

D YOUNG & CO PATENT NEWSLETTER *no.28*

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Events



18 April 2012

Biotech European Case Law Webinar

Robert Dempster and Simon O'Brien will present this 45 minute round up of recent EPO biotech case law. To register visit: www.dyoung.com/event-webapr12

18-21 June 2012

BIO International Convention

Louise Holliday, Simon O'Brien and Robert Dempster are attending BIO. Simon will be speaking on IP Issues Affecting Biomarker Diagnostics and Personalized Medicine.

For more information: www.dyoung.com/events

Editorial



As we reach the end of the first quarter of 2012 and enjoy the first three days of consecutive sunshine in London, we can already focus on further interesting developments in the world of patents.

Completing our review of the ongoing patent litigation in the field of mobile technology, we take a look at how different IP rights have been used in this litigation. We also continue our reporting of developments regarding SPCs, a field where almost every quarter the CJEU is attempting to clarify an additional aspect of what some of us remember was established as being a straightforward mechanism for patent term extension of pharmaceutical patents. In other areas we look at the EPO approach to plant varieties in the context of the recent 'melon' decision and turn again to the CJEU for its interpretation of a prior right in the context of registered designs.

We enjoyed meeting many of our clients at our recent seminar on antibody patents held in London. Related to this, there is just enough space left to draw your attention to the next of our increasingly popular European biotech webinars which will take place on 18 April. To register visit www.dyoung.com/event-webapr12

Editor:

Neil Nachshen



Article 01

Patenting Plant Innovations at the EPO

The Saga Continues

In Europe, 'plant or animal varieties or essentially biological processes for the production of plants or animals' are excluded from patentability. The Enlarged Board of Appeal decision G1/98 attempted to clarify the distinction between a 'plant' and a 'plant variety'. Plants which are not plant varieties have to date been patentable before the EPO. However, if the claims related to a plant variety *per se* then these would be considered excluded from patentability. Therefore claims to plants *per se* in Europe which may cover plant varieties but where the plant varieties are not specifically claimed are patentable in Europe.

Recent Enlarged Board of Appeal decisions (G2/07 and G1/08)¹ have concluded that a non-microbiological process for the production of plants which contains the steps of sexually crossing the whole genomes of plants and of subsequently selecting plants is in principle excluded from patentability as being 'essentially biological'.

In order for a process of plant production to be patentable an additional step of a technical nature is necessary, which step 'by itself introduces a trait into the genome or modifies a trait in the genome of the plant produced' so that the introduction or modification of that trait is not the result of mixing of the genes of the plant chosen for sexual crossing.

Claims in Europe for inventions directed to methods of producing plants should therefore ideally be formulated to exclude any sexual crossing and selection steps. For example a method claim may be formulated as a method of identifying a plant with elevated levels of a compound of interest which method comprises steps of a technical nature only.

Whether plants obtained solely by an excluded method will be patentable in Europe is still under review. Technical Boards of Appeal (such as in T-1854/07)² had previously confirmed that such 'product-by-process' claims remain a product claim (i.e. a claim to the plant *per se*) irrespective of the process it refers to and therefore the claim to the plant

was not excluded from patentability even if the method by which it was produced was. However, very recently the Technical Board of Appeal in T-1242/06 (the Board that originally referred questions in G1/08 to the Enlarged Board of Appeal) has attempted to refer further questions to the Enlarged Board of Appeal to seek clarification on whether plant claims are patentable when they are solely produced by an excluded method. The questions that have been referred at the time of writing have not been finalised and the Enlarged Board of Appeal has not yet formally accepted the referral. However, any decision from such a referral may change the landscape for plant patenting in Europe. The reaction of one of the opponents in T-83/05 (which resulted in the parallel Enlarged Board of Appeal decision G2/07) has been to ask for proceedings in that case to be stayed until the outcome of T-1242/06 is clearer.

The questions tentatively proposed by the opponent in T-1242/06:

1. "Is a claim which is not directed to an essentially biological process as defined in Art. 53(b) EPC and G1/08 patentable if such claim would render inoperative the exclusion from patentability as defined in G1/08?"
2. Is a claim patentable if such claim is directed to a plant, fruit, seed or any other part of an essentially biological process as defined in G1/08 if such a claim would render inoperative the exclusion from patentability as defined in G1/08?"
3. If such claim is patentable which other requirements are there to be met?"
4. If such claim is unpatentable which other requirements need to be met to escape the exclusion from patentability as defined in G1/08?"

