



## EPO Appeal Board criticises UK *Aerotel/Macrossan* decision regarding patentability of computer programs and other “excluded” subject matter

In its decision in *Case T154/04 (Dun Licensing Associates L.P.)*, a case relating to a patent application entitled “Method of estimating product distribution”, the European Patent Office (“EPO”) Technical Board of Appeal severely criticised the approach taken by the English Court of Appeal in the *Aerotel/Macrossan* case.

In *Aerotel/Macrossan* the Court of Appeal considered the application of Articles 52(2) and (3) of the European Patent Convention (the “EPC”). Article 52(2) excludes from what is to be considered an “invention” certain subject matter and activities, including “schemes, rules and methods for ... doing business, and programs for computers”, but only, according to Article 52(3), if the patent or patent application “relates to such subject-matter or activities as such”.

In an attempt to clarify the approach to be taken by the UK courts when deciding whether something falls within the exclusions in Article 52(2) the Court of Appeal set out a four stage approach (known as the ‘technical effect approach with rider’): (1) properly construe the claim; (2) identify the actual contribution of that claimed to the state of the art; (3) ask whether the contribution falls solely within the excluded subject matter; and (4) check whether the actual or alleged contribution is actually technical in nature.

When arriving at its decision in *Aerotel/Macrossan* setting out the test the Court of Appeal was bound by its own earlier decisions. However, recognising this, the Court of Appeal set out various questions it thought might usefully be asked of an Enlarged EPO Board of Appeal, if an opportunity arose, relating to the current approach to adopt in determining whether the Article 52 exclusion applies. The Technical Board of Appeal then considered all but one of these questions in the *Dun Licensing* case – but refused to refer them to an Enlarged Board of Appeal, saying not only was there no basis for such a reference in this case but that there was no requirement as the practice and case law of the Board referred to in the questions already had a sound legal basis.

The Technical Board of Appeal has now said in the *Dun Licensing* case that the approach in *Aerotel/Macrossan* is irreconcilable with the EPC; that it has no basis in the EPC; and that it contravenes conventional patentability criteria. According to the Technical Board of Appeal the approach in *Aerotel/Macrossan* was incorrect because it runs together the four separate and independent requirements in Article 52(1) that for something to be a patentable invention it must: be an invention; be novel; involve an inventive step; and be capable of industrial application.

According to the Technical Board of Appeal:

- Novelty in particular is not a requisite of an invention within the meaning of Article 52(1) but a separate requirement of patentability.
- For examining the patentability of an invention in respect of a claim, the claim must be construed to determine the technical features of the claim (i.e. the features which contribute to the technical character of the invention – and that technical and non- technical features (even when non-technical features form a dominating part of the claimed subject matter) can appear in a claim).
- However novelty and inventive step can be based only on technical features. Non-technical features, to the extent that they do not interact with the technical subject matter of the claim for solving a technical problem (i.e. non-technical features “as such”) do not provide a technical contribution to the prior art and are thus to be ignored in assessing novelty and inventive step.
- Article 52(2) is merely a negative, non-exhaustive list of what should not be regarded as an invention within the meaning of Article 52(1).
- Article 52(3) was introduced as a bar to a broad interpretation of Article 52(2).
- By having any technical character, any product, method etc, even if formally relating to the list in Article 52(2) is not excluded from patentability under Article 52(2) and (3).

In order to be patentable, the subject matter claimed must have a “technical character” (or involve technical teaching) – i.e. an instruction to a skilled person as to how to solve a particular technical problem using a particular technical means. However, novelty is not necessary to establish the technical character of an invention whereas novelty and inventive step can only be established on the basis of the technical features of the invention,.

Thus, in the view of the Technical Board of Appeal, “*any reference to the prior art in the context of Article 52(2) and (3) EPC would lead to insurmountable difficulties*”. This is completely contrary to the position set out by the Court of Appeal in *Aerotel/Macrossan*. The Technical Board of Appeal’s view was also that the Court of Appeal’s position that novel and inventive subject matter in so far as it is excluded subject matter does not count as a “technical contribution” was irreconcilable with the EPC.

