Kluwer Patent Blog

From "in foro interno, in foro externo" to "non foro interno, in foro externo": Is the CJEU constructing the patent house from the roof down?

Miquel Montañá (Clifford Chance) · Thursday, May 29th, 2014

Those who embraced a deceptive feeling of easiness when they saw Articles 6 – 8 vanish from the text of Regulation (EU) Nº 1257/2012 of the European Parliament and the Council of 17 December 2012 will feel uneasy upon revisiting the judgment of 18 July 2013 (Case C-414/11 "Daiichi") from the Court of Justice of the European Union ("CJEU"). If you thought that the Monster was over and done with (rather ironically, the first patent in history was granted to a monster, i.e., *Il Badalone*), please read this judgment carefully and you will see the first gremlins popping up. The stubborn stance taken by the European Union ("EU") Commission in that case, aimed at stealing the Member States' competence to apply and interpret TRIPS' provisions on patents, has led to a paradoxical result, which is that the Commission's insistence may have reintroduced substantive patent law on the desk of the CJEU through the back (*rectius*, TRIPS') door. As readers will remember, the yet-to-come Unified Patent Court ("UPC") is expected to apply international treaties, among other relevant sources of law. This means that if in future cases the CJEU were to dig further into the hole that it started digging in the Daiichi judgment, the monster, like those odd little animals in *Gremlins*, will pop up from the hole. The difference is that this time the monsters will be real indeed.

This paradoxical result would be the latest extravaganza of the CJEU's intellectual property's monster productions. Those who thought that Medeva was fun should buy some popcorn, a soft drink and go see Daiichi, which, coupled with the removal of Articles 6 – 8 from Regulation (EU) Nº 1257/2012, lends itself to becoming a formidable case study on how to build the patent house from the roof down. This runs against the logic that had inspired the CJEU from its origins, which was of course to assume an "external" competence ("*in foro externo*") in situations where the EU had "internal" competence ("*in foro interno*") to achieve an EU objective. The so-called principle "*in foro interno, in foro externo*", which is deeply enshrined in the bounds of the EU's architecture, was already applied as early as in Opinion 1/1976, of 26 April 1977.

What the CJEU has done in the Daiichi judgment has shaken up this architectural model. This is because, as mentioned, the CJEU has given the EU, at the Commission's insistence, the gift of the "*in foro externo*" competence to interpret "external" patent law (i.e. TRIPS) , while at the same time the EU political institutions – also at the Commission's insistence – gave away the "*in foro interno*" competence to approve "internal" patent law. This awesome upshot placed the CJEU, in Daiichi, in the odd situation of having to interpret TRIPS' provisions on patents on issues that

required the previous interpretation of provisions of the European Patent Convention (such as the effect of Reservations under the old Article 167) which the CJEU lacks competence to interpret.

All in all, the hole that the CJEU started to dig in Daiichi, should it get any deeper in future cases, may well reintroduce substantive patent law on the desk of the CJEU through the Commission's right hand, the same substantive patent law than the Commission sought to remove from the CJUE's desk through the left hand, together with the other political EU institutions.

To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please subscribe here.

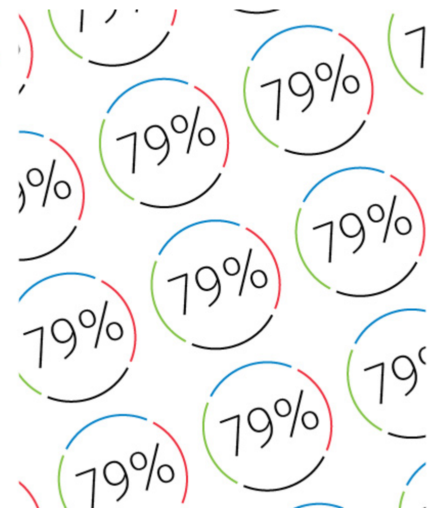
Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.
The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Thursday, May 29th, 2014 at 8:56 am and is filed under European Union
You can follow any responses to this entry through the Comments (RSS) feed. Both comments and pings are currently closed.