Question Q213

National Group:	**The Netherlands**
Title:	**The person skilled in the art in the context of the inventive step requirement in patent law**
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Questions

The suggested questions will try to analyze and to understand the definition of the "person skilled in the art" in three steps: the notion of the "person", the issue of its personal "skills" and finally the "technical field" in which these skills are exercised.

1) The study proposed by AIPPI starts with the consideration of the person as one of the elements of the definition of the person skilled in the art.

The Groups are therefore requested to indicate if the person skilled in the art is one, or more, person.

First of all, it should be said that the interpretation of the skilled person in the Dutch legal practice in influenced by the interpretation as given under the European Patent Convention by the Boards of Appeal of the EPO. The reason is that many cases that are heard by Dutch courts are based on the Dutch part of a European patent.

The question whether the skilled person can be one or more persons. This is especially true when the skilled person is said to have knowledge in several technical domains (see also question 6). It further will depend on the breadth of the patent and the technical field of the patent (District Court Novartis vs Actavis, 2 July 2008;

Boehringer Ingelheim Pharma vs Purac Biochem, 26 May 2009; Intervet v. Merial, 9 december 2009).

If a skilled person is a team of people, then are the team members all the same or may they be different in their various attributes, specifically if such a team may comprise persons from various disciplines or having different levels of qualifications?
Whether the team members are the same or different in their attributes is dependent on the subject of the claimed invention. Thus, when the team person originates from different disciplines the level of qualification may be different.

2) Is the skilled person a real person (or team of persons) or a hypothetical person?

The skilled person or skilled team is a hypothetical person or team The skilled person is thought to have encyclopedical knowledge of the literature and qualifications in order to be able to understand the patent and the prior art (Advocate General in Gouda vs Henkel, BIE 2004/15). In addition, it is a fiction that the skilled person and team has access to all relevant knowledge available in the form of any information carrier. Because of the hypothetical nature of the skilled person or team it is not possible for the court to hear the skilled person or team.

3) The person skilled in the art has to be analyzed in the frame of her/his personal capacities and attributes.

At first, it is necessary to know whether and if so to which extent this person has reasoning and/or creative capacities or if he/she has merely the capacity to perform or execute the orders or instructions from other people.

It is presumed that the skilled person knows all the literature of his technical field, but has little or no creativity. The skilled man may make combinations with his common general knowledge, and he may follow up on directions or lines of thought as developed in the prior art document. However, he can combine different pieces of prior art only if there is a specific 'pointer' in the prior art, that would lead him to such a specific combination.

Another point that can be discussed is whether the personal attributes of the person skilled in the art are the same also for other circumstances in which the person skilled in the art may have a role, such as construction of the patent or for the consideration of the sufficiency of the disclosure in the specification, even if this last point goes beyond the scope of the present study.

The personal attributes of the skilled person are the same, as well as in the other circumstances in which he plays a role. These circumstances are: (1) assessment of validity, (2) assessment of the scope of protection and (3) sufficiency of the disclosure.

The skilled man has as his main task in the assessment of validity and of inventive step the determination whether a particular solution would be obvious to the skilled man. This may include the assessment of the skilled man's expectation of success. While considering the prior art for the assessment of validity, reference may be made to the skilled man also in order to determine the scope of the disclosure of prior art.

Where it concerns the construction of claims and the scope of protection, reference is made to the Protocol on the interpretation of art 69 EPC, which explicitly excludes determining the scope of protection solely based on the assessment by the skilled

man. As such he seems to have a more limited role where it concerns the assessment of the scope of protection.

Where it concerns the sufficiency of disclosure it should be noted that Netherlands law mirrors art 83 EPC in that it requires the patent specification to contain a description that allows the skilled person to work the invention. The skilled man is always assumed to be the 'addressee' of the patent. Therefore, his skillset may be different, depending on the patent's technical field. He has full knowledge of the relevant technical field, including terminology and the required specialist knowledge, see also question 5. In general, the Netherlands case law indicates that sufficiency thresholds are easily met and therefore insufficiency does not generally play a role of any significance in the assessment of validity.

