D YOUNG & CO

PATENT NEWSLETTER

April 2009

MERCK PATENT, EP1175904B, REVOKED BY EPO

Merck's patent, EP1175904B, relating to their 70 mg once-a-week alendronate treatment for osteoporosis was revoked by the EPO Opposition Division at Oral Proceedings held on 17-18 March 2009.

This patent was a divisional of EP998292B which also protected this treatment regime but had been revoked by the Technical Board of Appeal in 2006 due to added matter. Merck recycled the same invention, addressing the added matter rejection of the Board of Appeal and had commenced litigation against generic companies in several territories. The recycled patent was therefore of great interest to the generic industry as demonstrated by the 17 oppositions filed and its inclusion in the EU Commission's review of the pharmaceutical industry.

BACKGROUND

The parent patent had been rejected as lacking inventive step by the Opposition Division and then on the ground of "added matter" by the Technical Board of Appeal. The Board of Appeal therefore did not reach any decision on inventive step. The claims

CONTINUED ON PAGE 2

LIGHTS, CAMERA, ACTION!

WASHINO KINYA v SONY CORPORATION

At the Oral Proceedings of the Technical Board of Appeal T0083/06, the Board dismissed an appeal by the patent proprietor, Washino Kinya, against a decision of the Opposition Division to revoke European patent 0812509, following an opposition filed by Sony Corporation, represented by D Young & Co. As part of the appeal the Patent Proprietor requested that an expert witness be allowed to make oral submissions to support the presentation of their case. This article describes the facts of the case and explains the conditions set by the EPO for allowing oral submissions by persons other the European patent attorneys. The difference between the established rules and their implementation by the Board of Appeal are discussed and some tactical points presented for consideration.

THE FACTS

The European patent, owned by Washino Kinya, related to a camera which captured and recorded video images in more than one format (multi-format), and a system for editing the video images in one of the formats and then applying the edit decisions to video images in another of the formats in order to form a video production. Each of the video formats is recorded with correlated time code information, which allows edit decisions made on one format to be applied to the other format.

CONTINUED ON PAGE 3

UK PATENT PROSECUTION IP FIRM OF THE YEAR

D Young & Co are delighted to announce that we have been recognised by the UK publication, Managing Intellectual Property (MIP), as UK Patent Prosecution Firm of the Year for 2009.

The prize was handed out during the MIP Global Awards Ceremony held at London's Dorchester Hotel on March 31st 2009.

We are honoured to receive this prestigious award and are grateful to our clients for their continued support.

CONTENTS

EDITORIAL

Welcome to our April 2009 newsletter.

We are pleased to begin this newsletter as MIP's UK Patent Prosecution Firm of the Year. We received this accolade at the MIP Global Awards Ceremony on 31st March. We are delighted to receive this recognition for our work in IP.

In this edition, we report on the very recent revocation of Merck's patent EP 1175904B (70 mg once-a-day alendronate treatment for osteoporosis) after one of the largest opposition oral proceedings to be held at the EPO. We also highlight our recent success in revoking EP 0812509B before the EPO Board of Appeal (T0083/06) and provide comment on tactics at oral proceedings.

In addition, we provide articles on the recent judgement from the House of Lords in Generics (UK) Ltd & another (appellants) v H Lundbeck A/S (respondents) and the UK High Court's ruling in Schlumberger Holdings Ltd. v Electromagnetic Geoservices A/S. There are also articles on Registered Community Designs and employee-inventor remuneration.

Finally, we are pleased to announce the appointment of two new partners to D Young & Co, with Tim Russell (Chemistry and Biotechnology Sciences Group) and Tony Albutt (Electronics and Mechanical Engineering Group) joining the partnership as of 1 April 2009. Their biographies are included in this edition of the newsletter and can also be found on our website.

We hope you enjoy this edition of our newsletter.

CONTINUED FROM PAGE 1

were amended in the divisional application to take account of the Board of Appeal decision and the examiner acknowledged inventive step on the basis of selecting an alternative "closest prior art" document from the Opposition Division and a statistically significant advantage arising from an analysis of past-marketing reports of adverse side effects when comparing the 70 mg/week dosage with the previous 10 mg/day dosage.