For the avoidance of doubt, plants produced by recombinant gene technology are not part of this review and assuming they are novel, inventive, industrially applicable and enabled

> Notes

1. The so-called 'broccoli case', as reported in our February 2011 newsletter: dycip.com/pnl0211
2. The so-called 'sunflower case'

> Missed anything?

In between issues of this newsletter we posted news about four questions referred to the EBA regarding the correction of an appellant's name: dycip.com/T44508. Visit our website for up to the minute IP related articles and news

> Knowledge Bank

Scan the QR code below using your internet enabled smart phone to access our knowledge bank



A recent opposition related to closterovirus-resistant melon plants.



(*Raphanus sativa*) obtained by an essentially biological process. This was the first time that a Dutch Court had examined such a case. According to the Dutch Court in summary proceedings, allowing the protection of a plant obtained solely by a non-patentable, essentially biological method, is contradictory to the EPC and would render the regulations of the EPC in this particular field void. Taste of Nature's plant claims were therefore dismissed.

This sort of decision is certainly not binding on the Enlarged Board of Appeal, but again may be seen as pressure from contracting states of the EPC to consider this matter further.

Considering that the EPO's own data show that this would affect only a small minority of patents in the field of plant patenting (eg, the non-GM plant patents) – this may not overall affect business' commitment to Europe. It is important for companies embarking on plant patenting in Europe to seek professional advice from experienced patent attorneys in this field so as to not fall foul of the EPC's provisions in this technology.

If you have any questions with regard to plant patenting in Europe – please contact the authors.

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Useful links:

Full text of decision G2/07:
dycip.com/g207dec

Full text of decision G1/08:
dycip.com/g108dec

Full text of decision G1/98:
dycip.com/g198dec

Full text of decision T-1854/07:
dycip.com/t185407dec

Full text of decision T-1242/06:
dycip.com/t124206dec

EPO statistics:
dycip.com/epomelonstatistics

will continue to be patentable in Europe. The EPO is clearly conscious of the public debate surrounding their decisions in plant cases. In an attempt to put the debate into context, the EPO has recently published some statistics indicating that although around 800 applications are filed per year in the plant arena, fewer than 100 patent applications claiming non-GM [non-genetically modified] plants are filed every year. Furthermore, of the 13,848 patent applications relating to plants published by the EPO since 1990, 1,690 ended with the grant of a European patent. Of these, only 88 are patents for non-GM plants, while 1,602 relate to GM plants. The EPO press release also attempts to put into context the recent opposition of EP1962578B to closterovirus-resistant melon plants. Claim 1 of this patent states:

"A CYSDV-resistant plant of the species Cucumis melo, said plant comprising an introgression from a plant of melon accession PI313970, which introgression comprises

a CYSDV-resistance-conferring QTL or a CYSDV-resistance-conferring part thereof linked to at least one marker located on the chromosome equivalent to linkage group 6 of melon accession no PI313970, wherein said marker is E11/M49-239, and wherein said QTL or said part thereof is present in homozygous form."

There are no method claims.

The argument of one of the opponents is that such a claim as drafted includes plants that are obtainable by crossing techniques, and that merely to direct a claim to products and not to the process of breeding should not be a way of 'avoiding' G1/08. Whilst we do not know at this time, this argument may increase pressure on the Enlarged Board of Appeal to consider the questions pending before them.

In addition there has been a Court ruling in The Hague in January 2012 in a patent case between Taste of Nature (Koppert Cress) and Cresco on the patentability of a plant

USPTO Competition Patents for Humanity

In addition to awarding patents, the United States Patent and Trademark Office (USPTO) will soon be awarding prizes. The 'Patents for Humanity' program was announced in February, and is a competition intended to reward patent owners who use their patented technology to address humanitarian issues. Entrants are required to submit an explanation of how they have applied their technology to improve the lot of impoverished and underserved populations, either by direct use of the technology or by research. Naturally, the technology must be the subject of a US patent or patent application.