Finally, the question that can be discussed is the issue of knowing if the personal attributes of the person skilled in the art are the same for different IP rights covering technical creations, like patents or utility models, species, etc., if they exist in the national law.

Under Netherlands law, there are no other IP rights covering technical creations.

4) Another important aspect of the question is to know what are the personal skills of the "person skilled in the art"?

At least, two important issues deserve to be analyzed:

- What is the level of the qualification or skills of the person?

The level of skills of the skilled person will mainly depend on the field of the invention. The skilled person or team has encyclopedical knowledge of the literature and qualifications to be able to understand the patent and the prior art. But the Dutch court will regard the skilled person as an "average skilled worker". The skills will therefore be on an average level.

- And what are the nature and the scope of his/her knowledge?

a) what is the scope of such knowledge in general terms?
The nature of the above-mentioned skilled person and of his knowledge is related to the technical field of the invention. In general, handbooks and review articles will be regarded to form part of the scope of his knowledge. The skilled person is expected to consider the prior art of his relevant neighboring and broader general technical fields. He is assumed to search the literature of non-specific (general or broader) fields, which provide solutions to general technical problems solved by the invention in its specific field. The skilled person is assumed to act upon so-called 'pointers' in publications, which may lead the skilled person to disregard certain publication which would otherwise be deemed logical for him to consider, or may lead the skilled person to consider prior art in neighboring technical fields or even completely different technical fields, which he is deemed not to consider without such a pointer.

b) is such knowledge limited to the general technical training of such person?
In general, one could say that the knowledge of the skilled person is not limited to the general technical training.

c) to what extent is information in documents – articles or prior patents - considered to be included as part of such working knowledge?
If the technical field of the invention is one that develops quickly such that textbooks are not yet available and the general knowledge is not likely to be found in handbooks or review articles, then prior patents or patent applications can form part of the skilled person's working knowledge.

d) can such knowledge include information which the person may not have memorized, but can readily look up?
Again, as the skilled person is a fictitious person having encyclopedical knowledge of the literature, the fictitious person appears not to have the need to look up information.

5) The question of the person skilled in the art raises also the problem of the moment of the evaluation of those skills: should they be all evaluated at the moment of the appreciation of the validity of the patent, i.e. at the moment of the priority date, or could they be evaluated also at the date when the patent is assessed by the Judge, for example in the infringement proceedings, where the validity can be debated jointly with the infringement claim? This may conduct to the differences of appreciation in case the notion of the equivalence is used in relation to the prior art.
Where it concerns the validity of the patent, the knowledge of the skilled person at the priority date of the patent (i.e. when the invention was made) is relevant for the assessment of the level of skill.

Where it concerns infringement, Dutch case law is not clear about which point in time should be the reference time for the skilled reader to assess the scope of protection e.g. to assess the equivalence of an alleged variant. This question has been addressed by the Dutch group in AIPPI Question Q175. Since then case law has not changed substantially.

In brief in a case by case approach lower Dutch Courts have applied both fixed assessment dates (the date of the invention, or publication of the patent application) and variable assessment dates. The Court of Appeal of the Hague has repeatedly admitted that it is not possible to define the scope of protection forever "as the scope will depend on the specific infringement at stake and a selection of prior art" (Court of Appeal, 20 February 1992, Epilady/Improver; Court of Appeal, January 30, 2001,(Epenhuysen/Diversey). Quantity wise more decisions have been rendered by the Dutch Courts that apply a variable date, in most cases the alleged infringement date.
The Dutch Supreme Court has not decided to date on the question what date is the relevant reference date in determining the scope of protection, but the Advocate General had chosen for the date of infringement (Supreme Court, 2 November 2001, (BT vs. KPN and Plumettaz).

6) The next issue related to the definition to the person skilled in the art is the technical domain or "the art" in which his or her skills are performed.

The first sub-question is to know if those skills are concentrated in one or several technical fields.
*The answer to the first sub-question is that the Dutch courts have accepted that the skills of the person skilled in the art are concentrated in a technical domain, so that it may require inventive step if a solution to a problem is coming from outside this domain (District Court (*12 March 2008 *) ECB vs Document Security Systems).*

It is noted that this does not mean that any invention with elements from a plurality of domains requires inventive step, because the Dutch courts have defined the technical domain dependent on the objective problem that is solved by the invention. Thus the technical field can differ from that of the closest prior art, Boehringer Ingelheim Pharma vs Purac Biochem, 26 May 2009).

