

Kluwer Patent Blog

Another milking robot decision...DeLaval not liable for infringement of milking robot patent

Anders Valentin (Bugge Valentin) · Friday, June 12th, 2015

On 28 May 2015 the Eastern High Court of Denmark rendered judgment in a case between the two largest manufacturers of automatic milking systems, in which Lely had claimed damages from DeLaval International AB (Sweden) and its Danish subsidiary, DeLaval A/S for infringement in Denmark of the Danish part of a European patent.

DeLaval, on the other hand, had submitted a claim for revocation of the patent-in-suit, which concerned the incorporation of an after-treating device (for spraying a cow's teats) into a milking robot arm, which also carried out other functions in the milking process.

The case before the High Court had been pending since 2002, which was the reason why it fell under the jurisdiction of the High Court, and not the Maritime and Commercial Court, which would have been the proper venue under the current Danish procedural system. This also meant that the case was heard by a panel consisting of legal judges only.

The Court ruled on three different legal questions: (i) Whether the Danish courts had jurisdiction over the Swedish parent company of the Danish sales entity, (ii) whether the patent-in-suit was valid as issued and (iii) whether it had been infringed by DeLaval's marketing and sale of their VMS™ milking robots from 2000 until the patent expired in 2012.

On the issue of jurisdiction over the claim against the Swedish parent company, the High Court cited article 5(3) of the Brussels Convention which applied when the suit was filed in 2002 and confirmed that ECJ decisions interpreting the subsequent (but almost identical) provision in article 5(3) of the Brussels I Regulation can also be relied on for the purpose of understanding the "old" provision. The High Court then made reference to ECJ cases C-387/12, C-170/12 and C-441/13 and cited the ECJ as teaching that "a case concerning the alleged infringement of intellectual and industrial property rights, where the protection conferred by an act of registration is limited to the territory of one member state, should be filed with the courts of said state."

The High Court then noted that in this case, the alleged infringing product had been marketed through at least one website in the Danish language, where the top level domain belonged to the Swedish company, which furthermore linked on its website to Danish sales representatives for the VMS system. Thus, the court confirmed its jurisdiction over the Swedish parent company for a claim of patent infringement in Denmark – even if the Swedish parent had not carried out direct marketing in Denmark.

The claim filed by DeLaval for revocation of the patent-in-suit was turned down. DeLaval had argued that the independent claims of the patent lacked both novelty and inventive step over the document that both parties (and the EPO) had agreed constituted the closest prior art. The Court, however, disagreed, and in doing so relied on statements from both the EPO TBoA and from the independent court-appointed experts' report in the case.

More interestingly, perhaps, the case comprised a discussion as to the applicability of article 53(c) to one of the independent claims of the patent-in-suit, namely a method claim comprising “a method for after-treating the teats of a milked animal in an implement for the automatic milking of animals, which implement [...] and wherein [...] automatically an after-treating liquid is sprayed from said arm [...]”

DeLaval argued that as this treatment had the prophylactic aim of avoiding the infection of (healthy) milked animals with mastitis, then it was excluded from patenting by way of article 53(c) and the claim was therefore invalid. This argument was not followed by the High Court, however, and the High Court ruled against applying article 53(c) to the claim in question, reasoning as follows:

“Claim 11 concerns the functioning of an implement for automatic after-treatment after milking, wherein all of the animals are subjected to one and the same standardized after-treatment. As said in the patent description this treatment is performed in order to enhance the hygiene and health of the animal. The steps set out in the claim describe the way in which the implement works in conjunction with other parts of the patented apparatus, and which provide the improved compactness that also warrants the grant of a patent. Those steps, however, do not have any direct function in relation to obtaining the therapeutic effect on the animals.

Under these circumstances, method claim 11 is not deemed to concern a method for therapeutic treatment, which is comprised by the prohibition of patenting.”

Finally, the High Court found that there was no infringement of the patent-in-suit, either literally or by equivalent means.

There were two features from the introductory part of claim 1, which the Court did not consider were present in the VMS™ system. The parties agreed that this introductory part of the claim was in fact a description of the closest prior art – a previous patent for a different type of automatic milking robot that did not have an after-treating device. Lely had argued that for the purpose of the invention – the provision of a milking robot arm, which integrated an after-treating device in the arm in a particularly compact way – these two features were not essential; there was in other words, no true combination between the features in the introductory part of the claim and those in the characterizing part of the claim.

Therefore – relying on the oral testimony of the court-appointed expert and making reference also to parallel decisions in other European jurisdictions and to a specific embodiment shown in a figure of the patent-in-suit – the Court found that the differences between what was claimed in the patent and the allegedly infringing VMS™ system were not only minor deviations on inessential points but rather constituted a decisive difference in construction, where what was deemed significant in the claimed invention was not present in the VMS system.

Therefore, there was no infringement under the doctrine of equivalence.

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

Kluwer IP Law

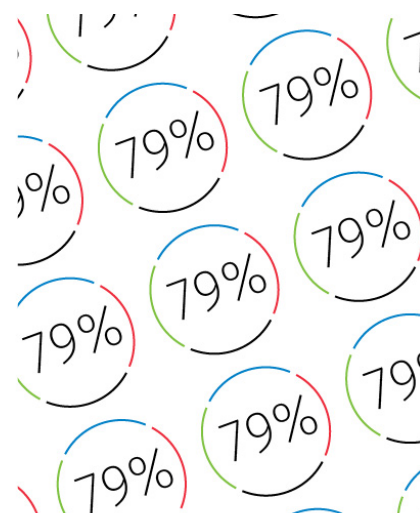
The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred 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 Friday, June 12th, 2015 at 9:03 am and is filed under [\(Indirect\) infringement, Denmark](#)

You can follow any responses to this entry through the [Comments \(RSS\) feed](#). Both comments and pings are currently closed.