This decision leaves UK law at odds with EPO case law, as the decisions of the EPO Technical Board of Appeal are not binding on UK courts whilst those of the Court of Appeal are. This makes it difficult both for applicants, who may have applications treated differently depending on whether they file in Europe or the UK, and for those who wish to assert in the UK European patents which contain matter which may be excluded by Article 52(2) and (3).

**A copy of the EPO Technical Board of Appeal decision dated 15 November 2006 can be found at <http://legal.european-patent-office.org/dg3/pdf/t040154ex1.pdf>.**

## EPO considers the scope of Article 69 and its Protocol relating to the interpretation of a patent

In Case *T 0223/05 3.3.01 (Irreversible inhibitors of tyrosine kinases/WARNER-LAMBERT COMPANY LLC)*, the EPO Technical Board of Appeal gave a significant ruling regarding the scope of Article 69 of the EPC and its Protocol on the interpretation of a patent claim. The case concerned Wyeth's opposition to the grant of a European patent to Warner-Lambert Company LLC for a chemical compound.

The patent related to a complex organic compound containing certain constituents, designated as X and Y. The wording of the relevant claim (claim 18, an independent product claim) was silent as to the value of X when Y was not present. However the description of the patent did give some assistance as to the meaning of X, although that was not necessarily the meaning the skilled person would ascribe on reading the claim.

The Opposition Division originally upheld the patent, its position (in so far as is relevant) was summarised by the Board as follows: *"the wording of Claim 18 was silent as to the values of X, when Y was not present. In view of this lack of information, the skilled reader would have referred to the content of the description in order to clarify the value of X when Y was absent. It turned out from a description of the patent that all the claimed compounds had a Michael acceptor side-chain. Hence the skilled reader would have corrected this lack of information in Claim 18 by the content of the description and would have concluded that in the absence of Y, X has to be a Michael acceptor side-chain"*. With this construction of claim 18 Warner-Lambert were able to overcome a novelty objection.

Wyeth appealed to the Board against the Opposition Division's conclusion, and claimed that a proper construction of Claim 18 would lead the skilled reader to find that X could have any one of the five meanings which were listed in the claim (i.e. was not limited to the Michael acceptor side-chains referred to in the description). The Board rejected Wyeth's views and stated that Claim 18 was indeed *"silent regarding the meaning of X when Y was absent"*. However the Board held that *"In the absence of any precision as to the chemical nature of X, the sole conclusion is that it can have any definition that would appear sensible to the skilled person"*.

Accordingly, Claim 18 had to be interpreted by reference to Article 69 and the Protocol. Article 69(1) provides *"The extent of protection conferred by a European patent or a European patent application shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims"*. The Protocol states that the *"strict, literal meaning of the wording used in the claim"* does not alone define the extent of European patent protection. However, the Board held that Article 69 and the Protocol do not provide a basis for excluding what is literally covered by the terms of the claim.

In light of this, the Board rejected the Opposition Division's approach to *"read into the claim a particular meaning for X which only appears in the description and then to rely on this feature to provide a distinction over the prior art"*. The Board held that its position was supported by Article 123(3), which stipulates that *"claims of the European patent may not be amended during opposition proceedings in such a way as to extend the protection conferred"*; and therefore details contained in the description alone (albeit in this case the Board held the description did not provide for a precise definition of the relevant fact, i.e. the chemical nature of X) could not be

read into Claim 18. Furthermore, the Board noted, the extent of protection of a patent is examined in the opposition proceedings only within the framework of Article 123(3). The interpretation of the extent of protection of a patent is not the task of the EPO; it is that of the national courts competent in procedures on infringement cases.

Essentially, this decision illustrates that the terms of patent claims must be full and precise; the extent of protection is firmly rooted in the wording of the claims.

This decision also shows a clear and important difference between European and US patent law. For example, in a claim which covers “means plus function” in the USA the means are limited to those described in the specification. However, under European law, the means could be any which the skilled person would recognise as being suitable for carrying out the claimed function.

