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New Swiss Patent Court confirms special requirements in regard to prayers for relief in Swiss patent proceedings

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In a recent decision the new Swiss Federal Patent Court confirmed that it adheres to the case law with regard of the wording of prayers for relief in Swiss patent proceedings. Unlike in other jurisdictions, plaintiffs in Swiss patent proceedings must be very careful if they just adopt the wording from their patent claims in their prayers for relief. Prayers for relief in Swiss patent proceedings have to orientate themselves to the patent claims but must clearly describe the infringement problem. If the patentee adopts the wording of the patent claims the court is likely to dismiss the case because the infringing object or actions do not seem to be described specifically enough.

The Swiss Claimant Misapor filed a lawsuit against the Swiss company Beton Val Mulin and Mr Danko Basura and claimed that both Defendants infringed the Swiss part of the EP 1 183 218. The patent relates to lightweight concrete, in particular a light weight aggregate for a casting compound that is bound with a binder, comprising foam glass lumps of crushed foam glass.

Claimant's prayers for relief requested the Defendant be enjoined from using "flowable and settable casting compound, in particular lightweight concrete, with a binder, in particular cement, and lightweight aggregate, the light weight aggregate consisting of crushed foam glass, characterised in that the lightweight aggregate exhibits a screen-analysis curve that is graded between 0 and the largest grain size with at least 3 fractions." The wording of the requested injunction corresponded precisely to claim no. 3 of the patent of the lawsuit in progress.

Defendant claimed that the plaintiff's prayers for relief were not sufficiently specific and, hence, the forbidden conduct was not expressly specified. Defendant particularly complained that the precise meaning of "grain size with at least 3 fractions" was neither in the patent claim nor clearly defined in the submission and that the amount of grain sizes was disputed and would depend on the interpretation of the Federal Patent Court.

In response, Claimant modified its prayers for relief in its next brief and added the type designation "Technopor Perimeter 50" to better describe the lightweight

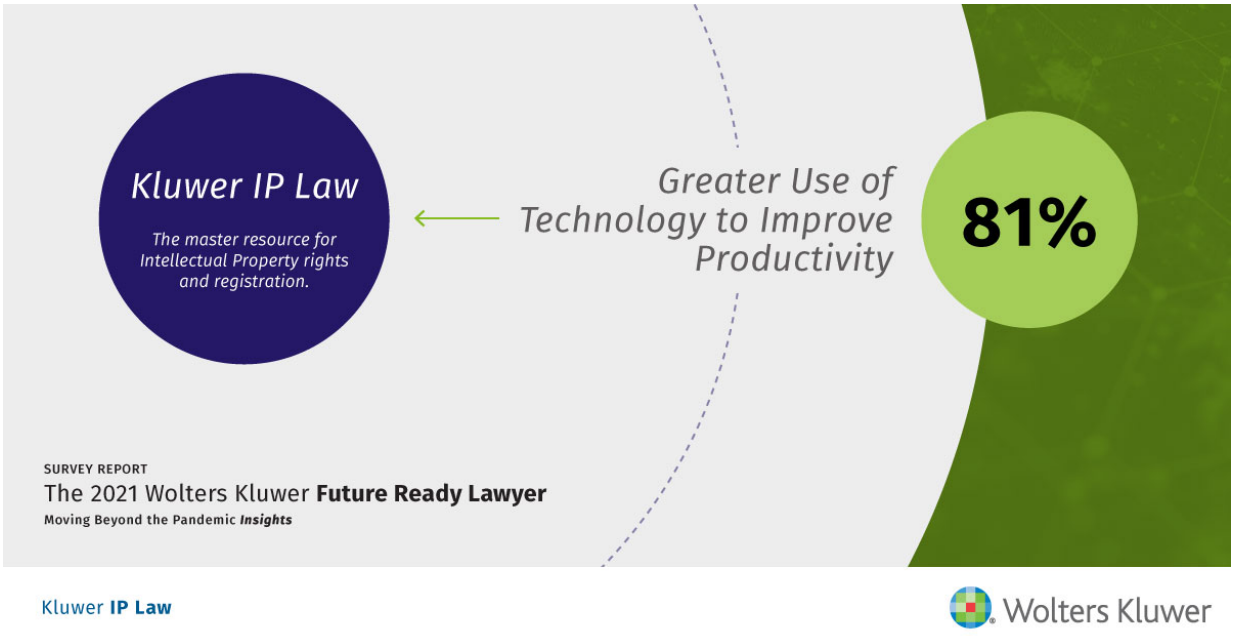
aggregate.

In a settlement hearing the Patent Court presented its provisional assessment of the case. The Court confirmed that it was of the preliminary opinion that Claimant's prayers for relief did not describe the infringing device and actions sufficiently clear.

However, the Claimant adhered to its prayers for relief and decided not to change them but tried to explain in its next brief why the prayers for relief are sufficiently precise.

The Federal Patent Court still held that the wording of the prayers for relief did not sufficiently describe the characteristics of the allegedly infringing product and that it was necessary to define what is meant by the term "grain size with at least 3 fractions" and therefore, the Claimant's submission was not specific enough to warrant the requested relief. Furthermore, the court confirmed that a product name (such as Technopor Perimeter 50) that can be changed at any time may only be used as a supplement to specify the allegedly patent infringing product. As a consequence, the Federal Patent Court dismissed the lawsuit without prejudice and without making a substantive decision in the case. Consequently, the decision does not have a res judicata effect, which probably explains **–** in light of the negative provisional judgment of the competent technical judge (Fachrichtervotum) **–** why Claimant did not reword its prayers for relief with more detail.

This judgment shows that one must be very careful in Switzerland in drafting the wording of the prayers for relief in patent infringement proceedings. Even in cases of literal clear patent infringement it may not be sufficient to just use the wording included in the patent claims.



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