

Kluwer Patent Blog

What happened to/in Summer 2014 in the Netherlands?

Rik Lambers (Brinkhof) · Friday, October 3rd, 2014

Before diving into this year's Oktoberfest with the Munich IP community, colleague contributor Thorsten Bausch [summarized the German Federal Court of Justice's case law of Summer 2014](#). As the days of raising beer mugs and polka dancing come to an end in Munich, so does the Dutch Summer (finally). Time for an overview of what occupied the Dutch Courts these past months.

As in Germany, the doctrine of **equivalence** was considered by the Hague District Court. In the [MBI/Shimano case](#) the District Court applied the Dutch Supreme Court's [Medinol/Abbott](#) findings on equivalence of a few months earlier (on stent litigation which meandered through Europe for years).

In [Medinol/Abbott](#) the Supreme Court first considered that (ex Art. 69 EPC and Art. 1 of the Protocol) the scope of protection is determined by the claims of the patent, interpreted in the context of the description and the drawings, while such interpretation 'in context' is not limited to situations in which the meaning of the claims is unclear (and therefore interpretation in context can result in a limitation of the scope, and *vice versa*).

The Supreme Court then touched upon the reference date to determine patent infringement. The Supreme Court considered that the scope of protection should be determined on the priority/filing date, taking the skilled person's knowledge and perspective at that date into account. Whether a product falls within the determined scope of protection, should (also) be determined by the skilled person's knowledge at the date of infringement, specifically when it comes to the matter of equivalence.

In [MBI/Shimano](#) the District Court further interpreted the Supreme Court's findings:

"[T]he scope of protection of a European patent is established on the basis of the skilled person's perspective on the first [priority/filing] date in view of [...] aforementioned principles (also named the contextual interpretation). Equivalents already known at that moment will be involved in this interpretation. The question to be answered thereafter, whether a product or method should be considered infringing, takes, in principle, place on the basis of the scope of protection on the first date, as established by the contextual interpretation. The possibility of additional

protection by equivalence will be limited, as equivalents known to the skilled person have already been involved in the contextual interpretation on the first date. Such a possibility only seems to exist in case of equivalents which were not foreseeable at the first date, which can then be involved in the infringement question and, if appropriate, brought within the scope of protection.”

In another Summer case (*Bayer/Sandoz*) the District applied an equivalent reasoning. These decisions, and how they relate to recent decision of other European courts, may be part of a future post on this blog.

Between the Supreme Court’s *Medinol/Abbott* judgment and the District Court’s *MBI/Shimano* and *Bayer/Sandoz* decisions, the Hague Court of Appeal added some German flavor to a Dutch recipe: the **cross-border injunction**. In *Apple/Samsung* the CoA, in PI appeal proceedings, considered a claim for a cross-border injunction against several (Dutch) Samsung entities. Earlier, in proceedings on the merits, the Dutch District Court had held the Dutch part of the European patent in suit valid and infringed (and granted an injunction), while the German Federal Patent Court had held the German patent invalid

The CoA first considered that it was competent to provide a cross-border injunction on the basis of i) Art. 2 Brussels I Regulation (as the entities were domiciled in the Netherlands)[1], and / or ii) Art. 31 Brussels I Regulation (in view of the EU Court of Justice’s *Solvay/Honeywell* judgment)[2].

After having established its competence, the CoA rejected the cross-border claim, considering:

“In above mentioned merits proceedings the Hague District Court held the patent to be valid. The Bundespatentgericht, however, has declared the patent invalid in its decision of 26 September 2013. In view of that decision, and its (detailed) reasoning, it has to be assumed for now that there is a reasonable, not to be neglected chance that the concerned patent will also be held invalid by the other foreign courts of the states for which an injunction is requested. In view of this the cross-border injunctions (will not be granted and therefore) will be denied.”

In sum, a German decision can carry a cross-border weight in the Netherlands (even if it differs from a Dutch merits decision).

At the beginning of Summer, the Hague Court of Appeal assessed **inventive step** in the *Sandoz/AstraZeneca (Quetiapine)* case. The CoA judgment is read worthy for the precise and step-by-step application of the problem-and-solution approach (abundantly citing EPO TBA case law). In particular the CoA considered the patentee’s argument that the claimed invention was not obvious, because, in short, he was not motivated to develop a sustained release formulation of quetiapine and because he had no reasonable expectation of success in doing so (there were contraindications).

The CoA considered that:

“[...] posing these motivation questions cannot be reconciled with the CPA [Closest Prior Art] and the formulation of the problem, which should be the starting point according to the Court of Appeal. After all, the problem to be solved by the person skilled in the art is the development of a quetiapine formulation (to be administered orally) that creates a stable and desired plasma level with less frequent administration. In answering this question, it cannot be taken into account whether the person skilled in the art was motivated to develop a quetiapine formulation and whether there was indeed any need for less frequent administration. The fact that motivation can play a role in answering the question whether the person skilled in the art would take a certain direction when searching for a solution to the problem before him differs from the question whether the person skilled in the art was motivated at all to solve the problem before him.”

