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Mollusc patent litigation: going back in time

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For those who thought that patent litigation was only relevant for big pharma or cutting-edge telecom devices, it may be of interest to learn about a relatively recent judgment from the Court of Appeal of A Coruña that has resolved a fierce dispute around patents protecting mollusc cleaning machines. A Coruña is one of the main cities on the coast of Galicia, one of the gastronomic paradises of European seafood lovers. So it is not surprising that the dispute revolved around four machines that the defendant had acquired for the purpose of cleaning molluscs.

In its judgment of 11 September 2014, the Court of Appeal of A Coruña dismissed the appeal filed by the owner of two patents that protected the mollusc cleaning machines allegedly used by the defendant. The Court of Appeal explained that the judgment of first instance had dismissed the complaint because the expert opinion produced by the Court-appointed expert "*was very conclusive in demonstrating that* [the machines] *were protected by a patent different to that of the complainant and the thesis of the latter was rendered devoid of evidence*."

Leaving aside other aspects of the case, it is surprising that for the purpose of examining infringement, the Court-appointed expert did not compare the allegedly infringing machines and the patents asserted by the complainant, but the machines at hand and a later patent. It is very surprising, indeed, because this approach of course ignores the possibility that the latter patent could be a dependant patent of a former patent (article 54 of the Spanish Patents Act). It also ignores that according to article 55 of the Spanish Patents Act "*the owner of a patent may not invoke it to defend him/herself against actions brought against him or her for infringing other patents which have an earlier priority date.*" This provision was introduced in 1986 to eradicate a provision of the old law whereby obtaining a "paper" patent granted immunity against infringement actions filed by third parties.

This is why it is even more surprising that in its judgment of 11 September 2014, the Court of Appeal of A Coruña sought to rely on the following legal grounds to justify the dismissal of the appeal:

"*The two mollusc cleaning machines acquired in 2003 are protected by the patent for an invention, held by another person, registered under no. 9702574 (ES 2.142.739 B1). In principle, this patent and the claimant's one are considered different and compatible by the competent specialist body, the Spanish Patent and Trademark Office, which also examined (Report on the State of the Art – February 2000), even in relation to Mr Nemesio's patent, the novelty and inventive step of the claims of Mr Aureliano's patent, with a favourable decision, granting the patent.*

In addition to the report by court expert Mr Luis María in these proceedings, stating that the machines in the defendant's facilities match the technical description of Mr Aureliano's patent and that there is no copying or imitation of the complainant's patent, we also have the contrary stance defended by the appellant with the reports issued in other proceedings by experts Messrs Cornelio (p. 200 et seq) and Erasmo (p. 217 et seq) in this regard."

As readers will have noted, the Court of Appeal again failed to grasp the irrelevance derived from the fact that said machines might be protected by a later patent.

The teaching from this judgment is that although the case law of the Courts of Appeal of Barcelona and Madrid, due to their specialization, is comparable to the case law of any other European jurisdiction, in some Spanish regions there is still a long way to go before the standards required by modern patent law are reached. Reading the judgment reported in this blog one has the impression of being taken back in time.

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