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Pemetrexed – NL – Court of Appeal Inverts District Court

Rik Lambers (Brinkhof) · Wednesday, December 16th, 2020

Yesterday, the Dutch prime minister announced the Netherlands will be 'locked down' until mid-January. At the same time the author of this blog, part of a six member audience due to COVID restrictions, paid his last visit to the movies for many weeks to come. On the screen *Tenet*, a mishmash of Sci-Fi wannabe and James Bond. Its core ingredient: inversion. In between yawns, this concept reminded the author of the Dutch Court of Appeal's inversion of the District Court's decision in the pemetrexed case.

No, not really. The movie didn't drop to the level that the mind wandered off to patent litigation. That would have been equivalent to a one star review (actually, *literally*, it's three out of five). But, in retrospect and applying Tenet's unintelligible philosophy, the Court of Appeal ('CoA') inverted the District Court's almost – from a European-wide perspective – one-off pemetrexed decision.

No spoilers ahead, as it will be known by now that the CoA – end October – held that Fresenius with its pemetrexed *diacid* product infringed Eli Lilly's patent claiming pemetrexed *disodium*. Not literally, but by equivalence. In doing so, the CoA seemed to have walked a middle ground between the UK and continental (equivalence) doctrines, possibly with a bit more footing on the latter.

So, as much has been spoiled already, let's keep it to the observation that the CoA tried to – and, to add, quite clearly – set out the Dutch position on equivalence. Not to waste this space on a summary of main points of the CoA's equivalence approach, let's just refer to – detached from the facts of the case, and delving into the meat of the matter – paragraphs 4.1 – 4.11 of attached English translation of the CoA's judgment (machine style, as a disclaimer to errors to be encountered; the original Dutch version can be found here).

What will be interesting to see is how – over the years to come – the Dutch courts will apply the CoA's teaching. As always – and that's the beauty of patent litigation – there will be rhythm, but will it move to the UK, the 'continent', or remain in some Dutch equivalence equilibrium? Or – in simple terms – will it be inverted, again?

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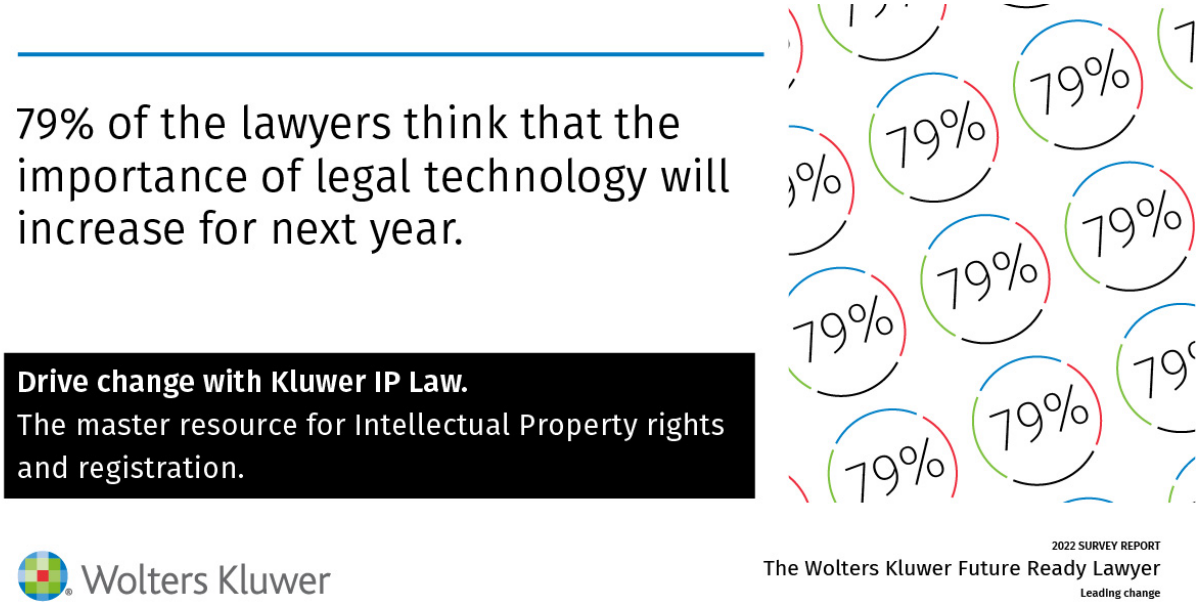

This entry was posted on Wednesday, December 16th, 2020 at 12:37 am and is filed under literally fulfil all features of the claim. The purpose of the doctrine is to prevent an infringer from stealing the benefit of an invention by changing minor or insubstantial details while retaining the same functionality. Internationally, the criteria for determining equivalents vary. For example, German courts apply a three-step test known as Schneidmesser's questions. In the UK, the equivalence doctrine was most recently discussed in Eli Lilly v Actavis UK in July 2017. In the US, the function-way-result test is used.">Equivalents, Infringement, Litigation, Netherlands, Patents
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