As many generics were already on the market selling the 70 mg dosage, the newly granted patent generated considerable concern leading to one opponent writing to the President of the EPO concerning the examination and opposition procedure. In addition to the permitted grounds of opposition, the oppositions included lengthy arguments concerning *res judicata* and double patenting.

THE OPPOSITION

The opposition was one of the largest held at the EPO and oral proceedings were conducted over two days. The decision was announced rejecting the amended claims as lacking inventive step over the prior art. In doing so, the Opposition Division reversed the examiner's decision concerning the "closest prior art." The claims were then considered to be obvious.

The opponents had argued that the data relied upon by the examiner was unreliable and more importantly, was not a comparison with the closest prior art, regardless of whether this was the document relied upon by the examiner, or the document ultimately chosen by the opposition division. This decision is in line with the previous national decisions in the Dutch and Belgium national courts (concerning the divisional) and UK courts (on the parent patent). The full reasoning will become available in 4-6 weeks.

Neil Nachshen represented the TEVA parties to the opposition and has been advising TEVA on their alendronate related litigation in the EU and Eastern Europe since 2000.

NEIL NACHSHEN

EUROPEAN DIVISIONAL APPLICATIONS
NEW PROPOSALS

The Administrative Council of the EPO has, in a decision of 26th March 2009, decided to amend the period during which a divisional European patent application may be filed.

Under the current regime a divisional application may be filed at any time based on any earlier pending European patent application. However, under the new rules all divisional applications will have to be filed within 24 months of the first communication from the Examining Division (first office action) in any series of divisional applications; or within 24 months of a specific objection of lack of unity.

The changes are expected to come into force on 1 April 2010 and we will provide further information and analysis in future Newsletters.

Furthermore, according to the claims presented before the Court of Appeal, the video formats are arranged to be data compressed, the compression of one format being greater than the compression in the other format. By compressing one of the formats by a greater amount, the video images can be recorded on a non-linear recording medium, such as a hard-disk, which allows editing to be performed more quickly. The edit decisions can be applied to the less compressed, higher quality recording, in order to produce the final version of the video production. Since the edit decisions are generated using the more compressed version on a medium which can be navigated more quickly, such as a hard-disk, the time to produce the video production is reduced. Furthermore the less compressed version, from which the final video production is formed, can be stored on any desired recording medium, because navigation on that medium is only required when applying the edit decisions, and so the time to navigate that format will have a reduced affect on the rate at which the final video production can be formed. The technique is particularly relevant to high definition video productions, because navigating high definition video material is computationally and technically more demanding.

It is understood that there were other members of the patent family to the European Patent which was revoked by the Opposition Division, notably in the US and Japan. However, it is understood that the European opposition procedure and the appeal was the first jurisdiction to reach a conclusion.

THE APPEAL

At the Oral Proceedings before the Opposition Division, the European patent was revoked on the ground that it lacked novelty and/or inventive step, having regard to a prior published Japanese patent application.

The Patent Proprietor then appealed the decision. As part of that Appeal, the Patent Proprietor submitted an affidavit from an expert witness, which asserted inter alia that the definition of the term "compression", which the Opposition Division had applied in order to read the claims onto the prior art, was not one which would be recognised by the skilled person.

After receiving the summons to Oral Proceedings the Patent Proprietor requested that their expert witness be allowed to join the Oral Proceedings via a video conferencing facility. The Board of Appeal refused the request, stating amongst other reasons for refusal, that the Patent Proprietor had not submitted any arguments as to why the expert was required to make oral submissions on specific legal or technical issues as required by the principles set out by the Enlarged Board of Appeal in Decision G 4/95. Shortly after the deadline for making final written submissions before the Oral Proceedings, the Patent Proprietor informed the Board of Appeal that their expert witness would be attending the Oral Proceedings. The Patent Proprietor also requested permission for the expert witness to make oral submissions to assist in presenting the Patent Proprietor's case, but without giving any indication of the technical or legal grounds on which the expert was to speak.

G 4/95

Decision G 4/95 was a relatively early case in the history of the EPO, which set out the conditions under which a person accompanying a European patent attorney can be allowed to make oral submissions to assist in the presentation of a case. The decision by the Enlarged Board followed a case before the technical board of appeal in which a party objected because the other side's case was presented almost entirely by a US patent attorney, thereby undermining the principles of having European patent attorneys as professional representatives which are recognised by the EPC. In addition to the requirements identified above of specifying issues on which an accompanying person will be speaking, G 4/95 established that the request for an expert witness to speak must be made sufficiently in advance to allow all parties to make appropriate preparations, including, if necessary, provision for other experts to speak.

