

Personal Liability of Directors for Patent Infringement

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A recent decision of the Federal Court of Australia has sent a clear warning to directors of companies that are found to infringe patents - they may be personally liable for damages.

While this decision may be more expected where there is wilful infringement (i.e., the director had knowledge of a patent and chose to ignore the patent despite it being likely that the company would infringe), in the present case, personal liability was found without there being any evidence that the director had knowledge of any patents.

A fundamental premise of the patent system is that it is not necessary for an alleged infringer to have knowledge of a patent for there to be infringement. The Court was of the view that there was no reason why this should not extend to directors, at least where the director played an active role in the operation and

running of the company and where there was knowledge of competing products (but not patents). Essentially, the Court decided that the director's actions reflected indifference to the risk of infringement because no efforts were made to establish whether there were any patents covering at least the competing products.

The decision highlights the importance of conducting patent searching before launching a new product so as to better ensure that there is freedom to market that product. While additional costs and efforts during the development and launching of a product are never welcome, the potential risks should not be ignored.