IPQC - meeting

Patent Quality: a Greek tragedy

June 14, 2024

«Hoge bomen vangen veel wind»

Dutch expression

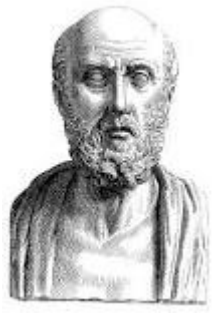
Translation:
«High trees catch a lot of wind»

Disclaimer: the statements made in this presentation are my own and they do not necessarily represnt the position of Syngenta Crop Protection AG

Greek myths and stories

- The EPO-cratic oath : What is the harm of patents on non-working «inventions» ?
- Pygmalion : Confusion between claim and invention
- Zeno paradox 1, Achilles and the tortoise : Abuse of the benefit of the doubt
- Zeno paradox 2, the «bald man paradox» : the claim commensurate with the technical contribution
- Augias stable : Does the mantra «bullshit in is bullshit out» hold for examination ?
- Prometheus set free : some practical recommendations

Hippocratic oath (or should I say the «epocratic» oath?)



Primum non nocere

A European

Patent

Examiner

What if I grant a patent for invention that does not work ? I do no harm, if it does not work, it is not commercially useful

Many things are commercially interesting without necessarily being inventions.

In fact, most commercially interesting things are NOT patented

EPO-cratic oath

- Mixtures are commercially important products in the crop protection business
  - Farmer does not want to drive over his field more than necessary
  - Mixtures have a broader spectrum than a solo product
  - It is a known method to combat resistance

- So if the inventive activity is not sufficiently supported by the technical teaching then the patent is taking away the freedom of the farmer to use that mixture.

- THERE ARE MIXTURES THAT ARE SYNERGISTIC (that should be patentable)

- However, by awarding patents too easily on certain subject matter the patent office will undermine the value of the patents that really do protect an invention.

Pygmalion and Galata

The relationship between claim and invention

Pygmalion and Galata

Actually one of the Metamorphoses of Ovid

Pygmalion was a cypriot, rather misogynous, sculptor. He remains celibate and focuses completely on sculpting. But then he sculpts the «perfect» woman in ivory. He falls in love with the sculpting and the Aphrodite brings the sculpting to life and Galata is born. They get married and live happy ever after.

Pygmalion and Galata (1890)

Painting by Jean-Léon Gérôme (1824 – 1904)

Metropolitan Museum of Art in New York City

Pygmalion and Galata

Help me find the word «inventon» in this definition

Article 84 EPC is the definition of the claims:

The claims shall define the matter for which protection is sought.
They shall be clear and concise and be supported by the description.

The EPO (and many patent attorneys) conflate the claim with the invention.
This is done for understandable reasons but it is important to make a difference.

The G2/21 case is about a mixture of two KNOWN insecticides that is shown to be «synergistically insecticidal» in a certain ratio against a certain pest.

The invention is that this mixture **HAS** synergistic properties : that is what needs to be demonstrated. That is for me the Article 83 requirement. Not whether the person skilled in the art would be able to mix two products.

Pygmalion and Galata

Help me find the word «claim» in this definition

- Article 83

  The European patent application shall **disclose the invention** in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art.

- Imagine that the invention is that a mixture of known compound A and known compound B have a synergistic effect when applied on a specific insect in a ratio range.

  Do I disclose the invention when I say that it is **a** mixture of A and B ?

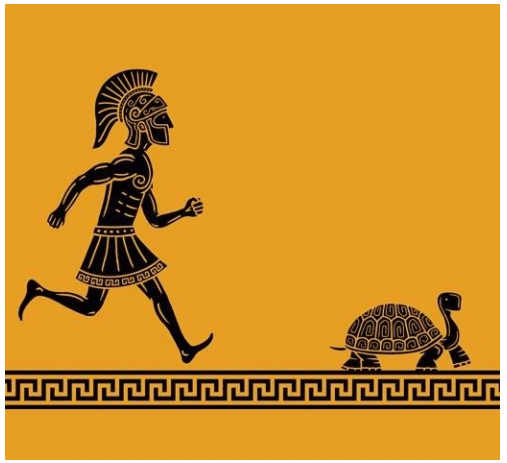
  Do I disclose the invention when I say that I enable the invention by just mixing A and B ?

  Is it correct that if I use that mixture for something completely different, I would be blocked by this patent?