In the assessment of the question whether the skilled person *would* have solved the problem as claimed, the CoA did consider his reasonable expectation of success. The CoA concluded that the alleged problems asserted by the patentee would not withhold the skilled person from developing (with a reasonable expectation of success) the claimed quetiapine formulation.

Finally, one decision of the Hague District Court further considered the conditions for the **compensation of legal costs**. In short, in the Netherlands the reasonable and proportionate costs of the party winning infringement/invalidity proceedings have to be remunerated by the losing party. Over the past years this principle (grounded in the EU Enforcement Directive) has been slowly fleshed out by the Dutch Courts. In *Anjimoto/GBT* some more details were added: the legal costs related to the “international coordination” of the case, and costs related to the EPO prosecution of the patent in suit, were not remunerated.

Legal costs, and the compensation thereof, being the last thing on a lawyer’s mind, a further discussion of this subject will be put off for now. Until that time, we raise a glass of Dutch beer to the end of Summer and the imminent return of our German colleagues to the post-Oktoberfest soberness: *Proost!*

[1] Art. 2 Brussels I Regulation: “1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”

[2] Art 31 Brussels I Regulation: “Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under

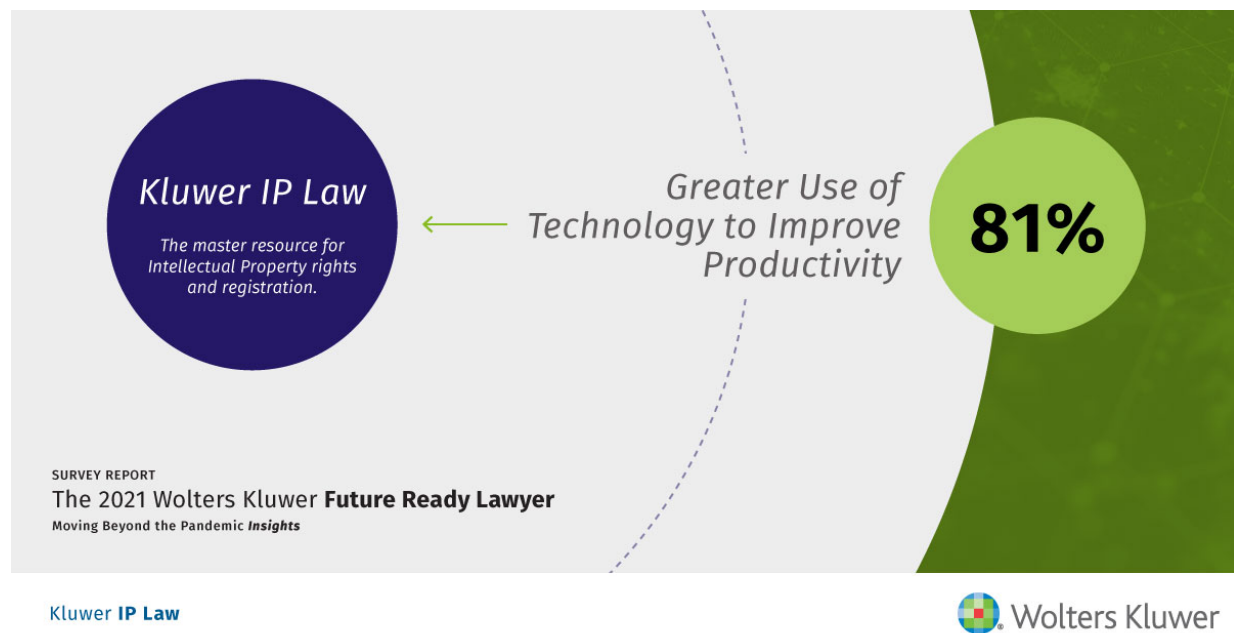
the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.”

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This entry was posted on Friday, October 3rd, 2014 at 12:30 pm and is filed under (Cross-border) jurisdiction, (Indirect) infringement, literally fulfil all features of the claim. The purpose of the doctrine is to prevent an infringer from stealing the benefit of an invention by changing minor or insubstantial details while retaining the same functionality. Internationally, the criteria for determining equivalents vary. For example, German courts apply a three-step test known as Schneidmesser’s questions. In the UK, the equivalence doctrine was most recently discussed in Eli Lilly v Actavis UK in July

2017. In the US, the function-way-result test is used.”>Equivalents, Injunction, Inventive step, Netherlands, Scope of protection

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