**A copy of the EPO Technical Board of Appeal decision dated 24 April 2007 can be found at <http://legal.european-patent-office.org/dg3/pdf/t050223eu1.pdf>.**

## Patent amendments in the UK and the importance of the specification as filed

The UK High Court has said, in *Triumph Actuation Systems LLC v Aeroquip-Vickers Limited*, that when deciding whether a proposed amendment to a granted patent is allowed under s76(3)(a) of the Patents Act 1977, it is necessary to compare it with the specification as originally filed rather than with the specification of the patent at the time of amendment.

This case involved an infringement action in relation to a patent for control mechanisms of power transfer unit equipment used in the hydraulics in the Airbus A320 aircraft. The patentee, Triumph, applied to amend the patent by including features of one claim of the patent into another claim of that patent.

Vickers opposed the proposed amendment on the grounds that it was not clear and that it was not allowed under s76(3)(a) of the Patents Act 1977, which states that amendments to patents are not allowed where they result in the specification of the patent disclosing additional matter.

Vickers argued that there was no disclosure of the combination in the patent specification prior to the amendment. This meant that the combination would be additional matter. Triumph argued that this was the wrong approach and said that the correct question was whether the amendment disclosed matter added to the disclosure of the application for the patent as it had been filed originally. In this case, the relevant material had been deleted from the specification during prosecution of the application for the patent, and Triumph said (although the High Court did not agree) that the new combination was disclosed in the deleted matter.

It is quite common for examiners of patent applications to require patentees to delete sections of description of the patent before the patent is granted. This decision is therefore good news for patentees, because it means that they can rely on material that has been deleted from the specification during the prosecution process of that patent.

**A copy of the UK High Court judgement dated 15 June 2007 can be found at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Patents/2007/1367.html>**

## Patent co-applicants share priority rights

The EPO Technical Board of Appeal has ruled, in *Case Number: T 0788/05 - 3.3.02 (Terumo Kabushiki Kaisha)*, that where an application for a patent has been made by two co-applicants, the right of priority under Article 87(1) of the EPC belongs jointly to the co-applicants. Consequently, in order for a subsequent application to claim the priority of an earlier application made by co-applicants for the same invention, the subsequent application needs to have been made by both co-applicants.

Article 87(1) of the EPC provides: “A person who has duly filed ... an application for a patent ..., or his successors in title, shall enjoy, for the purpose of filing a European patent application in respect of the same invention, a right of priority during a period of twelve months from the date of filing of the first application.”

On the basis of the ruling, if a subsequent application is made by only one of the co-applicants, the subsequent application could not claim the priority of the first application. An exception to this is where all rights have been transferred to the applicant before it files the subsequent application. Notably, in the absence of a transfer, the first application made by both co-applicants will represent prior art in relation to the subsequent application made by only one of the co-applicants.

The ruling was given in relation to considering whether a disclaimer amendment submitted by an applicant to the subsequent application could be allowed. In order for the disclaimer amendment to be allowed, the applicant had to establish that the priority date of the first application did not attach to the subsequent application and consequently, the first application represented prior art under Article 54(3) of the EPC. The Board accepted this on the basis that the subsequent application had been filed by only one of the co-applicants named in the first application.

The ruling provides a useful reminder that the right of priority is a key right encompassed in patent applications. From a due diligence perspective, where a patent application of interest claims priority from an earlier application filed in the name of co-applicants, the ruling points to the relevance of considering whether the patent application of interest has been filed in the required names and if not, the prior art implications of the earlier application. Where the patent application has been filed in the name of all co-applicants, a prospective acquirer may also wish to investigate the arrangements in place to deal with filing subsequent applications in the names of the co-applicants and whether the benefit of any such arrangements should also pass to the acquirer.

For parties wishing to enter into collaborative arrangements resulting in patentable subject matter that is to be co-owned, the ruling points to the relevance of cooperation from each party to safeguard priority rights attaching to a patent family arising from the collaboration. This may include considering mechanisms for naming the parties as co-applicants in any subsequent applications filed after the collaboration has ended.

