

The Importance of a Seemingly Insignificant Poster Presentation...

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A recent decision from the High Court of Justice Chancery Division¹ in the United Kingdom has accentuated the need for tight control on disclosure of any data pertaining to a potential invention. The case involved two companies, Laboratorios Almirall SA (Almirall) and Boehringer Ingelheim International GmbH (Boehringer), which both started out having patents with surprisingly similar subject matter. Obviously, this situation could not last for long.

Background

Both patents were essentially for a combination of two drugs for the treatment of respiratory disorders – acclidinium and a β_2 -agonist. The two patents in question were filed within a year of each other and the similarity in the subject matter was not discovered until both were published (patent applications are not made public until more than a year after filing).

Acclidinium is not a new compound, having been disclosed in an earlier patent application by Almirall.² In early May of 2003, Almirall presented two different poster presentations at a conference on two separate days.³ The posters disclosed LAS 34273 (acclidinium) without disclosing the particular preferred enantiomer, and, more importantly, clinical data of the bronchodilatory and bronchoprotective properties on healthy males and those with Chronic Obstructive Pulmonary Disease (COPD). It is important to note that the posters did not disclose the use of acclidinium in combination with any other drugs.

The Judge summarised the facts of the matter as:

The first poster caught the eye of a passing Boehringer scientist [...] who took four photographs of the poster. The photographs were then sent to Boehringer's International Project Management team in Germany for what was referred to as a "Competitive Assessment Update" on anticholinergics.

Three months after Almirall's poster presentation, in July 2003, Boehringer filed three patent applications for the combination of acclidinium with various other drugs. The third of these applications was directed to the use of acclidinium in combination with a β_2 -agonist for the treatment of COPD. In the applications the preferred form of acclidinium was stated to be the *S* enantiomer.

In May 2004, with no knowledge of Boehringer's earlier patent application, Almirall filed its own patent directed to a combination of the *R* enantiomer of acclidinium with a β_2 -agonist for the treatment of respiratory disorders, particularly asthma and COPD.

On discovery of the Boehringer patents, Almirall applied for the revocation of the third Boehringer patent. Almirall used the grounds that Boehringer's invention was anticipated or was obvious and was insufficiently described. Boehringer counter-claimed that, if its patent was invalid, so too was Almirall's patent for the same reasons.

What to put in a patent specification

It appeared the patent application filed by Boehringer had been filed with little supporting information, such as experimental or clinical data. The presiding Judge stated:

No disclosure of any experimental work was given. Boehringer confirmed that they indeed had no disclosable documentation or laboratory records relating to experiments and/or tests with the anticholinergic compounds [acclidinium] in combination with β_2 -agonists.

Boehringer later filed supporting information during the hearing to show the efficacy of its claimed combination. However, the further supporting information was directed to the racemate and the *S* enantiomer only, rather than the active *R* enantiomer.

Almirall's patent specification included detailed reasoning regarding its invention and why it was not obvious. It also contained detailed experimental and clinical data demonstrating the results of combining *R*-acclidinium with a β_2 -agonist.

Almirall argued that Boehringer's patent was obvious in light of the two poster presentations and its earlier patent application for acclidinium.

The Court found Boehringer's patent was indeed invalid and the invention was obvious. The Court also found the patent specification insufficient in that it did not contain enough information to enable a person skilled in the art to make use of the invention.

However, justice is a double edged sword. The Court then proceeded to determine the validity of Almirall's patent and found that Almirall's patent was also obvious over its disclosure in its earlier patent and the two posters. Both Boehringer's and Almirall's patents were revoked.

Why is this important?

In a previous Patent Proze article we discussed patenting vs. publishing⁴ and we mentioned that a poster presentation could be sufficient to destroy novelty for a patent application. In this case the poster presentations did not disclose the invention per se, but they did disclose enough information to render the invention obvious and therefore unpatentable.

This decision also highlights the need for sufficient description of an invention to be included in a patent specification. Although Almirall's disclosure in its posters and earlier patent were the nails in the coffins of both applications, if this

¹ *Laboratorios Almirall SA v Boehringer Ingelheim International GmbH* [2009] EWHC 102 (Pat)

² WO 01/04188

³ The American Thoracic Society conference in Seattle

had not occurred, Boehringer's application may still have been found invalid on the grounds of insufficient description.

