Germany

“Bottle Carrier” (Flaschenträger)

Patent Act, Sec. 139(2); Code of Civil Procedure, Sec. 287

Decision of the Federal Supreme Court (Bundesgerichtshof)

24 July 2012 – Case No. X ZR 51/11

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- a) The infringer of a proprietary right is obligated to surrender all profit made as a result of the infringing acts insofar, but only insofar, as such profit is based on the use of the intellectual property under protection.
- b) In a case of patent infringement, the share of the infringer’s profits to be surrendered must be judged by determining whether and to what extent the profits realised were based on the product’s technical features or other decisive factors in the consumers’ decision to buy the product that were a result of the use of the invention. The amount of the infringer’s profits to be surrendered must therefore be estimated by the trial judge under consideration of all facts of the individual case and on sole discretion.
- c) The infringer’s objection that the profit could have been made through non-infringing acts is immaterial when determining the share of recoverable profits. A non-infringing product design, which was not in fact available at the time of infringement, is irrelevant for the evaluation of the market opportunities connected with the use of the proprietary right during this time period and therefore also for the determination of the recoverable portion of the infringer’s profits.

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