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Franz Hofmann*

Enforcing Patents Smoothly: From Automatic Injunctions to Proportionate Remedies

Balancing interests via remedies in Intellectual Property Law

Intellectual Property Law aims to balance different interests at stake. At a conference in Erlangen on 22 March 2019 ("Enforcing Patents Smoothly: From Automatic Injunctions to Proportionate Remedies"), injunctions as a tool for the patentee to negotiate remuneration as well as "tailored" injunctions as a means of preventing, for example, hardship to the infringer were discussed. This introduction outlines both the structure of injunctive relief in German Private Law and the theoretical framework of balancing interests in IP law, especially patent law.

I. Controversy on injunctions in Patent Law

The patent system has long been subject to critical discussions. In 2006, the decision *eBay Inc. v. MercExchange* triggered a controversy on remedies,¹ which also reached Germany in the aftermath of the development in the US.² The US Supreme Court had denied an injunction based on the principles of *equity*. Accordingly, the court has discretion whether to grant an injunction or not. This depends on a four factor test: The plaintiff must demonstrate (1) that he has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.³ In this volume, *Daniel Alexander* will report in detail on the latest developments in England.⁴

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1 *eBay Inc. v. MercExchange*, L. L. C., 547 U.S. 388 (2006) = GRUR Int. 2006, 782; vgl. *Subramanian*, IIC 2008, 419.

2 *Ntouvas*, GRUR Int. 2006, 889; *Ohly*, GRUR Int. 2008, 787; *Schickedanz*, GRUR Int. 2009, 901; *Uhrich*, ZGE 2009, 59.

3 *eBay Inc. v. MercExchange*, L. L. C., 547 U.S. 388 (2006) = GRUR Int. 2006, 782.

4 Cf. *Alexander*, ZGE 2019, 279 (in this issue).

In Germany, in contrast, injunctive relief is granted automatically if a patent has been infringed.⁵ Injunctions are conceived as default remedies. On the one hand, the value of a patent depends on the availability of strong remedies. In the absence of injunctions, the holder of a patent has to tolerate the use of the invention by third parties, even if they have to compensate the right holder. His bargaining position, however, is weak. On the other hand, the “sharp sword” of injunctive relief can be dangerous.⁶ Whereas an injunction as a property rule enables negotiations on license fees (*Thomas F. Cotter* will provide more details from a law and economics viewpoint⁷),⁸ it is also a means susceptible to misapplication. Furthermore, an injunction might cause hardship. Against the background of switching cost, the missed chance to amortise investments or duties to recall products,⁹ the preventive function of injunctions can mutate into punishment.¹⁰ Arguably, such a remedy might not be proportionate in every case. “One size fits all solutions” such as automatic injunctions are not necessarily fair and equitable. Whereas some scholars argue for more flexibility even in the civil law system,¹¹ others warn not to undermine the incentive structure of the patent system as such. Notwithstanding that, relevant cases might be: (1) Standard-essential patents cf. *Picht*, ZGE 2019, 324 (in this issue), (2) patents in complex devices, (3) trolling, and (4) strong public interest in access to patented inventions.

The articles in this volume aim to trace the debate on injunctive relief and alternatives. Indeed, against the political background¹² it appears to be helpful to structure the arguments and analyse the legal framework carefully. This introduction, in turn, aims to demonstrate that balancing is something the patent system (or rather IP) is familiar with anyway (III.). The framework of remedies enables a manner of “fine-tuning” for IP rights (IV.). At the outset, the structure of injunctive relief in German Law will be recalled (II.).

5 *Grabinski/Zülch*, in: Benkard (ed.), Patentgesetz, 11. Aufl. 2015, § 139 Rn. 27.