TO OBJECT OR NOT TO OBJECT?

The patent system is about people as much as about protecting the technology. Whilst in the abstract sense the application of the principles of G 4/95 should direct the Board of Appeal to prevent an expert witness from speaking, because a party has not complied with those principles, the application of the law is usually tempered with reality in that rules are applied to people by other people. The members of the Board of Appeal will, as far as possible, not only do everything possible to be fair to both sides, but will do everything possible to be seen to be fair to both sides. As such the Board of Appeal, as in the present example, will not simply prevent an expert witness from speaking because the Patent Proprietor has not complied with the principles of G 4/95, but they will ask the other side's attorneys whether they object to the expert witness speaking. As an attorney, although it may seem to be a straightforward matter that one would block an expert witness for the other side from speaking, if there is an opportunity to do so, one needs to balance this opportunity to object against a possibility that there may be other, albeit unrelated, procedural issues raised on which the Board of Appeal may have to decide between the two sides. Therefore, if one objects to an expert witness speaking, especially if that person has travelled a great distance (the USA in the present case), then one needs to bear in mind that the Board of Appeal may seek to "even the score" by deciding against that side on another procedural issue.

Furthermore, one needs to consider whether it will appear to the Board of Appeal that the party objecting is doing so to prevent some material issue from being heard which again could be to the detriment of the objecting party.

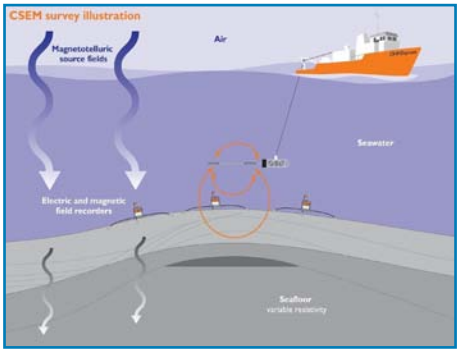
In this case, after balancing these issues, the author objected to the expert witness speaking on procedural grounds, the appeal was dismissed and the revocation of the patent was upheld.

JONATHAN DEVILE

DRILL HERE!

The UK High Court recently ruled in favour of the oil services company Schlumberger to invalidate three key patents owned by Electromagnetic GeoServices AS. The patents relate to one of the hottest areas in oil exploration - controlled source electromagnetics or CSEM for short - which has been described as the biggest breakthrough in oil exploration since the 1980s.

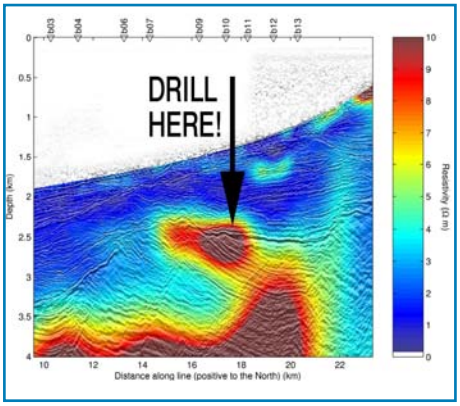
The reason for the excitement is that CSEM can directly detect oil reservoirs, whereas seismology cannot. While seismic is sensitive to geological structure by detecting how sound waves scatter from boundaries between layers of rock, CSEM measures electrical resistivity and so can detect oil which is resistive compared to its usual background. Since it can cost tens of millions of dollars to drill a test well to establish whether a prospect contains oil or just water, the value of CSEM is clear.



Oil industry recognition of CSEM underwent a step change in 2002 after scientists from the University of Southampton in the UK and Scripps Institution of Oceanography in the US published results of a joint survey off Angola with the Norwegian state oil company Statoil. This was the first public demonstration that CSEM could locate an oil field - albeit one already known to be there! Although the University of Southampton and Statoil wanted to form a joint spin-out company to exploit CSEM, they could not agree terms, so each formed their own companies - Offshore Hydrocarbon Mapping plc (OHM) based in Aberdeen and Electromagnetic Geoservices AS (EMGS) based in Trondheim.