**A copy of the EPO Technical Board of Appeal decision dated 8 May 2007 can be found at <http://legal.european-patent-office.org/dg3/pdf/t050788eu1.pdf>.**

# Staying proceedings for revocation in the UK

Recently several decisions have been handed down by the UK High Court and UK Intellectual Property Office (the “**IPO**”) (the new name for the UK Patent Office) regarding applications to stay (i.e. to suspend) proceedings for the revocation of patents in the UK pending the outcome of opposition proceedings before the EPO. The decisions suggest that a request for a stay is not likely to be successful, particularly whilst oppositions in EPO proceedings remain notoriously slow (often taking several years), and UK revocation proceedings can usually be heard within a year or less.

Under the EPC, within nine months of the grant of a European Patent, a party may bring opposition proceedings regarding the patent before the EPO. However, actions for patent infringement and revocation concerning national patents resulting from a grant of a European patent are the preserve of the courts of the Member State in which the national patent has been granted. Thus the validity of such a national patent can be challenged, via revocation or infringement proceedings, in a Member State court, on the same grounds, and at the same time, as opposition proceedings before the EPO.

In *Glaxo Group Limited v Genentech Inc* the High Court was asked to consider an application by Genentech to stay UK proceedings for the revocation of a European patent (designating 25 states including the UK) brought by Glaxo, pending the decision of the EPO in opposition proceedings regarding the same patent, also brought by Glaxo, and on the same grounds. The High Court held that “there is a presumption, although not a strong one, in favour of a stay, and that it is for the party resisting the stay to overcome the presumption”, and after considering what it regarded as the relevant factors for and against a stay, the High Court refused to grant the application. The Court placed particular emphasis on the likely delay that would result if a stay were granted (18 months to three years), noting that opposition proceedings in the EPO are still notoriously slow. The High Court went on to consider the cost to the claimant of such a delay, which was estimated at US\$80million, far outweighing the potential costs savings afforded by staying the proceedings, costs which the parties, being large multinationals, could afford. The Court also suggested that a reasoned judgement of the Patents Court might help the parties to settle their dispute without further recourse to the courts.

The same outcome was reached by the High Court in *Research in Motion UK Limited v Visto Corporation*. Once again, an application was made by a defendant to stay proceedings in the UK for the revocation of a European patent, pending the outcome of EPO opposition proceedings. The High Court commented that in the field concerned (mobile communication devices) “there is ... a need for commercial certainty at the earliest possible opportunity”, and the need for a speedy resolution outweighed the cost savings involved. The judge did consider in some detail undertakings offered by the defendant not to seek injunctive relief in the future or to seek to recover damages or an account of profits from the defendant due to infringement, just a reasonable royalty from the date of the decision in the opposition proceedings. However, the Court did not think that the undertakings fully addressed the negative impact on the claimant’s business that would result from a continued lack of certainty regarding the patent’s validity, nor did they negate the public interest in removing invalid patents from the register.

The IPO considered the issue of staying proceedings in *Gareth Williams and Surfactant Technologies Limited*. An action was brought by the claimant, before the IPO, for revocation of a UK patent. The defendant requested a stay in proceedings in view of the fact that a corresponding European patent, was subject to opposition proceedings in the EPO, and any outcome of those proceedings might need to be taken into account. The European patent, though similar to the UK patent, had been amended in light of prior art filed by a third party during the application procedure. Such amendments had not been made to the UK patent. The claimant had, as a result, brought an action to revoke the UK patent on the grounds of invalidity due to the prior art cited by the third party to the EPO and argued that the proprietor did not now have the option of making validating amendments to the UK patent, because it knowingly obtained a patent of invalid scope.

When considering the application, the IPO Hearing Officer thought that the factors to be taken into account were: the likely outcome of the EPO proceedings and the effects it might have on the action; the advantages and disadvantages to the parties of a stay; the costs to the parties; whether time and money could be saved; the public interest; and the strength of the substantive cases.

