

## GERMANY



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whether the offer or supply of the component in question actually confines the patentee in the economic (that is, commercial) use of the invention.

## Patent infringement assessed by commercial value

According to Section 10(1) of the German Patent Act, a patent has the effect that any third party that does not have the consent of the patentee is prevented from offering or supplying a component relating to an *essential* element of the invention. According to the recent *Flügelrad* decision of the German Supreme Court (X ZR 48/03 dated May 4 2004), in assessing what is an essential element of the invention, only components that have a functional interaction with other elements of the patented device can infringe the patent.

Once the components that have a functional interaction with other elements of the patented device are identified, the assessment boils down to the question of whether the component is suitable for a (non-infringing) repair or for an (infringing) new creation of the patented device. For this, in particular, the nature of the patented device and of the component has to be considered (BGH GRUR 1959, 232, 234 - *Förderrinne*).

On the one hand, the fact that the component offered or supplied is a wear-and-tear element, the replacement of which is typically to be considered during the normal lifespan of the patented device, may indicate non-infringement. On the other hand, if for example the replacement of such a wear-and-tear element extends the service cycle of the patented device in accordance with a property of the invention, the offer or supply of such a wear-and-tear element may be critical.

The *Flügelrad* decision introduces what may be considered to be a rule of thumb for the assessment of such an essential feature: when the *technical* or *economic* benefit of the invention is achieved *once more* by replacing the relevant component in the patented device, the offer or supply of that component may be considered to infringe the patent indirectly. This decision expands the assessment of what constitutes an essential element from a purely technical issue to the question of