The success of OHM & EMGS did not escape the notice of Schlumberger - the world's largest oil services company. Provoked by repeated sabre rattling by EMGS about its patents, Schlumberger sought revocation of three of the earliest EMGS patents in 2007. Although OHM had filed oppositions against all three patents at the European Patent Office (EPO), the UK court ruled in 2008 not to wait for a decision by the EPO, but rather to proceed to trial. Indeed as of today's date none of the EPO oppositions has a hearing date set which would appear to vindicate the position of the UK court, and call into question the opposite decision of the Dutch court.

In the UK trial, a principal point of dispute between the parties was the definition of the skilled person. The parties agreed that CSEM was a well known technique of itself, having been used for over 20 years by academic groups to map a variety of targets. EMGS argued that, although CSEM was not new, its application to detecting oil was. Following on from this, EMGS argued that an oil industry exploration geophysicist would never have thought of using CSEM, since oil people looked on CSEM as just a fancy academic thing. The judge, Justice Mann, did not accept this argument, but instead endorsed the Schlumberger position, which was that the academics already practising CSEM knew it could be applied to any resistive target including oil reservoirs, so since the invention was obvious to them, they should be free to practice it as a matter of public policy.



In doing so, the judge distinguished over the famous Dyson case (*Dyson Appliances Ltd v Hoover Ltd* [2001] RPC 473), where it was held to be inventive to design a vacuum cleaner that dispensed with a bag and in its place used a cyclone. Although cyclones were well known in a general sense to engineers who designed vacuum cleaners, the skilled person was held to be "bag-ridden", i.e. so fixated on the "fact" that a vacuum cleaner needed a bag, that his mindset prevented him thinking beyond that assumption. In the present trial, the judge distinguished over Dyson by stating: "*What I think that the evidence establishes (so far as exploration geophysicists were concerned) is not a positive view (akin to a mindset) that CSEM had no part to play in oil exploration, but an absence of an appreciation that it could*."

Related to this issue was a "squeeze" between sufficiency and obviousness. Since the EMGS patents were very thin on implementation detail, EMGS were forced to argue that the skilled person for assessing obviousness was a different person from the skilled person for assessing sufficiency, i.e. whether the patent has enough in it to allow the invention to be put into practice. This was because EMGS needed a CSEM expert for sufficiency to fill in the gaps in the patents, but needed to exclude the same notional person

when considering obviousness. After referring to sections 14 & 72 of the UK Patents Act, which correspond to Article 83 & 100 of the European Patent Convention, the judge stated: "*The statute therefore seems to point strongly to the same persons being the skilled addressee throughout, and for all purposes. This seems to me to accord with common sense and principle. It produces a sensible result.*" It is interesting to speculate how the EPO might approach this question. The EPO would almost certainly base its analysis on the problem-solution approach. Such an analysis might start from the EPO Appeal Board case T 422/93, where it was held: "*the starting point for defining the appropriate skilled person is the technical problem to be solved on the basis of what the closest prior art discloses...*".

Although this EPO case was purely on inventive step, perhaps one could develop an argument from it that a different skilled person could be selected to assess sufficiency? However, that would raise a potential incompatibility with the established EPO position that the same level of skill should be ascribed to the skilled person when considering both inventive step and sufficiency (e.g. T 60/89). This necessity of equal treatment of inventive step and sufficiency is exactly the line Justice Mann took in the present UK decision.

In any event, somewhat ironically given the time spent on deciding the point, the UK decision did not turn on the identity of the skilled person after all. To understand why, it is necessary to point out that the principal prior art document was a chapter in a text book. The text book was a primer for exploration geophysicists (EMGS's skilled person) written by a CSEM expert (Schlumberger's skilled person). Because of this fact pattern, the judge ruled the chapter was common general knowledge regardless of which definition of skilled person was adopted!

MILES HAINES

Figures reproduced courtesy of Offshore Hydrocarbon Mapping plc

RCD APPLICATIONS: KEEP THEM FREE OF OTHER PEOPLE'S TRADE MARKS!

Some recent decisions from the European Designs Registry (OHIM) have reminded users of the need to avoid incorporating other people's trade marks in your Registered Community Design (RCD) applications.

An RCD application is not substantively examined by OHIM, and it is only after registration that validity may be challenged by a third party who files an application for a declaration of invalidity. One of the possible grounds is that the RCD in question incorporates an earlier trade mark which is effective in one or more member states of the EU and which conflicts with some or all of the design features of the RCD.

