. Impermissible extension of the scope of protection.....	14
<i>Federal Court of Justice, judgment of 20.12.2018, X ZR 56/17 – Schaltungsanordnung III</i>	
7. Reasonable expectation of success: Federal Court of Justice vs. EPO.....	16
<i>Federal Court of Justice, judgment of 16.04.2019, X ZR 59/17 – Fulvestrant</i>	
8. Inventive step.....	19
<i>Federal Court of Justice, judgment of 07.08.2018, X ZR 110/16 – Rifaximin <math>\alpha</math></i>	
9. Disclosure in revocation proceedings.....	21
<i>Federal Court of Justice, judgment of 19.03.2019, X ZR 11/17 – Bitratenreduktion II</i>	
IV. Other issues in substantive law	
10. Standard-essential patents / FRAND principles.....	23
<i>Düsseldorf Upper District Court, judgment of 22.03.2019, 2 U 31/16 – Improving Handovers</i> <i>Karlsruhe Upper District Court, judgment of 30.10.2019, 6 U 183/16 – Datenpaketverarbeitung</i> <i>Mannheim District Court, judgment of 04.09.2019, 7 O 115/16 – Vorübergehende Identität</i> <i>Düsseldorf District Court, judgment of 08.01.2019, 4 CO 12/17 – Decodiervorrichtung</i>	
11. Compulsory licence.....	28
<i>Federal Court of Justice, judgment of 04.06.2019, X ZB 2/19 – Alirocumab</i>	
12. Employee inventions law.....	30
<i>Federal Court of Justice, judgment of 04.09.2018, XZR 14/17 – Drahtloses Kommunikationsnetz</i>	
13. Review of proportionality in claim for injunctive relief.....	32
<i>Munich District Court I, judgment of 13.06.2019, 7 O 10261/18 – Verhältnismäßigkeitsprüfung beim Unterlassungsanspruch</i>	
V. Procedural law issues	
14. Division of application.....	34
<i>Federal Court of Justice, court order of 07.05.2019, X ZB 9/18 – Abstandsberechnungsverfahren</i>	
15. Interest in declaratory judgment in light of inspection proceedings.....	36
<i>Federal Court of Justice, judgment of 02.10.2018, X ZR 62/16 – Schneckenköder</i>	
16. Stay of infringement proceedings.....	39
<i>Karlsruhe Upper District Court, court order of 02.01.2019, 6 W 69/18 – Empfangsanordnung</i>	
17. Opponents as necessarily joined parties.....	41
<i>Federal Court of Justice, court order of 22.10.2019, X ZB 16/17 – Karusselltüranlage</i>	

## FOREWORD

The Federal Court of Justice was able last year to concretise its case law in relation to one decisive element of patent interpretation: The prior art cited in the patent is of particular importance for the patent's interpretation. As a rule, the skilled person perceives the patent as rising above the prior art cited by himself. Accordingly, objects which have already been described in the cited prior art are generally not covered by the patent's scope of protection. Although these principles are not new, they are once again receiving special consideration – especially with regard to the grant procedure. The mere inclusion of a document as state of the art into the description of the invention can be of decisive importance for the scope of protection of the patent.

For the first time in a while, the Federal Court of Justice had to deal with the right of continued prior use. In particular, the Federal Court of Justice traces the limits of what a "prior user" may change in his product without leaving the safe ground of his right of continued prior use.

In the area of validity, the question of the "reasonable expectation of success" has recently become a perennial

issue. Here, the Federal Court of Justice clearly distances itself from the European Patent Office and also from the Dutch courts. The view of German law remains focused on the "incentive" that prior art documents offer to the skilled person for proceeding in a certain direction.

As far as FRAND is concerned, the Düsseldorf case law continues to consolidate. However, the first decision of the Karlsruhe Upper District Court has (finally) been handed down, bringing the case law of the second major venue into line with the Düsseldorf case law regarding essential aspects: the requirement of transparency and the subsequent compliance with the Huawei ZTE obligations are now also recognised by the Karlsruhe Upper District Court. Further decisions by the Düsseldorf and Mannheim courts also make it clear, however, that the right to injunctive relief is not off the table in Germany. Patent infringers who are merely passive and refuse to sign a non-disclosure agreement run the risk of being ordered to cease and desist.

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**EISENFÜHR SPEISER**



### **Bremen**

Am Kaffee-Quartier 3  
28217 Bremen  
Tel +49 421 3635-0  
Fax +49 421 3378788  
mail@eisenfuhr.com



### **Munich**

Arnulfstraße 27  
80335 Munich  
Tel +49 89 549075-0  
Fax +49 89 55027555  
mailmuc@eisenfuhr.com



### **Berlin**

Anna-Louisa-Karsch-Straße 2  
10178 Berlin  
Tel +49 30 841887-0  
Fax +49 30 841887-77  
mailbln@eisenfuhr.com



### **Hamburg**

Johannes-Brahms-Platz 1  
20355 Hamburg  
Tel +49 40 309744-0  
Fax +49 40 309744-44  
mailham@eisenfuhr.com