The Dutch courts have accepted that the skilled person will look for solutions in generic fields and neighboring fields when the objective problem is generic to the neighboring fields and the technical field of the invention (*District Court, HTS Hans Torgensen & Sønn vs. Bébécar utilidades para criança (15 juli 2009).*

And the second one is related to the way the frontiers between different technical fields can be established: how this determination is assessed by the Judges or Patent Offices?
The establishment of frontiers between different technical fields appears to be an issue of fact. The Dutch courts have defined no specific rules for determining these frontiers. But, as mentioned, the Dutch courts (see Boehringer decision) have used the objective problem that is solved by the invention to select the technical field. This can lead to inferences about the combination of skills of practical workers in this field, to define its contours, but not its exact frontiers.

It should be emphasized that the Dutch courts have not developed an elaborate doctrine of their own on this issue. For a doctrinal basis the Dutch courts refer with approval to the case law of the European patent office. Presently, the Dutch patent office does not decide on novelty and inventive step. It issues only opinions, nowadays most of which are drafted by European patent office examiners, with arguments based on European patent office practice.

7) The question is also to know what is the nature of his/her competence in the technical field and particularly if this competence theoretical or practical?
As discussed in our previous answers, the nature of the competence of the skilled person within the technical field will be dependent on that technical field. The Dutch group is not aware of Dutch legislation or Dutch case law indicating whether this competence is of a theoretical or practical nature. The Dutch Group is of the view that – in theory – this competence may be theoretical, practical or both theoretical and practical as long as this person or team has ordinary skill in the art.

8) The Groups are requested to indicate how in practice the assessment of the skills of the person skilled in the art is operated. What is the role of the opinion of the experts on this point?

In most cases where the Dutch court needs an observation about the skills of the skilled person, the Dutch courts appear to define the knowledge and attributes of the skilled person themselves, without detailed reference to evidence. Evidence is cited more as confirmation than as authority. This is often done when interpreting the available prior art (what would the skilled person learn from the disclosure of the (closest) prior art or when answering questions of obviousness in relation to inventive step.
In general it is felt that care should be taken by asking experts to define the skills and knowledge of the average skilled person, since the level of knowledge of an expert (by definition) is higher than that of the skilled person but the expert does not know all the art in his technical field. There is an inherent risk to base the interpretation of the prior art on the opinion of an expert. In Dutch legal practice, the experts that are most

used in court cases are party-experts. Only recently the courts have started to appoint independent experts.

9) Finally, the Groups are also invited to present all other questions which may appear in the context of the question of the person skilled in the art.

What is considered common general knowledge?

Risk for trivial patents

One of the problems, also addressed in question 4 above, is what can be considered to be common general knowledge. This is a type of knowledge that the skilled person is aware of without specific prompting and which may include knowledge outside the field of the invention. Thus, an argument for lack of inventive step that relies on common general knowledge faces a lower threshold in terms of required evidence of motivation to combine. In return it must be shown that this knowledge is common general knowledge rather than just public knowledge.

The threshold for showing the "common general" nature of knowledge may lead to the grant of patents on "small" inventions that apply knowledge that is too insignificant to be published as specific knowledge, if the common general nature of the knowledge is insufficiently documented. At least in theory, evidence from expert testimony appears to be indispensible to fill this gap in the ability to prove the common general nature of knowledge. The fact that patent offices rarely use such evidence may explain some of the patents on small inventions that have lead to public outcry.

Any attempt to harmonize the analysis of the person skilled in the art should keep in mind the context of public acceptance of patents. On one hand the group finds it desirable for daily patent practice that the current "open" definition of inventive step of many patent acts should be made to endorse use of more concrete harmonized formal "rules" about how the skilled person functions. On the other hand, such rules should be justifiable in terms of the reality of industrial development and not become detached from it. Otherwise, this could lead to repeated public outcry that could eventually endager the function of the patent system to promote innovation.