The competition organisers are seeking entries in four categories: medical technology, food and nutrition, clean technology, and information technology. The USPTO has mentioned medical diagnostics, water sterilisation, mosquito control and land mine detection as examples of eligible inventions, and are encouraging businesses of all varieties to enter. The competition is open until the end of August 2012, and will be judged during September to December 2012. The USPTO has not yet named the judges, but has made it known that they will be drawn from academia.

Each winner will be awarded a prize in the form of an 'acceleration certificate' which they can redeem at the USPTO to speed up the processing of a patent or application which is not related to their competition entry. Up to 50 winners are to be selected from the first 1000 entrants. The competition has been launched as a pilot program, suggesting that it will run again in future years if the 2012 contest is a success.

We would be delighted to hear from any of our readers who have entered, or who are contemplating entering the competition!

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Useful links:
[Patents for Humanity on USPTO site:](#)

dycip.com/patenthumanity

RCDs as an Additional Form of Rights Protection European Perspectives and the Apple v Samsung Dispute

Following on from an article we published in the February edition of this newsletter (in which we discussed national validation strategies for European patents), this article will consider how Registered Community Designs (RCDs) may be used as an additional method of rights protection. This is to be illustrated using the ongoing Apple/Samsung dispute where RCDs, in addition to patents, are being asserted by Apple against Samsung.

Regarding the RCD aspect of the above dispute, much of the focus has been in the German and Dutch courts. Interestingly, although the RCD is a unitary right which extends across the whole EU, the German and Dutch courts have adopted very different interpretations in relation to the scope of the respectively 'protected' rights. In particular, as will be discussed, for the same RCD, the German and Dutch courts reached completely different conclusions regarding the breadth and depth of protection afforded to a 'minimalist' design.

Germany

Having brought an action against Samsung in August 2011, Apple was successful in achieving a swift preliminary injunction against Samsung's Galaxy Tab 10.1 computer. This preliminary injunction was granted on the basis that Apple would be likely to succeed at trial in relation to their RCD protecting the shape of their iPad and iPad2 products. The preliminary injunction ordered by the Court was initially made on a pan-European basis before being scaled back for jurisdictional reasons. Whilst this preliminary injunction has been upheld as recently as 31 January 2012, its commercial significance has been undermined for the following reasons:

1. Although the preliminary injunction prohibiting the sale of the products within Germany applies to both Samsung's German subsidiary and its parent company, only the German entity is prevented from making cross-border sales. Samsung Electronics Co. Ltd. (the parent company) is therefore permitted to continue selling the products outside of the territory.

Samsung Galaxy



Apple iPad



2. Although upheld by the Düsseldorf Higher Regional Court, the decision was based upon a violation of German competition law and not on Apple's substantive design right. From a strategic perspective, a decision based upon the latter may have proven much more valuable to Apple.
3. On 9 February 2012, the Düsseldorf Higher Regional Court determined that Samsung's modified Galaxy Tab 10.1N (a 'work-around' product) did not infringe Apple's relied upon RCD. As a result, the decision of 31 January (upholding the injunction against the Galaxy Tab 10.1) is all but rendered irrelevant.
4. A full trial of the issues is still to be heard, which may not necessarily follow the lead of the preceding Court decisions which have granted (and confirmed) Apple's injunction.
5. So far within Germany, the injunction has only had a temporary disruptive effect, not least because Samsung's European logistics centre is in the Netherlands.

Although at first it may appear that within Germany, the protection afforded by

registered designs is limited, it should be noted that Apple has had greater success in obtaining swift injunctive relief where it has relied upon its RCDs than when relying upon certain of its patents.

Evidencing the potential of RCDs to function as a useful tool in a litigant's armoury, the Düsseldorf Court held that in its opinion, *"Apple's EU design rights grant a medium range of protection, if not a broad one"*. In contrast to the rather more costly and lengthy litigation associated with pursuing patent infringement actions, (as Apple is doing against Samsung and a number of other companies in separate disputes) it remains that RCDs may to some extent, provide a more economic and timely means of obtaining injunctive relief.