The powers of the IPO (or a UK court) to allow validating amendments are discretionary, and a request to make amendments can be denied if it is thought that the patentee is not seeking the amendments in good faith. The Hearing Officer noted that this was not a matter that could be considered before the EPO, and in any event, the UK patent was different to the European patent, and therefore there was no possibility of the outcome of the EPO proceedings influencing the IPO as regards discretion. The Hearing Officer went on to state that a stay was unlikely to save the parties time or money, as the likely outcome of the EPO proceedings was for the European patent to be maintained but with limitations, still leaving the significant question of discretion to amend the UK patent to be litigated before the IPO. The financial burden placed on the defendant as a result of having to run two actions was taken into consideration by the Hearing Officer, but he noted that the defendant had failed to adduce any evidence regarding its financial standing and therefore it was difficult to assess whether the financial burden was undue or not. Finally, the Hearing Officer considered that the public interest was best served by resolving the issue of validity sooner rather than later. Therefore, the application for a stay was denied.

Following these decisions it appears that, although there is a presumption that proceedings in the UK for revocation of a European patent, or a UK patent that is closely related to a European patent, should be stayed pending the outcome of opposition proceedings in the EPO, it is not a difficult presumption to overturn. Provided a claimant can establish that it will suffer appreciable negative effects as a result of a stay, and the financial burden of dual proceedings is of a magnitude that the court (or IPO) considers the applicant can bear, a stay is unlikely to be granted. This position may of course change if the EPO is able to cut the time it takes to process opposition proceedings, eliminating the UK courts' main concerns regarding delay and a need for commercial certainty, but this looks somewhat off.

**A copy of the High Court's decision in *Glaxo Group Limited v Genentech Inc*, dated 15 June 2007, can be found at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Patents/2007/1416.html>; and the IPO's decision in *Gareth Williams and Surfactant Technologies Limited*, dated 14 August 2007, can be found at <http://www.ipo.gov.uk/patent/p-decisionmaking/p-challenge/p-challenge-decision-results/o22907.pdf>**

# European Court of First Instance declines to extend rules on privilege to cover in-house and non-EU qualified lawyers in European competition law cases (and where does this lead to?)

The rules on legal professional privilege (“LPP”) in EC competition law were clarified – but not fundamentally changed - on 17 September 2007, when the Court of First Instance (the “CFI”) handed down its eagerly-awaited judgment in *Akzo Nobel v Commission*<sup>1</sup>.

- The CFI rejected Akzo's arguments that LPP protection should be extended to cover communications with in-house counsel. This means that LPP continues to be limited in EC competition law cases to communications between clients and external, EU-qualified, lawyers. The result is a continuing disparity between EU and national laws. In the UK, for example, communications between in-house counsel and their clients are privileged, in the same way as communications with external lawyers.
- The case makes no change to the position under EC competition law regarding advice from non-EU qualified external lawyers – this is not protected by LPP.
- The CFI also ruled that an undertaking is entitled to refuse the European Commission (the “Commission”) even a cursory look at a document which it claims is covered by LPP, where this would result in disclosure of the contents of the document. Where LPP is disputed, Commission officials should put a copy of the document in a sealed envelope and remove it from the premises. It must then adopt a decision rejecting the application for LPP, thus allowing the undertaking concerned to appeal the decision to the CFI. Only when the dispute is resolved in the Commission's favour may it look at the document.

## Background

The Commission, with the assistance of the Office of Fair Trading, carried out dawn raids at the UK premises of Akzo Nobel Chemicals Limited (“Akzo”) and Akcros Chemicals Limited (“Akcros”) (together the “Applicants”) in February 2003. During the raids, the Applicants' representative informed the Commission officials that certain documents were likely to be covered by LPP. The Commission officials insisted on examining these documents to form their own view. Faced with a threat of fines for obstruction of the investigation, the Applicants compromised: the head of the investigating team examined the documents in the presence of the Applicants' representative.

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<sup>1</sup> *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities*, joined cases T-125/03 & T-253/03



### The disputed documents

There were five disputed documents:-

- The “Set A Documents”:-
  - a memorandum containing information gathered for the purpose of obtaining outside legal advice in connection with Akzo’s competition compliance programme; and
  - a copy of the above memorandum bearing manuscript notes referring to contacts with an external lawyer.