6 Cf. *F. Hofmann*, NJW 2018, 1290.

7 Cf. *Cotter*, ZGE 2019, 293 (in this issue).

8 Cf. *Calabresi/Melamed*, 85 Harvard Law Review 1089.

9 BGH 11.10.2017 – I ZB 96/16 = GRUR 2018, 292 – *Produkte zur Wundversorgung*; BGH 29.9.2016 – I ZB 34/15 = GRUR 2017, 208 – *Rückruf von RESCUE-Produkten*; BGH 19.11.2015 – I ZR 109/14 = GRUR 2016, 720 – *Hot Sox*; different view OLG Düsseldorf 14.2.2019 – 20 W 26/18 = GRUR-RR 2019, 278 – *Tinnitus-Präparat*.

10 *Heald*, Illinois Public Law and Legal Theory Research Papers Series No. 10–38 (<http://papers.ssrn.com/abstract=1851681>, last access: 23.07.2019).

11 *L. Tochtermann* denies this based on the law as it stands.

12 Cf. <https://www.handelsblatt.com/politik/deutschland/unterlassungsanspruch-dax-konzerne-fordern-harte-massnahmen-gegen-patent-aufkaeufer/23714580.html?ticket=ST-3212839-cj53Zkd5ANuggGp3tLvD-ap1> (last access: 23.07.2019).

II. Structure of injunctive relief in German Law

The “remedy-system” in common law countries is distinct from the approach in civil law systems.¹³ German private law is a compilation of subjective rights. Particularly, individuals can rely on claims. Sec. 194 (1) German Civil Code (BGB) defines a claim as the right to demand that another person does or refrains from an act. Crucially, this substantive right does not depend on the interference of a court. However, earlier in history, in Germany at least, injunctions were considered to be court orders.¹⁴ The wording of some provisions in the German Civil Code still reflect this view. The “procedural connotation” can be found in Sec. 12 BGB or Sec. 1004 (1) BGB. Sec. 12 BGB, e.g., provides:

“If the right of a person to use a name is disputed by another person, or if the interest of the person entitled to the name is injured by the unauthorised use of the same name by another person, the person entitled may require the other to remove the infringement. If further infringements are to be feared, the person entitled may seek a *prohibitory injunction* [auf *Unterlassung klagen*].”¹⁵

According to the modern view, however, “injunctions” (or better: the right that the debtor refrains from doing something) are conceived as claims in the realm of substantive law. In this regard, Sec. 97 (1) German Copyright Act (UrhG) provides:

“Any person who infringes copyright or any other right protected under this Act may be required by the injured party to eliminate the infringement or, where there is a risk of repeated infringement, may be required by the injured party to cease and desist. An entitlement to prohibit the infringer from future infringements shall also exist where the risk of infringement exists for the first time.”¹⁶

This provision also demonstrates *pars pro toto* which requirements have to be fulfilled in order to obtain the right to demand that another person refrains from an act.¹⁷ First, the claimant has to establish that one of his rights (e.g., a property

13 Cf. Hofmann/Kurz, in: Hofmann/Kurz (eds.), *Law of Remedies. A European Perspective*, pp. 3 ff.; for a detailed comparison F. Hofmann, *Der Unterlassungsanspruch als Rechtsbehelf*, 2017, § 1 and § 2.

14 v. Caemmerer, in: v. Caemmerer/Friesenhahn/Lange (eds.), *Hundert Jahre Deutsches Rechtsleben. Festschrift zum Hundertjährigen Bestehen des Deutschen Juristentages 1860–1960*, Band II, Karlsruhe 1960, pp. 49, 53 f.; Larenz, NJW 1955, 263; for an overview Fritzsche, *Unterlassungsanspruch und Unterlassungsklage*, 2000, pp. 114 ff.

15 For the official translation, cf. https://www.gesetze-im-internet.de/englisch_bgb/ (last access: 22.07.2019).

16 For the official translation, cf. https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html (last access: 23.07.2019).