The Netherlands

As mentioned, Apple also commenced an action against Samsung in the Netherlands, asserting the same RCD as asserted in Germany. However, whilst responsive to Apple's patent infringement claims, the District Court in The Hague did not agree that Samsung's Tablet computers were infringing the RCDs held by Apple in relation to their iPad and iPad2 products. In particular, the District Court in The Hague dismissed Apple's request for an injunction against the Galaxy Tab, feeling that the minimalist design afforded

significantly narrower protection to Apple than that afforded by the German Court. This contrary conclusion was reached despite the Dutch Court having the earlier German decision available to it. On the facts, it appears that the Rechtbank's-Gravenhage gave their attention to 'prior art' which was not considered in Düsseldorf, therefore justifying their departure from the preceding German decision. In light of the very different interpretations of RCDs by the courts in Germany and the Netherlands, manufacturers / brand owners should consider adapting their IP protection strategies accordingly.

So, what can RCDs protect?

Usefully, RCDs are able to protect certain aspects of a product which are often excluded from the scope of patent protection. In particular, where patents protect the technology associated with a product, RCDs protect the 'look and feel' of the product. By way of an example, RCDs may be used to protect both two-dimensional and three-dimensional shapes. This form of IP may prove to be of increasing importance in future disputes.

Notably, RCDs enable manufacturers to protect elements of their products which relate solely to their look and feel, such as icons, typefaces and more generally the overall 'get up'. In an increasingly competitive marketplace, the

ability to obtain protection for such elements is particularly important. This is particularly the case in the area of smartphones and tablets, where manufacturers look to develop brand-specific Generated User Interfaces (GUIs). This is particularly the case with the introduction of Android v4.0 and the Apple OS (and the imminent introduction of Windows 8), which are used as the same GUI across the respective smartphone and tablet product families for various manufacturers. These GUIs are the means by which users interact with the product and enable its various functions to be carried out. Safeguarding key features within a product's user interface is therefore fundamental as they constitute the basis of the inherent 'look and feel' which is often king in the retail market, and in particular in the smartphone and tablet market.

Lessons Learnt

We have reviewed the Samsung and Apple dispute, but what have we learnt? We learnt in our previous article that the Dutch courts and the German courts tend to be pro-patentee and seem happy to grant preliminary injunctions. This is particularly useful in respect of the Netherlands as this is commonly a port of entry into the EU. Also, the London Agreement means that patent protection can be achieved relatively cheaply in the Netherlands.

We also have learnt that RCDs can be obtained to cover the look and feel of a product. However, although the RCD is a unitary right which extends across the whole EU, the national courts can have completely contrary views when deciding the scope of protection provided by the RCD. We have also learnt that RCDs may be an increasingly useful form of IP, especially in the electronics field, where the 'look and feel' of a product, and in particular the "look and feel" of a product's GUI is becoming the differentiator between competing products.

Authors:

Jonathan Jackson
Scott Gardiner



The Samsung Galaxy Tab, a product that has features and looks similar to the Apple iPad



Infringement of an Earlier Registered Design

CJEU Ruling in Cegasa v Proin Road Sign Case Clears Traffic for RCD Enforcement

The CJEU has issued a rare decision relating to registered designs, and it has answered the question whether obtaining your own registered design can prevent you from infringing an earlier registered design belonging to another party.

In the field of patents, it is well established that obtaining your own (later) patent will not help you in avoiding infringing an earlier patent belonging to another party, but registered design law is more of a backwater compared with patent law and for many years there has been something of a gut feeling that somehow the act of obtaining your own (later) registered design might act as some kind of shield against accusations of infringing an earlier registered design.

We now know that the CJEU considers that the later registered design does not provide a shield. Specifically, the CJEU in its capacity as the appellate court for EU law governing Registered Community Designs (RCDs) has decreed that a later RCD does not provide a shield against being held to infringe an earlier RCD belonging to another party.

Up until this decision, it has sometimes been tempting for a party, worried about infringing (or accused of infringing) an existing RCD, to consider trying to frustrate enforcement of that RCD by applying for and obtaining their own (later) RCD for their own product.

