

GERMANY



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the infringement courts will adopt a similar approach in patent proceedings where the assessment of validity is in the hands of the GPTO/Federal Patent Court or EPO.

High barrier set for revocation of injunctions

In Germany, a granted preliminary injunction may be revoked if a change in circumstances occurs after grant. In a recent decision the District Court in Düsseldorf decided on a case where a request for revocation of a preliminary injunction was filed based on the fact that the utility model (the subject of the injunction) had been partially cancelled by the German Patent and Trademark Office (GPTO).

If infringement proceedings are based on a utility model in Germany, the defendant may raise a plea of invalidity, since utility models are not substantially examined but registered upon fulfillment of formal requirements. The infringement court will decide on the validity of the utility model. However this decision on validity is effective for the parties of the proceedings only. In these proceedings, the Appeal Court in Düsseldorf considered the utility model to be valid (and infringed) and consequently granted the injunction.

The defendant filed a cancellation action with the GPTO requesting partial cancellation of the utility model, which was granted. The decision was appealed by the owner of the utility model.

Based on the first instance cancellation, a request for revocation of the preliminary injunction was filed with the District Court in Düsseldorf based on the argument that the cancellation constitutes a change in circumstances, justifying the revocation of the injunction.

The District Court has now decided that since both the decisions of the GPTO and the Appeal Court in Düsseldorf were based on the same references and arguments and since the non-final decision of the GPTO is not binding on the infringement courts, no change in circumstances occurred. Rather, the decisions of the GPTO and the Appeal Court represent different legal views, neither of which has precedence over the other. Therefore, the request for revocation was denied and the injunction stays in force.

It remains to be seen whether or not