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# Kluwer Patent Blog

## Cephalon v Orchid – no infringement on purposive construction

Brian Cordery (Bristows) · Tuesday, July 12th, 2011

In the recent case of *Cephalon v Orchid* [2011] EWHC 1591, the UK Court held that three patents relating to the drug modafinil, used to treat sleep disorders such as narcolepsy, were not infringed and were invalid for obviousness. Previously in this case the court had refused to grant an interim injunction despite the failure of the generic entrants to “clear the way”, ordering instead an expedited trial (as reported on this blog back in November last year).

Of main interest in this case was the English Court’s ruling on construction. The principal issue which divided the parties was whether the claims of the patents were referring to particle size in manufactured tablets (Cephalon’s contention) or whether they were referring to particle size in the bulk active ingredient used to make the tablets (Mylan’s contention).

The approach of the English Court to claim construction is well settled. The court adopts a purposive construction and determines, as set out in *Kirin-Amgen v TKT* [2005] RPC 9, ‘what the person skilled in the art would have understood the patentee to be using the language of the claim to mean’. Accordingly, the Court was of the opinion that while the language of the claims construed literally and acontextually referred to the particle size in the manufactured tablets, thus covering the generic product, the skilled person would not be drawn to such a literal construction. Instead, the skilled person would understand the claims to refer to the particle size in the active ingredient used to make the tablets, such that the generic product did not infringe. This construction was based on the general teaching of the patents as well as the common general knowledge of the skilled person, a drug formulation scientist, who would not have known how to measure particle size in the manufactured tablets.

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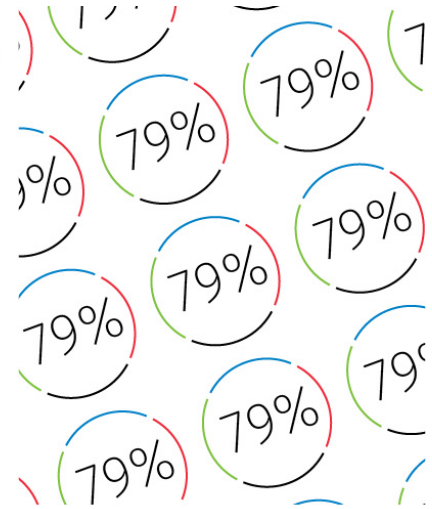
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