17 Unfortunately, the official translation of Sec. 139 (1) German Patent Act misses this point as the translation still reminds of the procedural roots which no longer exist (cf. “Any person who uses a patented invention contrary to sections 9 to 13 may, in the event of the risk of recurrent infringement, be *sued* by the aggrieved party for cessation and desistance. This right may also be *asserted* in the event of the risk of a first-time infringement”, cf. <https://www.>

right such as physical property or a patent) has been violated by the defendant. Secondly, he has to show a “danger of recurrence” or a “risk of first-time infringement”. Once these preconditions are met, the *Unterlassungsanspruch* (“injunction”) comes into force. As a basic rule, according to the prevailing view, there is no room for a specific proportionality test, a fault requirement or even any form of discretion. *Lea Tochtermann* will outline this in more detail,¹⁸ although *Jan Bernd Nordemann* will show that there are nonetheless instruments, such as “grace periods” (*Aufbrauchfristen*), to avoid individual hardship.¹⁹

From an analytical point of view, the core of injunctive relief is a legal duty.²⁰ The entitlement of A inversely obliges B not to interfere with A’s legal position. As long as there are no limitations or exceptions, third parties have a duty, for instance, not to infringe a patent. This duty does not depend either on a specific court order or on a claim. However, in practice this duty is not sufficient; in many cases people fail to comply with their obligations. For the sake of enforcement, the “basic duty” can be replicated in a claim pursuant to Sec. 139 (1) German Patent Act (PatG) as well as via a court order. Sec. 139 (1) PatG provides:

“Any person who uses a patented invention contrary to sections 9 to 13 may be required by the aggrieved party to refrain therefrom if there is a danger of recurrence. The right shall also exist if there is a risk of a contravention occurring for the first time.”²¹

In the event of a violation of the duty (= danger of recurrence) or risk that the duty might be disobeyed (= risk of first-time infringement) the right holder’s position is strengthened as he or she obtains a secondary right (type of “specific performance”). The third party’s duty not to interfere with the right of the other person is mirrored in a claim of the owner of the right.

This “claim right” again is the basis for a court order. Basically, the court replicates the right to demand that the other person refrains from a specific act. This interplay between duty, claim and court order can be described as a “cascade of obligations”.²² The court order is important for two reasons: First, where the scope of the defendant’s duty or rather the claimant’s right is disputed, the court can clarify this. Secondly, the court order can be executed. If the defendant does not comply with the order, depending on a motion of the claimant the court can start execution proceedings in accordance with Sec. 890 (1) German Civil Procedure Code (ZPO). It says:

gesetze-im-internet.de/englisch_patg/index.html (last access: 23.07.2019)). In the German version, however, the wording with respect to injunctive relief does not differ in the Copyright Act and Patent Act.

¹⁸ Cf. *L. Tochtermann*, ZGE 2019, 257 (in this issue).

¹⁹ Cf. *Nordemann*, ZGE 2019, 309 (in this issue).

²⁰ *F. Hofmann* (n. 13), pp. 393 ff.

²¹ For the official translation, cf. footnote 17.

²² *F. Hofmann* (n. 13), pp. 421 ff. and 431 ff.

“Should the debtor violate his obligation to cease and desist from actions, or to tolerate actions to be taken, the court of first instance hearing the case is to sentence him for each count of the violation, upon the creditor filing a corresponding petition, to a coercive fine and, for the case that such payment cannot be obtained, to coercive detention or coercive detention of up to six (6) months. The individual coercive fine may not be levied in an amount in excess of 250,000 euros, and the coercive detention may not be longer than a total of two (2) years.”²³

The purpose of Sec. 890 (1) ZPO is simple: By threatening financial sanctions, the provision intends to steer the defendant’s behaviour.

The claim pursuant to Sec. 139 (1) PatG in turn enables out-of-court settlements. In practice, most right holders try to settle the dispute out of court by sending so called “cease-and-desist-letters”.²⁴ As Sec. 97a (1) UrhG states, before instituting proceedings in court the injured party shall notify the infringer to desist from infringement and shall give him the opportunity to settle the dispute by entering into an obligation to desist from infringement accompanied by an equitable contractual penalty. By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance (Sec. 241 (1) ZPO). If the defendant agrees on such a contractual obligation not to infringe the claimant’s rights again (the performance consists of forbearance) secured by a penalty clause (cf. Sec. 339 ZPO) the claim (right to an injunction) according to Sec. 139 (1) PatG extinguishes. This is fair, as the debtor has to pay the contractual penalty in the case of repeated infringement.

