The Inventiveness Requirement in Patent Law

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Wolters Kluwer released a new title last week in the Information Law Series: The Inventiveness Requirement in Patent Law by Lodewijk Pessers. Pessers recently received his Ph.D. in this subject. We asked the author to briefly describe the book’s contents.

By Lodewijk Pessers

'The Inventiveness Requirement in Patent Law' tries to answer the question of how the inventiveness requirement has evolved over time, that is, from the very first moment that we can distinguish its contours up to the present day. In doing so, it focuses on three aspects in particular: what are the historical phases that can be discerned in the evolution of the requirement? What are the socio-economic and political forces that have determined or influenced its course? And how can similarities and dissimilarities between the jurisdictions under examination (i.e. the United States, the United Kingdom, Germany and the Netherlands) be explained?

The book is divided into two parts. The first describes the evolution in its first three phases: the medieval, the mercantilist and the pre-modern phase. The tool is dedicated to the modern phase and devotes particular attention to two different 'schools' that developed in the 19th century and which continue to be relevant for the doctrine's direction, even today.

The first, dubbed the qualitative school, is based on the idea that patents should reward the traditional (others would say 'archetypical') inventor. The criterion of inventiveness, in this view, is meant to distinguish between the routine products of workmen and the extraordinary, ingenious output of true inventors. In this tradition concepts such as 'genius', 'ingenuity', 'obviousness in the eyes of the mechanic' and 'creativity' often appear. The patent system's main beneficiary is seen as an individual who, gifted with his exceptional qualities, importantly contributes to the advance of technology. The patent system is seen as an incentive system, in the sense that it fosters innovation. In contrast, the quantitative school is leery of such lofty images. Instead, it prefers to represent innovation as an incremental process that typically takes place in a corporate or industrial context. In this view, the standard of inventiveness is lowered to mere step, a technical contribution beyond the prior art. As a result, this school is more generous in the recognition of invention. It does have one advantage over the qualitative school: it is more objective and predictable in its application.

As increasing numbers of patents are being issued worldwide, the concept of inventiveness (translated into criteria as 'non-obviousness' and 'inventive step') has received more and more attention. In current debates, the question is often raised whether the requirement of inventiveness is too high and whether it is preventing real innovation. The book tries to provide a broad and historical perspective that might be helpful in times of intensified self-examination: are we moving in the right direction or are modern patentability thresholds (dangerously) low? 'The Inventiveness Requirement in Patent Law' tries to lay the groundwork for further and more in-depth discussions about the current standards of inventiveness.