

Kluwer Patent Blog

ECB Cashes in at Dutch CoA: DSS' Patent Revoked

Rik Lambers (Brinkhof) · Wednesday, December 22nd, 2010

Yesterday the Dutch Court of Appeal closed ranks with six out of nine jurisdictions in which the European Central Bank (ECB) started nullity actions against Document Security Systems' (DSS) patent related to anti-forgery measures (EP 455 750). The Dutch Court of Appeal revoked the patent for added matter over the application as originally filed.

The well-known pan-European patent litigation between ECB and DSS started when DSS filed a patent infringement action against the ECB at the European Court of First Instance in 2005. The Court of First Instance declared the action inadmissible as it considered the national courts to have exclusive jurisdiction. See a.o. para. 71 of the Court's Order:

[71] it is clear that jurisdiction to decide whether a national patent has been infringed falls not to the Court of First Instance but to the national courts. Accordingly, the patent infringement proceedings must be dismissed as inadmissible on the ground that the Court of First Instance does not have jurisdiction.

In response to DSS' "centralised" infringement action, the ECB filed nullity actions in nine of the European jurisdictions designated by the patent, a.o. based on invalidity for added matter. The different outcomes of the first national proceedings led to some discussion on the desirability of centralised patent litigation in Europe. In 2008 the Dutch District Court upheld the patent, bringing the score in first instance to 2-2 (UK High Court and France District Court: patent revoked; Dutch and German District Courts: patent upheld).

The Dutch Court of Appeal has now annulled the District Court's decision and revoked the patent for added matter. Five years after the centralised patent infringement action before the Court of First Instance, the patent has now been revoked in seven of the 9 jurisdictions (UK, Germany (the Bundesgerichtshof annulled the first instance decision), Belgium, Italy, France and Austria). The proceedings in Spain and Luxembourg are apparently still pending.

Perhaps more interesting than the specific considerations to revoke the patent for

added matter, is the Court of Appeal's reference to the decisions in other jurisdictions. While the District Court, as it did in this case, refers to foreign decisions quite often, the Court of Appeal seemed somewhat reluctant to do so. However, in this decision the Court of Appeal expressly notes that there is considerable agreement about the applied norm for added matter in the different (foreign) jurisdictions. It specifically refers to the various considerations on added matter in the decisions of the UK High Court and Court of Appeal, the Bundespatentgericht, the French District Court and Court of Appeal, the Belgium District Court and the Austrian Patent Office.

While the Court of Appeal does not, as the District Court did, discuss the foreign decisions in more detail, it is nice to note that it shows consciousness of the European dimension of the case at hand.

The Court of Appeal's decision can be found [here](#).

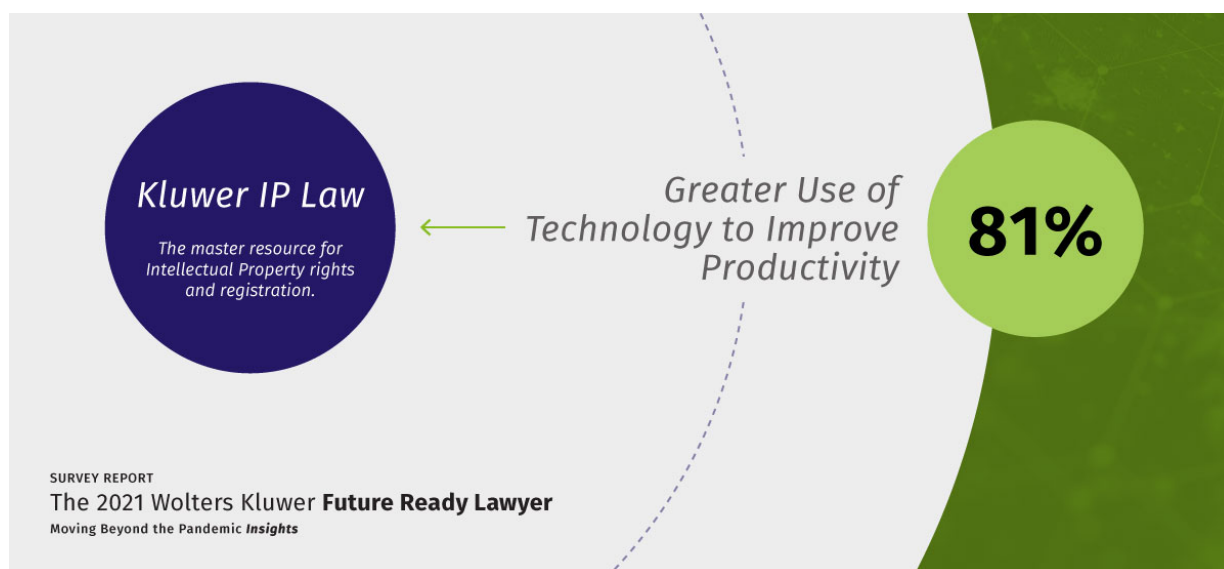
The decision will be reviewed in more detail for Kluwer IP Cases.

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This entry was posted on Wednesday, December 22nd, 2010 at 6:44 pm and is filed under [Art. 123\(2\) of the European Patent Convention \(EPC\)](#), a European patent (application) may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed. Adding subject-matter which is not disclosed would give an applicant an unwarranted advantage and could be damaging to the legal security of third parties. ([G 1/93](#), OJ 1994, 541) *The 'gold standard' of the European Patent Office's Board of Appeal is that "any amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the documents as filed" (G 3/89, OJ 1993,117; G 11/91, OJ 1993, 125).*">Added matter, [Netherlands](#)

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