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Super-evident

Miquel Montañá (Clifford Chance) · Tuesday, October 16th, 2012

In countries where patents and utility models (sometimes called “petty patents”) co-exist, a recurrent question is which is the level of inventiveness required for utility models as opposed to patents. According to article 8 of Spain’s 1986 Patents Act, which mirrors article 56 of the European Patent Convention, an invention protected by a patent is considered to be inventive if it does not result from the state of the art in an evident way for the person skilled in the art. In contrast, according to article 146 of the Patents Act, an invention protected by a utility model is considered to be inventive if it does not result from the state of the art in a “very” evident way. In judging the novelty and inventive activity of utility models, only the prior art divulged in Spain may be taken into account.

As readers will appreciate, drawing the fine line that divides the territory of what is “evident” from the territory of what it is “very evident” is not an easy task. Hence the relevance of the recent judgment of 26 September 2012 from the Court of Appeal of Barcelona (Section 15), which concluded that a utility model may only be revoked due to a lack of inventive activity when at the priority date it would have been “super-evident” to the person skilled in the art. In the case at hand, for the purpose of confirming the validity of the utility model examined, the Court took into account that for forty years nobody in the relevant sector had considered the possibility of applying the solution alleged to be super-evident.
So the teaching from this judgment is that one must go an extra mile to prove that an invention that took forty years to see the light is super-evident…

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