

EIP

UPC Court of Appeal Confirms Provisional Injunction for Ortovox

Mammut vs Ortovox

Court of Appeal Luxembourg

Order of 25 September 2024 [1]

UPC_CoA_182/2024, APL_21143/2024

Introduction

In its order dated 09 April 2024, the Düsseldorf Local Division reviewed the ex parte PI in favor of Ortovox Sportartikel GmbH (in the following “Respondent”) on request of Mammut Sports Group GmbH and Mammut Sports Group AG (in the following “Appellant”). We have reported on this decision here [2]. The Appellant appeals against the PI order of 11 December 2024 (in the version of the order after review of 9 April 2024). Furthermore, the Appellant requests that the statement of defence submitted in the main procedure and the separate counterclaim for nullity to be admitted in the appeal procedure. The Respondent requests to dismiss the appeal.

The Respondent owns the EP 3 466 498 B1 relating to a “Search device for avalanche victims and method for operating a search device for avalanche victims”. The Düsseldorf Local Division granted the ex parte PI regarding the attacked embodiment “Barryvox S2”, which was already exhibited as a prototype by the Appellant at a trade fair in Munich.

The Appellant argues that the patent claims 1 and 13 are limited to a modulated sound signal that varies only in volume and whose semantic content is limited to two pieces of information (e.g. right or wrong). The patent-in-suit does not provide any basis for the

distinction between the audio and the voice message. Furthermore, it is not understandable for a person skilled in the art to control the loudspeakers with the audio signal based on the description or the claims. The local division did not sufficiently consider the technical embodiment and the arguments regarding novelty and inventive step. The Appellant argues that combining two embodiments in a single device does not constitute an inventive step. It is undisputed that the attacked embodiment consists of two signal generators that can control the loudspeaker independently of each other.

The Respondent refers to the arguments put forward at first instance and defends the PI order.

Decision

The Court of Appeal ruled that the grant of the PI is justified and rejects the appeal by the Appellant.

The parties' submissions in the main proceedings (statement of defence and separate counterclaim for revocation) are not considered by the Court, because the subject matter of the proceedings in the appeal proceedings is determined in accordance with Rule 222 RoP. The ex parte PI is only reviewed by the Court of Appeal on the basis of the precedents set in the proceedings concerning the order of the interim measure. The statement of grounds of appeal provides a sufficient stage for all facts and evidence on which the appeal is based. Means of attack and defence that were rejected by the Court of First Instance may be considered pursuant to the discretion of the Court of Appeal in accordance with Article 222.2 RoP.

Validity

The Court considers the validity of the patent to be overwhelmingly probable. The person skilled in the art is able to exercise the claims (Article 83 EPC). In response to the Appellant's arguments regarding loudspeakers, it is pointed out that feature 3 does not require the loudspeaker to be activated, but that this is achieved by a control device according to features 2 and 4. The Court therefore denied the novelty-destroying effect. The Court affirms the inventive step under Article 56 EPC. The Court upholds the judgement of the first instance with regard to the novelty of the contested patent in relation to EP 2 527 011.

Infringement

The Court confirms that the attacked embodiment 'Barryvox S2' makes use of the technical teaching of patent claim 1. The term 'audio signal' is not to be limited to acute acoustic signals. The accused device, which already exists as a prototype, is equipped

with voice assistance. This establishes a threatened patent infringement, Article 62 para 1 UPCA.

Urgency

The Court may order an interim measure without hearing the Respondent, in particular if a delay would cause irreparable harm to the applicant. This is because Rule 212.1 RoP states that it is not a necessary condition for the order of an interim measure that irreparable damage is imminent.

Balancing of interests

The Court concludes that the interests of the Respondent outweigh the interests of the Appellant and that the interim measure is intended to prevent the announced market entry of the Appellant's products. Since the patent infringement has been found by the Court, the Appellant has no interest in securing his advance orders and thus depriving the Respondent of the market opportunity. The Court also refused the Appellants request to authorize the patent-infringing act by providing security.

It should be particularly emphasised in this litigation that Ortovox is the first company to successfully enforce a PI application in both UPC instances.

Written by Isabelle Schaller and Annika Kohlstock.

[1] [https://www.unified-patent-](https://www.unified-patent-court.org/sites/default/files/files/api_order/44E2F9FAB6D3AC2A1A2D6BCCB256947D_de.pdf)

[Court.org/sites/default/files/files/api_order/44E2F9FAB6D3AC2A1A2D6BCCB256947D_de.pdf](https://www.unified-patent-court.org/sites/default/files/files/api_order/44E2F9FAB6D3AC2A1A2D6BCCB256947D_de.pdf)

[2] [REVIEW of EX PARTE PI \(eipamar.com\)](#)