Last November, the Invalidity Division at OHIM gave consideration to RCD No. 807847-0001 which, as permitted by the modern European design law, was for a "graphic symbol" (i.e. a logo) which prominently incorporated the word "Vitec". The word "Vitek" was, however, already registered as a trade mark by a third party, specifically as an International registration designating various states of the EU. The owner of the trade mark complained that the RCD incorporated a word whose use he is entitled to prohibit on the ground that there would be a likelihood of confusion with his trade mark. The Invalidity Division agreed and the RCD was declared invalid.

In December, the Invalidity Division had to consider an RCD in which the earlier trade mark was incorporated in a registered design relating to a manufactured 3-D product rather than a 2-D graphic symbol. Specifically, RCD No. 794870-0004 protected a shoe and the side of the shoe was shown as having a stylised "H" in a contrasting colour. There was an earlier Community trade mark for a similar stylised "H". Prompted by this clash, the owner of the RCD tried to amend the RCD to re-establish its validity by removing the depiction of the stylised "H" from the side of the shoe. Amendment is allowed in invalidity proceedings but there must be "identity of design" between the original and amended designs. Unfortunately, the "H" was a prominent feature of the design of the shoe and the Invalidity Division held that the proposed amendment would change the identity of the design, and thus amendment was not allowed and the RCD was declared invalid.

We therefore recommend that, before filing an RCD application, it is wise to review the design and consider whether it incorporates somebody else's earlier trade mark. If necessary, remove the conflicting features before filing the RCD application as deletion may well be impossible after registration has occurred.

PAUL PRICE

WHAT IS SUFFICIENT?

OPINIONS OF THE HOUSE OF LORDS IN GENERICS (UK) LTD & OTHERS (APELLANTS) v H LUNDBECK A/S (RESPONDENTS)

On 25 February 2009, the UK House of Lords handed down its opinions in Generics (UK) Limited v H Lundbeck A/S[1] dismissing the appeal and confirming that the product claim to a single enantiomer was sufficient.

BACKGROUND

Lundbeck's Patent, EP(UK) 0347066, included a claim to the (+)-enantiomer of the racemate citalopram. Citalopram is an anti-depressant drug for which Lundbeck had previously held a patent.

At the first instance the judge found the claims to be novel and inventive, but invalid for lack of sufficiency. The first instance judge ruled that the preparation of the individual enantiomers to identify which one gave rise to the beneficial effects of citalopram was an obviously desirable goal and their testing trivial. The inventive step provided by Lundbeck was seen as a way of preparing the individual enantiomers. The judge concluded that, as the specification only disclosed one way to make the (+)-enantiomer, "the first person to find a way of achieving an obviously desirable goal is not permitted to monopolise every other way of doing so". In reaching his decision, the first instance judge relied on the House of Lords decision Biogen v Medeva[2] (Biogen). As reported in our June 2008 newsletter, the Court of Appeal disagreed and ruled that when an ordinary product claim satisfies the requirements of novelty and inventive step, the technical contribution to the art is the product and not the process by which it has been made, even if the process was the only inventive step.

BIOGEN

As a reminder, in Biogen the claim was essentially for a recombinant DNA molecule which expressed the genes of any HBV antigen in any host. The inventor had expressed large fragments of the then unsequenced HBV particle in a standard plasmid. The idea being that insertion of large fragments would give rise to a greater chance of these relevant HBV antigens being expressed. The House of Lords in Biogen found that the claims were too broad, since they covered methods which owed nothing to the actual invention.

HOUSE OF LORDS' DECISION

The question for the House of Lords in the present case was essentially whether the Court of Appeal's decision was an unwarranted departure from Biogen and therefore infringed the general legal principle that the extent of the patent monopoly, as defined by the claims, should correspond to the technical contribution to the art in order for it to be supported, or justified.

The House of Lords distinguished a simple product claim to the situation in Biogen which covered a wide class of products. The Biogen claim was characterised as being "to a product, a molecule … identified partly by the way in which it has been made … and partly by what it does", i.e. to a "product-by-process claim".

The House of Lords emphasised that, since the present claim related to single product claim, all that was required for sufficiency was a disclosure of one method of making the product.