Internet and Wikipedia

It is a fact that in the early 80s and 90s when this doctrine of the common general knowledge was developed, the information that was available to any person was at least more difficult to access than nowadays, when the most detailed information is only a mouse-click away. Not only is the information more easily accessible, the amount of information and the depth or specificity of it has also increased. One of the most speaking examples is Wikipedia, which is an encyclopedia by origin, but which contains so much in-depth knowledge and which is so up to date that the definition 'encyclopedia' hardly seems any longer justified. Can it still be assumed that the total content of Wikipedia belongs to the common general knowledge of the skilled person?

In a similar way the total content of the internet (or at least that part of it that is indexed by search machines like Google) would be available to the skilled person, including the databases with (scientific) literature and patents. It hardly seems tenable that Wikipedia would belong to the common general knowledge, while Espacenet and/or MedLine (just to name two easily accessible databases) would not, or only in special circumstances. Extending the argument into the extreme, this would mean that the common general knowledge would consist of the complete prior art. This can, however, not be the case.

In T1134/06 the Board contemplates that attempts are made to preserve web data in the form of web archives. But problems are still foreseen in relation to preservation of links

which may eventually connect to different material, the security structures and the terms of use.

Thus, probably, the common general knowledge should not be defined as content, but with an indication how easy a skilled person would be able to retrieve reliable information. An attempt thereto has been given by the Board of Appeal in T 171/84, T 206/83 and T 676/94 in which it has been stated that no undue effort in the way of a search should be required of the skilled person and that the information used had to be unambiguous and usable in a direct or straightforward manner without doubts or further investigation. This has recently been more or less confirmed in T 890/02 where the Board reasoned that "Whilst not being stricto sensu encyclopaedias or handbooks, databases (a) which are known to the skilled person as an adequate source for obtaining the required information, (b) from which this information may be retrieved without undue burden and (c) which provide it in a straightforward and unambiguous manner without any need for supplementary searches represent the common general knowledge of the skilled

person". It thus seems that any information which would fulfill these criteria can be considered known by the skilled person.

Whether this is a definition and view that also will be upheld by the national courts is something that remains to be seen.

5) Future harmonization:

After assessing the national solutions, the Groups are invited to present their proposals for the possible harmonization and specifically the harmonized definition of the person skilled in the art. The object of this section is not to repeat all the questions related to the current statute of the national law, but to find the most fundamental points on which the international harmonization could be sought.

1) Specifically, the Groups are invited to precise on which points they see the particular need of the international harmonization on the issue of the person skilled in the art.
   A precise definition of the knowledge stored in the skilled person or team
2) The Groups may indicate if the "person skilled in the art" standard should be assessed as a hypothetical model or on the contrary appreciated *in concreto*?
   The person or team skilled in the art is to be assets on the basis of a hypothetical model which is based objective guidelines such that the result is a person or team with average skills. The Dutch Group is also of the opinion that assessment in concreto is not always possible, which makes such assessment less suitable.
3) Should the skills of the "person skilled in the art" be only to execute other person orders or should they be creative and both practical and theoretical?
   The skilled person or team may act on its own way and/or take orders as long as such acting complies with the average knowledge. The skilled person may be minimally creative (in a non-inventive manner) within the given disclosure and guidelines of a document. All acts or thoughts of the skilled person should follow in an obvious manner from the relevant prior art documents. This means that the skilled person or team may act in a practical or theoretical manner.
4) Should the art in which the skilled person intervene be of only one discipline, or should it cover several technical fields?
   The skilled person or team may cover more than one discipline or technical field. All is dependent of the relevant problem to be solved. The skilled person or team will cover discipline and/or technical field to the extent as they are relevant in relation to the problem to be solved. The technical field may be extended to neighboring technical

fields as is mentioned in the new Guidelines of the European Patent Office (effective 1 April 2010).

5) The Groups are also invited to present all other suggestions which may appear in the context of the possible international harmonization of the definition of the person skilled in the art.

Note: It will be helpful and appreciated if the Groups follow the order of the questions in their Reports and use the questions and numbers for each answer.