

Kluwer Patent Blog

Patent Law and Philosophy

Thomas Musmann (Rospatt Osten Pross) · Tuesday, May 11th, 2010

I have to start this with a simple introduction into container technology:

This is an intermediate bulk container (IBC):



In principle such an IBC consists of three elements, the base, the outer steel cage and the inner bottle. The decisive issue in various patent infringement cases was whether the replacement of the bottle amounts to the manufacture of a new IBC or whether it is just a repair of the old IBC.

The Honourable Mr. Justice Floyd felt reminded of an old Greek legend (as reported by Plutarch):

The ship wherein Theseus and the youth of Athens returned [from Crete] ... was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for the logical question of things that grow; one side holding that the ship remained the same, and the other contending that it was not the same.

In the IBC business the question is one that is not only of philosophic interest but may be decisive as to whether the repair of an IBC covered by a patent by replacing the bottle (which bottle doesn't stem from the patentee) constitutes an infringement of the patent or not. Hence, the High Court of Justice in England as well as the Landgericht Hamburg in Germany had to overcome the philosophical paradox and make a decision.

The, so far, unanimous decision: The IBC remains the IBC even if the bottle is replaced.

Why so? Now, that's not easy to answer. Basically, the main reason given by the Courts was the nature of the patented teaching. While the bottle was also featured in the claim, the teaching of the concerned patent was an improvement of the cage construction.

Accordingly, the Landgericht Hamburg argued based on the BGH-decision Pipette System that the replacement of the bottle didn't amount to manufacture of a new IBC because the essential elements of the invention weren't embodied in the bottle (Judgement dated 31/08/2007 LG Hamburg 315 O 543/07, not published).

Justice Floyd, on the other hand, dismissed the approach of the BGH and found instead that the replacement of the bottle didn't amount to manufacture of a new IBC because the inventive concept of the patent was wholly embodied in the cage (Judgment dated 31/03/2010 in re. Schütz v. Werit in the High Court of Justice [2010] EWHC 660 (pat)).

Fortunately, the patent issue as such is resolved unanimously and the exploration of the ultimate difference of the two approaches can be left to the philosophers.

Max Rospatt

Also see Brian Cordery's post on this blog on the UK High Court's Schütz v. Werit judgment: [Bottling the After-Market](#)

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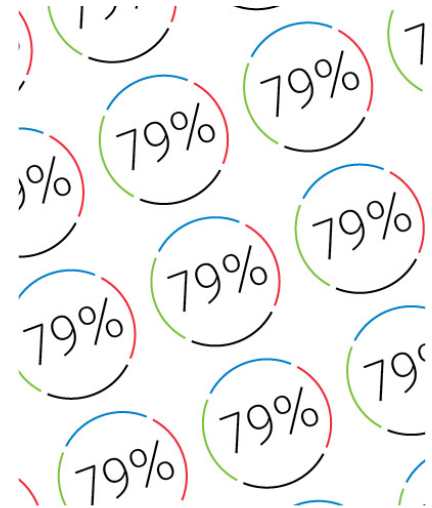
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