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Obstruction Ahead! The IPEC decision in *Adolf Nissen Elektrobau v Horizont Group*

Brian Cordery (Bristows) · Friday, January 17th, 2020

by Sarah McFarlane

As an early Christmas gift, on 18 December 2019, His Honour Judge Hacon handed down a judgment in the matter of *Adolf Nissen Elektrobau v Horizont Group*. This case concerned the field of electric road traffic signs. Horizont's UK patent (the 'Patent') claimed a board to be mounted on to vehicles which had an arrangement of lights which included flashing directional arrows and a warning cross which was shown in a different colour in a constant light. The benefits of the invention was said to be causing "increased levels of attention" to road users due to the "unusual – and thus unexpected – form and colour". Oddly the Patent specification described mobile electric road traffic devices that were known in the art as those that include directional arrows and warning crosses both of which flash and are in a yellow colour. This, however, was not in line with UK road traffic regulations which require that the crosses are constant (not flashing) and are red. It was noted in the decision that yellow flashing arrows and crosses are consistent with German road traffic regulations.

Adolf Nissen ('Nissen') sought to revoke Horizont's Patent for lack of inventive step over three pieces of prior art: DE007 (a German Utility Model), a US Patent ('Pederson') and the prior use of one of Nissen's traffic boards. The court held that Horizont's Patent was invalid as it lacked inventive step over DE007 and one of Nissen's traffic boards. DE007 described a panel with flashing lights which could be "interconnected to represent a leftward or rightward arrow or a diagonal cross". Horizont argued, among other things, that DE007 differed from the Patent as it did not display a constant (i.e. not flashing) red cross. It was held that it would be obvious to adapt DE007 to show a constant red cross as well as flashing yellow arrows as these were conventional road traffic signals in the UK. The skilled person would have known how to achieve this as part of his common general knowledge ('CGK') using LEDs of two colours in the spotlights. Further it was held that the any reservations the skilled person might have concerning safety or regulatory approval were not relevant to the assessment of obviousness. Turning to the other successful piece of prior art: Nissen's traffic board. This was supplied with a purely yellow LED display which contained a full library of possible signs, including a cross or flashing yellow arrows. As this yellow LED display was not in line with UK regulations, it was argued that the skilled person would not find this purely yellow LED display useful and therefore it would be obvious to incorporate red LEDs to allow the optional display of a red cross, so as to comply with UK regulations. This would make the device familiar to UK road users.

This decision highlights two important points which may be applicable to other cases concerning

technology in highly regulated sectors. Firstly it usefully reminds us of the territorial scope of CGK: it alerts us to the fact that in highly regulated fields, like road signs, significant variations in regulations can exist between countries. Under English patent law the skilled person is armed with UK CGK, in this case being knowledge of the UK regulations concerning traffic signs, which as we have seen above, will have an impact on their assessment of obviousness. Secondly it reminds us of the case law concerning inventive step and overcoming obstacles in patent law. The decision directs us to Lewison J's comment in *Ivax Pharmaceuticals v Akzo Nobel NV* [2006] which states that "obstacles to regulatory approval....are not relevant obstacles to an obviousness attack". It is important to consider the nature of the obstacle to determine whether it is relevant in an obviousness attack.

It is not yet known if the patentee will appeal.

The full judgement can be read [here](#)

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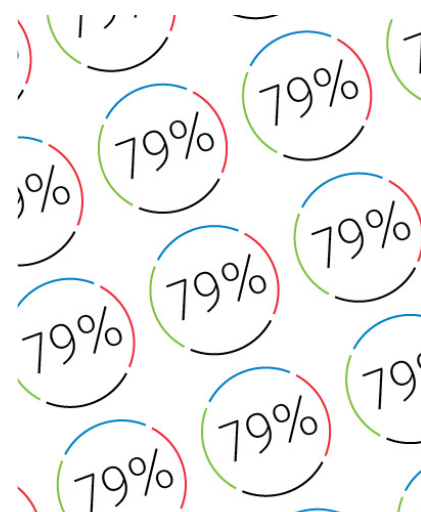
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