III. Balancing between Intellectual Property and the public domain

1. Proportionality as a comprehensive challenge

Intellectual property finds itself in a basic conflict between the protection of intangible goods via property rights and the free access to intellectual assets. There is a tension between intellectual property and the public domain. On the one hand, inventors as well as investors want to rely on an exclusive right. Primarily, money invested can be amortised best via property rights. On the other hand, third parties have a strong interest in IP rights not restricting their freedom. They want to have free access to inventions etc. Without providing more details, it is clear that different, regularly competing, interests are at stake. Definitely, there is a need to balance these interests. This balancing exercise can be undertaken on a macro- and a micro-level or rather in an abstract way or in detail. In the big picture, the law has to decide whether to grant IP rights at all: Is there a convincing

²³ For the official translation, cf. https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (last access: 22.07.2019).

²⁴ There are also procedural reasons for out-of-court settlements, cf. Sec. 93 Civil Procedure Code: “Where the defendant has not given cause for an action to be brought, the plaintiff shall bear the costs of the proceedings should the defendant immediately acknowledge the claim.”.

justification for a patent system or for copyright? Do we need further rights, e. g., to protect non-personal data? Is there a market failure?

More important, however, is the specific design of respective rights. In other words, it is crucial to balance patents etc. at a micro-level as well. Indeed, a micro-level analysis reveals that balancing is a well-known concept in IP law. At the level of scope of protection, for instance, Sec. 1 (3) PatG provides that discoveries, scientific theories and mathematical methods as well as presentations of information etc. do not qualify for patent protection. Denying the public access to fundamental theories etc. cannot be justified. When it comes to exploitation rights, merely repairing a patented product might not be considered as an infringing act.²⁵ The patentee's interest is trumped by the interest of the owner of a patented product. In copyright law, communications do not qualify as copyright infringements as long as they are not public (cf. Art. 3 InfoSoc-RL, 2001/29/EC). Sec. 11 PatG provides for limitations and exceptions. Again, in specific situations, the exclusive right has to be restricted; protection appears not to be justified in those cases. The framework of remedies is possibly another tool for balancing.²⁶ As *Jan Bernd Nordemann* will explain in his paper, under certain conditions "grace periods" can suspend an injunction temporarily. *Peter Tochtermann* will report from a practical point of view.²⁷

2. Balancing via the framework of remedies

According to the traditional view, however, it is not appropriate to implement policy considerations via the framework of remedies.²⁸ Once a patent infringement occurs, an injunction *must* be granted.²⁹ The doctrine of "automatic injunctions" in principle³⁰ leaves no room for a proportionality test beyond limitations and exceptions as laid down in Sec. 11 PatG or Sec. 24 PatG where the preconditions for compulsory licenses are codified. However, enforcement should not be as effective as possible but just and fair. From a legal realist's point of view, at the end of the day, the "scope" of patents etc. depends on the level of enforcement. The stronger the enforcement, the broader the protection and vice versa. Consequently, enforcement has to be appropriate. It's another means of striking a fair balance between different interests at stake. EU law, especially, acknowledges that remedies shall be proportionate (cf. Art. 3 (2) Enforcement Directive, 2004/48/EC).³¹ Similarly, Sec. 100 UrhG provides a rule for "damages in lieu of

²⁵ Cf. *Scharen*, in: Benkard (ed.), Patentgesetz, 11. Aufl. 2015, § 9 Rn. 38.

²⁶ *Fischman-Afori*, 29 Cardozo Arts & Entertainment Law Journal 2011, 1, 3 f.

²⁷ Cf. *P. Tochtermann*, ZGE 2019, 362 (in this issue).

²⁸ Elsewise *Fischman-Afori*, IIC 2014, 889 (for copyright law).

²⁹ Cf. *Haedicke*, Patentrecht, 4. Aufl. 2018, 13. Kap. para. 22 ff.

³⁰ Cf. BGH 10.5.2016 – X ZR 114/13 = GRUR 2016, 1031 para. 40 ff. – *Wärmetauscher*.

