WHITE & CASE

In for a Penny, in for a Pound

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It is generally known that those who infringe a patent are liable for committing the act of infringement. In the vast majority of cases this is the person who produces patent-infringing goods or sells or uses a patented method without being authorized to do so. Less obvious is liability in the case of mere participation, in particular in cases of merely supportive actions. The Düsseldorf Appeal Court (Oberlandesgericht Düsseldorf) has recently made a remarkable decision on the liability in such constellations (OLG Düsseldorf, judgment of 13 February 2014, file number I-2 U 42 /13).

1. Subject of the patent infringement proceedings are patented pole terminals for the manufacturing of electrical cable connections. The Defendant, based in Hungary, is active in the Hi-Fi market where they deal with the delivery of components for high-end devices. Their product range includes, among other things, cables and connectors, which the Defendant offers under their own company name. In addition, they are the exclusive contractor for a number of well-known foreign manufacturers. Among them is the Japanese company B, for which the Defendant sells various products outside Germany, including pole terminals, which are patented by the Claimant. However, this distribution exclusively takes place in the off-patent countries.

At the trade fair "High End" in 2011 in Munich an advertising flyer was displayed at the Defendant's stand. The front of the flyer showed the patent infringing pole terminals, and promoted the company B, not the Defendant. The back showed an advertisement of the Defendant's, which was not connected to B's allegedly patent infringing pole terminals. The design of the flyer's individual pages was undisputedly the respective advertising company's exclusive responsibility.

2. The Düsseldorf District Court (Landgericht Düsseldorf) dismissed the patent infringement suit against the Defendant. According to the District Court, the Defendant had not made an offer relevant to the patent. It had been obvious to anyone that the front and back of the flyer had a different design. Hence it was also apparent that the Defendant had nothing to do with the pole terminals and that only company B sold them.

The Düsseldorf Appeal Court rejects these considerations and finds against the Defendant for patent infringement. According to the Düsseldorf Appeal Court, the Defendant is liable for having made their own offer with relevance to the patent under section 9 of the German Patent Act (§ 9 PatG). The Defendant's display of the flyer at their stall at the trade fair was sufficient for this. The Düsseldorf Appeal Court does not base its decision on the design of the flyer's front and back. Rather, it is sufficient that the advertising flyers were

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displayed at the Defendant's stall. According to the Court, it would even have been sufficient if advertising flyers had been displayed at the Defendant's stall, which can clearly be attributed to company B only. The display at the stall made it clear to trade fair visitors that the advertised pole terminals could be obtained from company B. The owner of the stall is responsible for what is presented at the exhibition space. Consequently, an advertisement referencing a third company must be interpreted as the Defendant's own act.

3. Operators of a stall should strongly consider the following: They are not just liable for their own products. Another company's flyers can also trigger their liability if they are displayed at the operator's own stall. Even a disclaimer such as "Cannot be bought here" or "Only available from company B" does not protect against liability. Here, the Court does not sanction the Defendant's own offering of the products but the participation in a third party's offer.