During the hearing there was much discussion about whether "inventive concept" means the same thing as "technical contribution to the art". The House of Lords' view was that "inventive concept" is concerned with the idea or principle which gives rise to an inventive step, whereas "technical contribution" is linked to how far forward the inventive concept takes the state of the art.

Biogen could, therefore, be seen as a situation involving a brilliant inventive concept, but one which did not make a lasting impression on its rapidly advancing technical field, particularly once the HBV genome was sequenced. In the present case, although the inventive concept actually lay in the method of obtaining the (+)-enantiomer, the technical contribution was the provision of the product itself.

It is also worth noting that the House of Lords referred to a number of EPO Board of Appeal decisions in its ruling emphasising the importance of UK patent law aligning itself, if possible, with clear jurisprudence of the EPO. Indeed, although novelty was not an issue by the time the case reached the House of Lords, the House of Lords did note that, according to established EPO case law, the novelty of enantiomers is not destroyed by a prior description of the racemate, provided that the prior art does not include specifically named enantiomers which can be produced.

CATHERINE MALLALIEU

Notes:
1 [2009] UKHL 12
2 [1997] RPC1, 45

DOES "MYOVIEW" SHOW VISION OF FUTURE FOR EMPLOYEE INVENTOR COMPENSATION CLAIMS?

In a recent landmark ruling the English High Court has awarded two former employees of GE Healthcare (previously Amersham International Plc, "Amersham") £1.5 million in recognition of their contribution in creating a diagnostic tool for heart defects.

Drs Kelly and Chiu are co-inventors of a patented radioactive imaging agent "Myoview" used to detect heart defects. The product was highly successful for Amersham, generating world-wide sales of over £1.3 billion up to 2007.

Under the UK Patents Act 1977 it is possible for employee inventors to claim compensation in relation to patents which are of "outstanding benefit" to their employer. However, prior to this decision no such claim had ever succeeded, although it is known that there have been some settlements.

It had been widely observed that a major obstacle in making a successful claim for compensation under the Act is the need to show that the patent is of outstanding benefit. In 2005, the Act was amended to make compensation payable when the invention (and not just the patent) has been of outstanding benefit. However, this amendment only affects patents applied for after 1st January 2005 and so was not considered in this decision.

In considering the link between the success of Myoview and the patent protecting it, the court ruled that it was sufficient to show that the patent was a cause, not necessarily the only or dominant cause, of the benefit derived by the employer. Once this was established, the court should determine the amount of benefit attributable to the patent and then decide whether this benefit is outstanding in the circumstances.

In assessing the benefit of the patent, the court considered how Myoview would have performed without patent protection and on the facts of the case concluded that the benefit to Amersham was outstanding.

The court noted that from any standpoint, Myoview was responsible for a large proportion of Amersham's profits. In 1996 sales of Myoview exceeded £175 million against total R&D costs of less than £2.5 million. Myoview also compared favourably with other products in the Amersham stable, such as Ceretec (a brain imaging agent), which had peak annual sales of around £20 million. The court further ruled that the patent covering Myoview was an important factor allowing Amersham to participate in corporate deals which transformed the company into a global business.

In assessing the value of the patents to Amersham and the fair share which should be attributed to the inventors, the court adopted a conservative approach assessing the value of the patents at £50 million and the inventors share at 3%, thus arriving at the £1.5 million award.

This decision is probably of most significance to the pharmaceutical industry where a single patent may protect a product generating £ millions in sales. However, it is doubtful that this decision will result in a flood of new claims. Moreover, it is unlikely that the outcome will be welcomed in the boardrooms of Britain's life science companies, the relatively low value of the award, representing just 0.1% of turnover, should not have them off-shoring all their R&D activity just yet.

KIRK GALLAGHER

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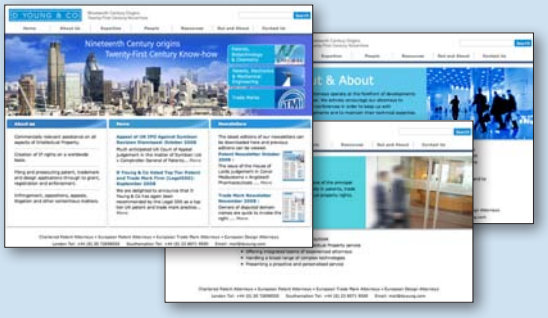

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