Achilles and the tortoise Abuse of benefit of the doubt

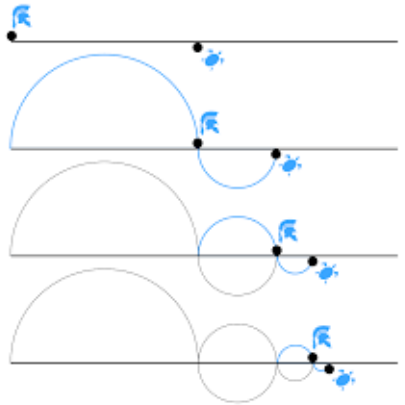
- The benefit of the doubt has a very dubious legal basis in my view.
- Article 4 (3) European Patent Convention

  "*The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council.*"



- Article 4 (2) of Regulation 726/2004 of the European Parliament and of the council… community procedures for authorization …of medicinal products

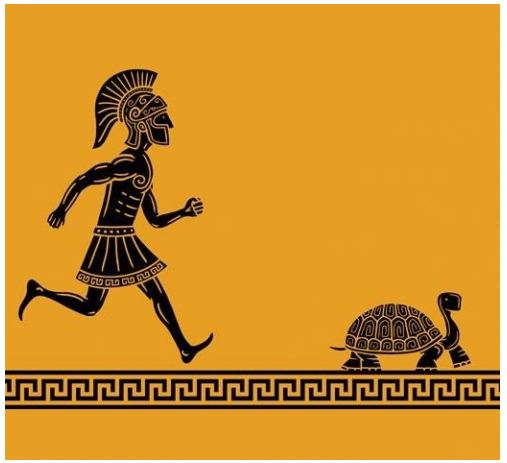
  "*The Community shall grant and supervise marketing authorisations for medicinal products for human use in accordance with Title II.*"

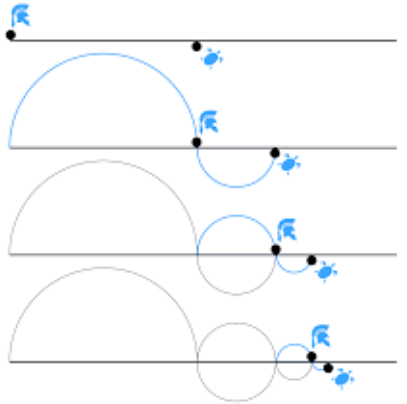


I am not aware that anyone can claim benefit of the doubt in the case of marketing authorisations for medicinal products.

Achilles and the tortoise Abuse of benefit of the doubt

- If the benefit of the doubt is constantly on the side of the applicant then you enter into the situation of Achilles and the tortoise.
- Present standard : serious doubts supported by verifiable facts, while the applicant can simply refer to non-supported allegation in the text.
- Syngenta as an opponent (and I am sure we are not the only one), has spent more money and resources to prove that something was not correct than the applicant ever did to get a patent
- Note that the opponent does not get anything (except the freedom that he was entitled to in the first place).
- **This is simply not a fair process**
- The benefit of the doubt should not be applicable for third parties either entering third party observations or filing oppositions.





The Zeno paradox

- The bald man paradox
- A bald man with 1 hair is still bald,
  a bald man with 2 hairs is still bald,
  ...
  When does the bald man have enough hair not to be called bald anymore

Nero is a famous comic character in Flanders

Comic author is Marc Sleen

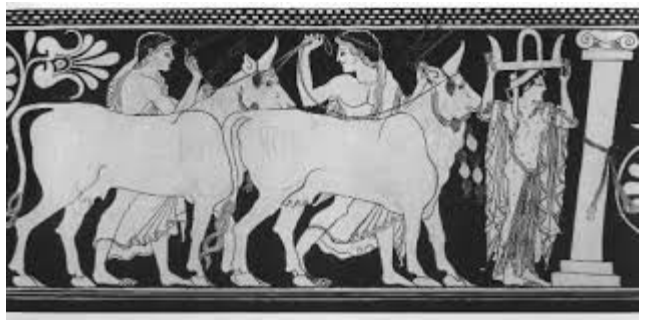
- When is the claim scope commensurate with the technical teaching

  Example is a methyl group : do I get methyl, do I get $C_{1\text{-}4}$alkyl, do I get $C_{1\text{-}8}$alkyl, etcetera ?

  Claim scope is the main issue in our technical art ?

- This is a long process and requires Examiners who are confident enough to limit claims.

Augias stable



- «Please remember Bullshit in is Bullshit out»
  dixit an EPO director
- This is in my view an incorrect view of the examination process
- It seems to suggest that the EPO somehow processes the application to transform it into a patent
- Examination is - in my view – not a transformation where the quality of the end product is dependent on the input.
- Examination is a selection between patentable and not patentable. If the application does not meet the requirements, it should be refused.

Prometheus set free: Some relatively simple steps to improve

- Change the approach of the benefit of the doubt always going towards the applicant/patent holder
- Have proper meeting minutes of oral hearings
- Take third party observations (even) more serious (lower the obsession with the «benefit» of the doubt.
- Take clarity objections more serious. Try to look at it from the person who potentially would infringe (hopefully UPC will help here when doing claim interpretation)
- Still give a decision even if the patent holder withdraws approval of the text
- EPO should take itself and its procedures serious and hence what is said or communicated during prosecution, opposition, and appeals should be cited in other procedures

Thank you for your attention !