A reminder: if you have any queries regarding patents or patent ownership, or indeed any form of intellectual property, please direct them to:

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Dates of Note continued

Sir **Arthur Conan Doyle** was born on May 22, 150 years ago, and the day marks 20 years since the first successful transfer of cells containing foreign genes into a human being (at the US NIH). **Waldo Semon**, inventor of plasticized PVC, died on May 26 1999.

The highest temperature produced in a laboratory was attained on May 27, ten years ago. A plasma temperature of 510 million °C was reached in the Tokamak Fusion Test Reactor (TFTR) operated at the Princeton Plasma Physics Laboratory. Sir **Humphrey Davy** died on May 29, 180 years ago, while May 30 marks the 50th anniversary of the first hovercraft flight at Cowes on the Isle of Wight; its inventor Sir **Christopher Cockerell** died on 1 Jun 1999. On the last day in May 150 years ago a patent for flaked cereal was applied for by Dr **John Harvey Kellogg**.

Irish chemist **Richard Kirwan**, whose book *Elements of Mineralogy* (published 125 years ago in 1784) was the first English systematic treatment of the subject, died on 1 Jun 1812. On the same day in 1909, Swedish chemist **Theodor Svedberg** filed to patent his method of producing colloidal sols or gels, simultaneously in the UK, Germany, Denmark and Switzerland. By 1926, he had received the Nobel Prize in Chemistry for his work with disperse systems. On Mar 4, 1929, **George Eastman** demonstrated the first Technicolor movie.

Johan Gadolin, who discovered the first of the 15 rare earth elements, yttrium in 1794 and after whom gadolinium is named, was born on 5 Jun 1760. June 9 marks the 50th anniversary of the death of **Adolf Windaus**, the German organic chemist who showed the connection between sterols and vitamins and who received the 1928 Nobel Prize for chemistry, the first for work in human nutrition.

Anders Angstrom died 21 Jun 1874. Jun 21 also marks the day in 1808 when the isolation of boron was announced by **Joseph Louis Gay-Lussac**, nine days ahead of Englishman **Humphrey Davy** who independently separated the element and made his announcement on 30 June.

Walther Hermann Nernst, one of the founders of modern physical chemistry, was born 135 year ago on Jun 25. On this day 60 years ago, scientists in New York announced that the anti-

tuberculosis drug *Neomycin* had been fully tested on animals. Moreover, Jun 25 1903 saw **Marie Curie** attend the examination committee for her PhD - she was awarded a Nobel Prize for her research later the same year! **Lord Kelvin** was born 185 years ago on Jun 26.

James Smithson, who died 180 years ago on Jun 27, was the English scientist who provided funds in his will for the founding of the Smithsonian Institution in Washington DC for the *increase and diffusion of knowledge*. He was a chemist and mineralogist, and *smithsonite* (zinc carbonate) was named for him. **F. Sherwood Rowland**, who has his 80th birthday on Jun 28, is one of the 1995 Nobel Chemistry Laureates (with Molina and Crutzen) for research on the depletion of the Earth's ozone layer.

July 1 marks the 75th anniversary of the first whole of body X-ray photograph. It was taken in Rochester (NY) with a one-second exposure using the ordinary clinical conditions common at an average hospital. On July 3, 1929, foam rubber was whipped up for the first time by **E.A. Murphy** at the Dunlop Latex Development Laboratories in Birmingham (UK).

Marie Curie died 75 years ago on July 4 and **Georg Ohm** 155 years ago on the 6th. **Robert Woodward**, the most noted organic chemist of the mid-20th century, died on 8 Jul 1979. On the same day in 1895 **Joseph Loschmidt** died. He was an Austrian chemist and physicist and first to propose (1861) some kind of cyclic structure for benzene and many aromatic hydrocarbons; this was four years before Kekulé devised the correct ring structure. It is also the 225th anniversary of the death of **Torbern Olof Bergman**, the Swedish chemist who experimented with carbon dioxide, which he named *aerial acid* and Priestley called *fixed air*. His investigation led him to successfully prepare artificial mineral water.

Erno Rubik, inventor of the cube named after him, has his 65th birthday on July 13, a day that also marked the birth of **Stanislaw Cannizzaro** in 1826 and the death of **August Kekulé** in 1896.

Emil Fischer, who laid down the foundations for enzyme chemistry, died 90 years ago on July 15, the day 140 years ago that margarine was patented.