This strategy has been possible because, firstly, an RCD application is not substantively examined for novelty or so-called individual character by the EU Designs Registry (OHIM) and an RCD can be granted in a matter of just a couple of weeks. Thus, an invalid RCD can be obtained very quickly, and at low cost, and OHIM considers that it falls to interested parties to apply to have the granted RCD declared invalid by commencing invalidity proceedings that would seek to show that when the designs forming the prior art in the public domain are considered (and this would include earlier published RCDs) the design shown in the RCD in question either lacks novelty or lacks individual character. These

invalidity proceedings typically last much longer than the short timescale for obtaining the RCD in the first place, and it can be months or years before an invalid RCD is struck off the Register at OHIM.

Secondly, the EU Regulation laying down the law governing RCDs is not as well worded as it could have been, and has opened the door to a line of argument that a later RCD acts as a shield against infringing an earlier RCD (at least until the later RCD is declared invalid). Specifically, Article 19(1) of Council Regulation (EC) No. 6/2002 states: "A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it". The wording "shall confer on its holder the exclusive right... to prevent any third party" is the wording that one would typically expect for a monopoly intellectual property (IP) right where the granted IP right is a 'right to stop others' and is not a right to use the IP oneself.

It is the rest of the wording in the form of 'shall confer on its holder the exclusive right to use it' that has, until now, given rise to the line of argument that a later RCD is a shield against infringing an earlier RCD on the ground that enforcing the earlier RCD against the proprietor of the later RCD would deprive the proprietor of the later RCD of his 'exclusive right to use' the later RCD even if that exclusive right is in conflict with the earlier RCD proprietor's 'exclusive right to stop' the later RCD proprietor's activities. The later RCD proprietor would say that the later RCD would first of all need to be declared invalid and struck off the Register before the earlier RCD could be enforced against any product that falls within the scope of the later RCD and within the scope of the earlier RCD.

It is this line of argument that has now been struck down by the CJEU and it can no longer be used to frustrate owners of branded goods who have an RCD protecting one of their products and who wish to enforce that RCD against an importer of counterfeit goods who stalls and delays action against the counterfeit goods by obtaining their own (later) RCD and then running the above line of argument.

Fig 1



Fig 2



The case decided by the CJEU does not relate to branded goods or counterfeits, but has general applicability even though it relates to the functional and less glamorous world of traffic bollards. The case is C-488/10 *Celaya Emparanza y Galdos Internacional SA v Proyectos Integrales de Balizamientos SL* ('Cegasa' v 'Proin').

Cegasa obtained their RCD (the 'earlier' RCD) in 2005 as RCD No. 000421649-0001: their 'road sign' (or traffic bollard) is shown in Fig 1, above.

Proin started marketing their competing bollard in 2007, and Cegasa served a cease-and-desist demand upon Proin in January 2008.

In April 2008, Proin filed their own RCD application and it was granted a month later as RCD No. 000915426-0001 (the 'later' RCD) and its appearance is shown in Fig 2, above.

In the infringement proceedings before a Spanish court, Cegasa argued that the Proin bollard was an infringement of the Cegasa (the earlier) RCD because the Proin bollard does not produce a different overall impression on the informed user compared with the design of the Cegasa RCD. Proin replied with the 'shield' argument that the Proin (the later) RCD gives Proin the exclusive right to use the Proin design and thus the Proin bollard is not an infringement of the earlier (Cegasa) RCD at least until the Proin RCD is cancelled by means of invalidity proceedings. Interestingly, Cegasa did not attempt to invalidate the later (Proin) RCD. Instead, the merits of the 'shield' defence were referred by the Spanish court up to the CJEU for a preliminary ruling.

SPCs for Combination Products Common Sense Prevails at Last?

The Polish government intervened in favour of the shield defence, and the European Commission intervened to argue that the shield defence does not apply. Perhaps the European Commission was keen to intervene in order to try to make amends for the original poor drafting of the wording of Article 19 in the Regulation.

The CJEU essentially decided that the earlier RCD trumps the later RCD on “the priority principle, under which the earlier registered Community design takes precedence over later registered Community designs”. In other words, the shield defence is not valid, and the right of the proprietor of the earlier RCD to “the exclusive right ... to prevent any third party” applies even when that third party is the proprietor of a later RCD and irrespective of the conduct of that third party, such as the fact that the third party applied for their RCD after becoming aware of the earlier RCD.