³¹ Critically *Stierle*, Das nicht-praktizierte Patent, 2018, pp. 302, 304 ff.

an injunction". Where the injuring party acts neither intentionally nor negligently, he may, in order to avert the assertion of an injunction, pay pecuniary compensation to the injured party if the fulfilment of the claims would cause disproportionate harm and the injured party can be expected to accept pecuniary compensation. Provisions like that ultimately show that proportionate enforcement ("sophisticated enforcement") is a fundamental principle, even in German Private Law.³² Yet, the framework of remedies only enables a manner of "fine-tuning". If, for example, the patent system allows for patents to be granted on software or pharmaceuticals, this basic decision cannot be reversed at the level of remedies. Furthermore, it is important to distinguish compulsory licenses (§ 24 PatG) from restricting injunctions. Specific public interest in access to certain technologies is governed exclusively by compulsory licenses. These requirements must not be frustrated via remedies. Still, there is a specific scope for "tailored injunctions". If on the facts of a specific case individual hardship occurs, a judge should be able to suspend an injunction. The German Federal Court is reluctant to do so, as *Peter Tochtermann* will further outline. The court argues that an injunction is not available only in exceptional circumstances.³³ In the decision *Wärmetauscher* the defendant infringed a patent. He used a patented heating system for convertibles without consent. The court granted an injunction as the heating system was not essential for the functioning of the convertibles.³⁴ This misses the point, however. The question of proportionality does not depend on the function of the infringing device but on the proportionality of the switching costs. The right question would have been whether the switching cost was out of scale. Remedies are not a means of cheap access to technologies (compulsory licenses might help or FRAND licenses in the case of standard-essential patents)³⁵. Notwithstanding this, remedies can fight individual hardship, e.g., if switching costs are high and the degree of fault is low. As proportionate remedies only can effectuate "fine-tuning" intervention by the legislator would not really help. The respective provision would have to be vague anyway. Therefore, it's for the judiciary to identify principles for "tailored" injunctions. *Martin Stierle* elaborates some guidelines in this volume.³⁶

³² Cf. F. Hofmann (n. 13), pp. 462 ff.

³³ BGH 10.5.2016 – X ZR 114/13 = GRUR 2016, 1031 para. 45 – *Wärmetauscher*.

³⁴ BGH 10.5.2016 – X ZR 114/13 = GRUR 2016, 1031 para. 52 – *Wärmetauscher*.

³⁵ Cf. EuGH 16.7.2015 – C-170/13 = GRUR 2015, 764 – *Huawei*.

³⁶ Cf. *Stierle*, ZGE 2019, 334 (in this issue).

IV. Conclusion

Remedies provide a further tool to strike a fair balance between different interests. Crucially, balancing on the level of remedies must be understood as a mechanism for “fine-tuning”. “Tailored injunctions”, especially, can prevent hardship. On the facts of the individual case, a bespoke solution can be found. However, remedies are not a means of acquiring free access to technologies. Remedies must not be misunderstood as being a “black box” providing for everything third parties wish to acquire. Against this background, the articles in this volume outline the debate on patent injunctions, the law as it stands, law and economics, international views and “tailoring” injunctions, e. g., via “grace periods”.

Zusammenfassung

Am 22.03.2019 wurde auf einer Tagung in Erlangen zum Thema „Enforcing Patents Smoothly: From Automatic Injunctions to Proportionate Remedies“ über Unterlassungsansprüche im Patentrecht diskutiert. Während der Unterlassungsanspruch Verhandlungslösungen ermöglichen soll, kann der Unterlassungsanspruch aber auch nicht beabsichtigte Unwuchten hervorbringen. Namentlich über Aufbrauchsfristen kann dies ausgeglichen werden. Während in dieser Sonderheft die Diskussion um den patentrechtlichen Unterlassungsanspruch dokumentiert werden soll, wird in diesem Einleitungstext die Struktur der Unterlassungshaftung kurz erläutert und aufgezeigt, dass der Interessenausgleich im Patentrecht auch auf der Ebene der Rechtsdurchsetzung verfeinert werden kann.

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