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# Kluwer Patent Blog

## It's Not Always About What You Do But How You Do It

Jan Lindberg (Attorneys-at-Law TRUST) · Monday, February 23rd, 2015

By Jan Lindberg and Kiira Lehtonen

The recent judgement of the Finnish Market Court (MAO:18/15) given on January 16<sup>th</sup> provides further guidelines as to what is expect from a method to be patentable especially in relation to existing techniques, while also serving as a good reminder that arguments non-related to the actual subject-matter do not save you, especially if you end up relying mainly on them.

The case involved a patent regarding an invention titled "a method for manufacturing a health product given as drops" of the Finnish medicine company Oriola Oy ("Oriola"). The invention was an oil-based liquid product given as drops, which included both vitamin D and lactic acid bacteria. Oriola was originally granted the patent, but the Finnish patent and registration authority later annulled it on the basis of a claim by Oriola's competitor Orion Oyj ("Orion"), which Oriola appealed to the Market Court. The case involved also certain other aspects, which are not discussed here.

The Finnish patent and registration authority had based the annulment on the existence of similar inventions, such as an oil-based medicine given as drops containing lactic acid bacteria and a consistence including *inter alia* vitamins both in liquid and in solid form. Oriola however rejected these by stating that while it is true that oil-based medicine had been on the market for quite some while and that lactic acid bacteria and vitamins had been available both as drops and in a solid form, their invention was the first to combine these into a homogenous liquid, which had not occurred during the 24 years the two had been simultaneously on the market. Therefore, Oriola concluded that the invention fulfilled the requirements of novelty and inventive step imposed on the grant of a patent.

Orion was naturally of a different view pointing out that while Oriola had brought up some facts to support the novelty and inventiveness of the product, it had completely failed to argue the same for the method used in the manufacture of the product, which was, in fact, the subject of the patent. Orion further pointed out that such methods did exist already prior to Oriola's invention and it would have been possible to produce the same exact product combining existing methods, which solution would have been obvious to a skilled person. It also pointed out that the homogeneity had not even been mentioned in the patent application documentation. Thus, Orion concluded that the invention was eventually more of a commercial idea than a patentable invention. The patent and registration authority, while acknowledging e.g. the fact that there had been a long period of time during which a similar invention would have been possible to make but had not entered the market, largely agreed to these claims.

The Market Court, after evaluating existing techniques, recognized the novelty of the invention, but then examined whether it essentially differed from solutions provided by existing technique. It pointed out that on the one hand a technique related to an oil-based product given as drops, consisting of edible oil and vitamin D, and on the other hand a technique related to an oil-based product given as drops, consisting of edible oil and lactic acid bacteria, were currently on the market. In addition, there were products containing both vitamin D and lactic acid bacteria. The Market Court then added that the features of the invention actually related to the methods used in the manufacture of Oriola's product were in fact rather ordinary and obvious to skilled persons. It further pointed out, as claimed by Orion, that Oriola had to a large extent failed to argue the inventive step in these features. Therefore, the Market Court finally decided to reject the appeal and Oriola ended up losing the patent.

In our view, this decision serves as a good reminder of the fact that one should always focus on the correct substance and aspects when arguing patent cases, i.e. if you decide to apply for a method patent, be sure your method is in the focus. As this case demonstrates, it is actually quite easy to get confused in these and finally ending up paying a lot of money just to realize you got it all wrong in the first place.

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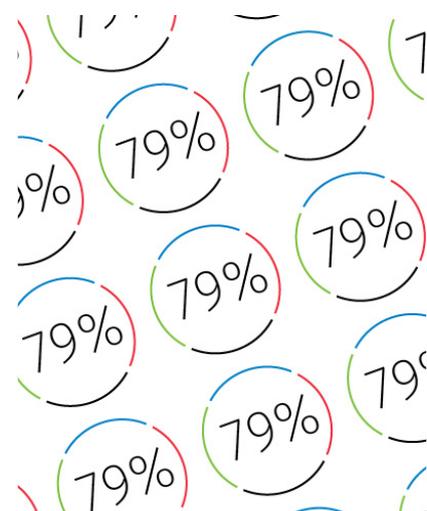
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