This is good news for RCD owners who now know that attempting to enforce their RCD against a competitor will not be frustrated and delayed by any later RCD obtained by the competitor. Specifically, it will no longer be necessary to remove the later RCD from the Register in order to have a clear run at enforcing the earlier RCD.

Overall, the ruling from the CJEU may make the RCD system more attractive as it has always offered a cheap and quick route to obtaining an IP right in the EU and it will no longer be blighted by the worry that a competitor will try to escape liability for infringement by indulging in the delaying tactic of obtaining their own (later) RCD for essentially the same design or a variant that does not produce a different overall visual impression.

Author:
Paul Price



Useful links:

Full text of decision C-488/10 Cegasa v Proin:

dycip.com/c48810dec

Hot on the heels of the *Medeva* and related decisions late in 2011, the CJEU has issued its latest order on SPCs for combination pharmaceutical products. The order was issued remarkably quickly, within eight months of its referral by the UK Patents Court, and will be welcomed by innovator pharmaceutical companies after the less favourable *Medeva* decision.

The ruling is the result of a long-running dispute between Novartis and generics manufacturers on combination drugs including the active agent valsartan. Valsartan is marketed by Novartis as Diovan® for treating high blood pressure; the company also markets a combination drug including valsartan and hydrochlorothiazide (HCTZ) as Co-Diovan® for the same indication.

Novartis formerly owned European patent no. 443983 covering valsartan: this patent was extended by an SPC, which expired on 12 November 2011. The company were also granted a European patent covering the valsartan / HCTZ combination: this basic patent expired before the valsartan SPC and was not itself extended by an SPC in the UK.

When Actavis announced its intention to market a generic version of the valsartan / HCTZ combination drug, Novartis sued it under the valsartan SPC. Novartis argued that, as the drug contained valsartan, it would have infringed the basic valsartan patent while it was in force, and would therefore infringe the SPC. Actavis counter-argued that the SPC only covered valsartan as a sole active ingredient, and the valsartan / HCTZ combination was a different ‘product’ for the purpose of the SPC Regulation and would therefore not infringe the SPC. The UK Patents Court referred the matter to the CJEU to clarify the law.

The CJEU has decided in favour of Novartis’ argument. According to the

ruling, if an SPC is granted for a drug containing an active ingredient (A), the SPC holder can **enforce** it against a competitor marketing an authorised drug which is a combination of actives (A + B) after expiry of the basic patent for A, unless the claims of the basic patent specifically exclude the presence of another active. This ruling is in sharp contrast to the Court’s decision in *Medeva*, in which it decided that an SPC could not be **granted** for an authorised combination drug A + B if the wording of the basic patent only specifies A (or a combination of A with another, unspecified active), and specifically rejected the ‘infringement test’ as a basis for assessing whether a product is ‘protected by a basic patent’ for the purpose of SPC protection.

The legal basis of the order is somewhat uncertain, and it could be argued to run counter to the original intentions and purpose of the SPC Regulation. Moreover, it appears to enable *Medeva* to be bypassed by simply filing SPC applications for single actives. However, the ruling is good news for innovator pharmaceutical companies, as it would allow them to prevent generics from circumventing an SPC protecting A by marketing a combination of A with another active. After the confusion of *Medeva*, common sense may have prevailed at last.

Author:
Garreth Duncan



Useful links:

Full text of decision C-442/11 Novartis v Actavis: dycip.com/c44211dec

C-322/10 Medeva: dycip.com/c32210dec

C-422/10 Georgetown University:
dycip.com/c42210dec

C-630/10 University of Queensland:
dycip.com/c63010dec

C-518/10 Yeda: dycip.com/c51810dec

C-6/11 Daiichi Sankyo: dycip.com/c611dec

D YOUNG & CO INTELLECTUAL PROPERTY

And finally...

Battleground Europe Smartphone Wars

With a global surge in smartphone usage Europe has become the battleground for an intellectual property war over smartphone technology. Join D Young & Co patent attorneys Gareth Scaddan and Susan Keston for views and insight into the ongoing dispute between Apple and Samsung and its wider implications for the smartphone market in the first of a series of webinars hosted by our Electronics, Engineering and IT Group.

This online webinar will take place on
20 June 2012 at 12pm and 5pm BST.

For further information and to register
visit: www.dyoung.com/event-webjun12



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