



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

www.competitionlawassociation.org.uk

www.ligue.org

GOLDING ESSAY PRIZE 2018

The CLA is offering a prize of £1000 to be awarded for an essay submitted by a student, trainee solicitor, pupil barrister, devil barrister (from Scotland) or trainee patent and trade mark attorney on the following topic:

Was the Supreme Court right in *Actavis v Eli Lilly* to introduce a doctrine of equivalents when determining infringement of patents in the UK?

*“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.” (Lewis Carroll, *Through the Looking-Glass*)*

A patentee uses the words in the claims of a patent to define the scope of its legal monopoly. Is a patent infringed by a product which doesn’t fall within the literal scope of those words, but is in some way equivalent?

Article 2 of the Protocol on the Interpretation of Article 69 of the European Patent Convention states that:

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

In Kirin-Amgen [2004] UKHL 46, Lord Hoffmann indicated that the right approach should be one of “purposive construction” - what the person skilled in the art would have understood the patentee to be using the language of the claim to mean. Protection could not extend outside the claim by a doctrine of equivalence, but “there is no reason why [equivalence] cannot be an important part of the background of facts known to the skilled man which would affect what he understood the claims to mean”.

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In Eli Lilly v Actavis [2017] UKSC 48, Lord Neuberger regarded this as conflating issues in a way that could lead to error and held that “a problem of infringement is best approached by addressing two issues, each of which is to be considered through the eyes of...the person skilled in the relevant art. Those issues are: (i) does the variant infringe any of the claims as a matter of normal interpretation; and, if not, (ii) does the variant nonetheless infringe because it varies from the invention in a way or ways which is or are immaterial?”

Who is right? Lord Hoffmann or Lord Neuberger?

The essay shall be of a maximum length of 5000 words (inclusive of footnotes) and the closing date for submission of entries is 28 February 2018. Entries should be formatted on A4 in at least 11 point font and 1.5 spacing with footnotes at the bottom of the page, and submitted in electronic form to the CLA secretary, Sharon Horwitz at sharon.horwitz@cma.gsi.gov.uk.

Entrants should please place a codeword instead of their real name on the essay and include both the codeword and real name, with confirmation that the author satisfies the entry qualifications, in the covering e-mail.

Those already qualified as lawyers whether in the United Kingdom or a foreign jurisdiction are not eligible for the prize and the entry qualifications apply as at 28 February 2018.

The panel of judges will be:

Celia Lloyd Davidson (Chair)

Withers LLP

Matthew Fisher

University College London

Philip Westmacott

Bristows LLP

The decision of the judges is final and the CLA reserves the right not to award the prize if the judges consider that no entry is of a sufficiently high standard or to divide the prize between two or more entries if the judges so decide.

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The CLA encourages all entrants to consider submitting their entries for publication, and may lend support to the submission of the winning entry. The winning entry must only be published if it is identified on publication as having won the CLA's Golding Essay Prize. All entrants agree not to submit their entries for publication until after the judges have announced their decision.

With kind regards

Sharon Horwitz
Secretary

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