

PATENT LITIGATION— THE DOCTRINE OF EQUIVALENCE

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The extent of protection of a patent determines the outcome of infringements proceedings and thereby the actual value of the patent.

Pursuant to § 39 of the Danish Patent Act, the extent of protection conferred by a patent is determined by the claims, and therefore determination of a patent infringement entails two steps:

- The claims must be construed, and
- The properly construed claims must be compared to the allegedly infringing device.

This involves ascertaining the true meaning and scope of each claim in light of the intrinsic evidence of record. This means the patent specification, other claims in the patent and other relevant prior art, as a person skilled in the art would understand them. If necessary, the court may look to extrinsic evidence, such as the interpretation those skilled in the art would give to a claim, as well as dictionaries and technical papers and articles.

In the context of patent litigation, claim construction is a question of law and, in order to ensure a uniform interpretation of a European patent, the EPC 2000—which came into effect on December 13, 2007—included an amended Protocol on the interpretation of Article 69 EPC. This is intended to bring about uniformity at a national level between contracting states to the EPC when interpreting claims.

The amended text reads:

“For the purpose of determining the extent of protection conferred by a European patent, due account shall be taken of any element which is an equivalent to an element specified in the claims.”

However, no definition of what is meant by “an equivalent” was included in the Protocol, and it is expected that this lack of a binding definition will do little to achieve the desired uniform interpretation. The different EPC countries will have different understandings of the term ‘equivalent’, as this term is not based on a clear statute but on a large literature of national decisions.

However, generally speaking, two devices are equivalent if it can be shown that a device accused of infringements performs substantially the same function in substantially the same way to obtain the same result as defined in the patent.

Based on the published patent decisions, it is clear that the Danish courts are awarding patent protection beyond the strict literal meaning of the wording of the claims. However, since the Danish courts usually give

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short reasons for their decisions, and these decisions are usually rather limited to the fact of the case in question, the Danish courts have never actually used the word ‘equivalent’, even though equivalence has been argued by the lawyers. The Danish courts have instead used the phrase ‘the core of the patent’, which gives a broader scope of protection than the strict literal meaning, but only if said scope can be understood by reading the patent.

However, on March 27, 2009, the Danish Supreme Court used the term ‘technical equivalence’ for the first time in a patent infringement case.

In said case, the company Guldager A/S, which had obtained a European patent validated in Denmark, sued the company Dansk Elektrolyse A/S for patent infringement.

The patent, which related to a method for corrosion-proofing a water system, had a main claim that referred to a single water tank and the use of electrodes directly connected to an electrolysis power source.

Even though the infringing system had two water tanks and the system did not comprise electrodes that were directly connected to a power source, the Supreme Court stated “...that the used system falls within the scope of protection or is at least considered to be technical equivalent with the claimed invention.” The Danish Supreme Court awarded the proprietor Guldager A/S DKr1.8 million (\$340,000) in damages.

This landmark decision is hopefully the beginning of a new era in which the Danish courts will use the doctrine of equivalence in future decisions in order to fully harmonise with the patent laws in Europe.

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