The Commission officials could not determine whether these were privileged.

- The “Set B Documents”:-
  - handwritten notes made by Akcros’ general manager, used for the purposes of preparing the memorandum in Set A above; and
  - two emails exchanged between the general manager and Akzo’s competition law coordinator, who was a lawyer qualified in the Netherlands and a permanent member of Akzo’s legal department.

The Commission decided that these were definitely not privileged.

The Commission officials put copies of the Set A Documents in a sealed envelope, which they took away with them on completion of the investigation. They put copies of the Set B Documents with the rest of the file they took, without sealing them in an envelope.

### The extent of LPP

The CFI reiterated the principle set out in the decision of the European Court of Justice (the “ECJ”) in the 1982 *AM & S* case<sup>2</sup> on the extent of LPP: that written communications between a lawyer and his client are to be considered confidential, provided that the following two conditions are met:

1. the communications must have been made for the purposes of the exercise of the client’s right of defence, even if they pre-date the start of the investigation; and
2. they must be with an independent EU-qualified lawyer.

#### *The Set A Documents*

The CFI ruled that the Set A Documents were not protected by LPP. They were not prepared with a view to being sent physically to an independent lawyer. Although they were drawn up for the purpose of a conference call with an independent lawyer, they were not addressed to the lawyer, nor did they contain a request for legal advice. The CFI found that they were not drawn up exclusively for the purposes of seeking independent legal advice in exercise of the Applicants’ rights of defence.

#### *The Set B Documents*

The CFI also ruled that the Set B Documents were not protected by LPP. The handwritten notes had been drawn up with a view to preparing the memorandum in Set A and could not be covered by LPP. The two emails had been exchanged between the general manager of Akcros and Akzo’s in-house counsel and, although they contained legal advice on issues that had arisen in the context of the Akcros compliance programme, they had not involved

<sup>2</sup> Case 155/79 *AM & S v Commission* [1982] ECR 1575

communication with an independent lawyer. The CFI rejected arguments from the Applicants, supported by professional bodies such as the International Bar Association, that in-house counsel could be considered just as 'independent' as external lawyers. It pointed to the fact that the ECJ expressly held in the *AM & S* case that independence precluded a lawyer being bound to his client by a relationship of employment. The ECJ's position had been a conscious decision, given that the issue had been debated at length during the proceedings.

### **What does this mean for in-house lawyers?**

The law in this case applies only to investigations carried out by the Commission of breaches of EC competition law. Businesses may also be investigated by national competition authorities which will each apply their own rules on LPP when seizing documents - as mentioned above, in the UK, communications between in-house counsel and their clients are currently treated as privileged, whether the investigation or proceedings relate to competition law or otherwise.

The decision is likely to affect in-house lawyers advising on IP issues: IP and competition law are closely related, and a number of important EC competition law decisions concern the use of IPRs. When there is a question over the protection of IP and the enforceability of IPRs under competition law, the following steps should help to protect a firm's position:

- Staff of the business that owns the IPRs should be cautious about committing anything to writing, unless the written documentation is to be sent an external lawyer for the purpose of obtaining legal advice on the application of competition law.
- Keep legal advice from internal lawyers on a separate file from that from external lawyers.
- Mark both files of advice file clearly as "Legally Privileged Documents".
- Mark all correspondence between the firm and its external and internal counsel clearly as "Legally Privileged. Prepared for the purpose of seeking legal advice".
- To the extent possible, address internal sensitive issues orally or through external lawyers.
- During any dawn raid, supervise carefully access to any privileged documents and where the Commission or NCA requests copies of privileged documents, ensure these are kept, unread by the investigators, in a sealed envelope until the issue of privilege is resolved.

It is not yet clear whether the CFI's decision will be appealed to the ECJ. If the principles in the case stand, a further issue for the future is whether they might be applied in other areas of EU Law, or in other EU institutions.

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