

How Do Judges Decide Intellectual Property Cases? [Introduction]

An attempt at some empirical research in the way IP-cases get decided in The Netherlands

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“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”

Oliver Wendell Holmes, Harvard Law Review 1897

“Law is not what judges say in the reports but what lawyers say - to one another and to clients - in their offices”

Martin Shapiro, Yale Law Review 1981

In 2008 I interviewed seventeen experienced IP-trial judges² on how they actually decided IP-cases.³ Much criticism is possible against this kind of ‘unscientific’, unverifiable research and the way I went about it. I was totally inexperienced in conducting empirical research and I am myself an experienced and therefor necessarily biased IP-litigator⁴ and opinionated academic.⁵ However, the results were considered very interesting by many people. Most other experienced IP-litigators told me they all more or less knew already that it works the way it emerges from the picture sketched in my article based on those interviews. It certainly did confirm to a large extent what I thought myself. That in itself is of course highly suspicious. To what extent was I just looking for and therefor finding confirmation of my own hypotheses and my own biases?

I studied extensively the views expressed by Dutch legal scholars⁶ and many others on judicial decision making and decision making in general, including the role of emotions in decision making.⁷

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² In The Netherlands most IP cases are decided in summary proceedings by the president (actually a vice-president acting as president) of one of the 19 district courts. The vice-president sits alone. He receives and reads the writ of summons and the evidence a few days in advance of the oral hearing. He gives his decision usually two weeks after the hearing. I interviewed 13 active summary proceedings judges and 4 former summary proceedings judges. At the time, those 13 active judges probably decided the majority of all IP-cases in The Netherlands.

³ Dirk.J.G. Visser, ‘Beslissen in IE-zaken’, *NJB* 2008, p. 1918-1926.

⁴ To name just one obvious bias: I worked as an IP-litigator at a large Dutch law firm between 1996 and 2004 and at that time I mainly represented many so-called ‘alleged infringers’, supermarkets, drugstores, parallel importers and private labels. At that time I had a strong bias against over-brought IP protection. Since 2004 I have been working at an IP niche firm representing mainly IP owners. Now I do have a bias in favour of strong IP protection.

⁵ There is no doubt that my views as an academic also get influenced by the work I do as an advocate and by the clients I have. It is important to be clear and open about that. Many academics pretend to be totally impartial but also get influenced by legal opinions they give and other experiences in their professional or private life and the people they talk to.

⁶ P. Scholten, *Algemeen deel*, Zwolle 1931, paragraph 28, B.M. Telders, ‘Rechtspraak en logica’, *De Gids* 1937, p. 103-112, Verzamelde geschriften I, Den Haag 1947, p. 159-167, F.J. de Jong, ‘De motieven van den rechter en de motivering van het vonnis’, *NJB* 1975, p. 541- 547, J.H. Nieuwenhuis, ‘Legitimatie en heuristiek van het

Since 2004 I have also been publishing my own views on the way IP-cases actually get decided.⁸ My views are not unopposed by other academics,⁹ some of whom seem to think that I am either out of my depth or out of line or both. Some IP-litigators I talk to also seem to think that too much debunking and demystification of the way cases get decided, too much openness about the way the law gets talked about in law firms and too much emphasis on the unpredictability, is not necessarily a good thing. Not all judges were happy with the things their colleagues said during the interviews in 2008. The court of appeal judges I approached were not willing to be interviewed at all. I do understand and respect these positions, which are, however, a serious impediment to further empirical research in this direction. I am grateful to the judges that were prepared to be interviewed and were prepared to give very honest answers.

My findings do corroborate with Barton Beebe's very interesting 'Empirical Study of the Multifactor Tests for Trademark Infringement' in the US. My ideas and hypotheses are influenced by recent studies on judicial decision making by Chris Guthrie, Jeffrey Rachlinsky and Andrew Wistrich¹⁰ and with some of the thoughts of Richard Posner in his 'How Judges Think'.¹¹ My views are also influenced by recent studies on decision making in general by many people,¹² of whom Daniel Kahneman is currently probably the most famous, because of his Nobel Prize in 2002. Every legal academic should read Kahneman's '*Thinking, fast and slow*'¹³ on fast intuitive thinking and slow deliberative thinking, the interplay between the two, and the amount of heuristics and biases that are at work in anyone's mind.

rechterlijk oordeel', *RM Themis* 1976, p. 494-515, H.F.M. Crombag, J.L. de Wijkerslooth en M.J. Cohen, *Een theorie over rechtelijke beslissingen*, H.D. Tjeenk Willink, 1977. C.E. Smith, *Regels van rechtsvinding*, 2nd edition, BJU 2007.

⁷ "Emotions occupy a central role; it is well known that, rather than being the antithesis of rationality, emotions aid human reasoning. People can reason and deliberate as much as they want, but, as neuroscientists have found, if there are no emotions attached to the various options in front of them, they will never reach a decision or conviction (Damasio 1994). This is critical for moral choice, because if anything morality involves strong convictions. These convictions don't – or rather can't – come about through cold rationality: they require caring about others and powerful "gut feelings" about right and wrong", Frans de Waal, *Primates and Philosophers, how morality evolved*, Princeton University Press 2006 (p. 18). (Damasio 1994: A. Damasio, *Descartes'Error: Emotion, Reason and the Human Brain*, New York, Putnam 1994).

⁸ Dirk J.G. Visser, *Het ABC van iedere IE-inbreuk, Het belang van de rest van de markt*, BJU 2004, Dirk J.G. Visser, 'De rechterlijke beslissing (in IE-zaken)' IEF 8189 www.ieforum.nl (16 september 2009), Dirk J.G. Visser & Gerrit de Jager, *Te intellectuele eigendom, De morele basisemoties van de IE*, deLex 2010, Dirk J.G. Visser, *Motiveren in IE-zaken*, Een handleiding voor het motiveren van een beslissing in een eenvoudige IE-zaak', deLex, 2011, Dirk J.G. Visser, 'Repliceren in IE zaken', BIE 2011, 11, pp. 320-325. Dirk J.G. Visser, '[Misrepresentation and Misappropriation](#)' in: Ansgar Ohly (Ed.) *Common Principles of European Intellectual Property Law*, Mohr Siebeck 2012, p. 247-254.

⁹ Jan Brinkhof, 'Over motiveren in IE-zaken, de kernvraag en basisemoties', BIE 2011, p. 284-295.

¹⁰ Chris Guthrie, Jeffrey J Rachlinski en Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases", *Cornell Law Review*, vol. 93, 1, p.1 -40. Available at: <http://ssrn.com/abstract=1026414>, and by the same authors "Inside the Judicial Mind", *Cornell Law Review*, vol. 86, p. 777 - 829 (2001) . Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=257634

¹¹ Richard A. Posner, *How Judges Think*, Harvard University Press 2008.

¹² See for instance: *Heuristics and biases*, The Psychology of Intuitive Judgment, Thomas Gilovich Dale Griffin and Daniel Kahneman (eds.), Cambridge University Press 2002.

¹³ Daniel Kahneman, *Thinking, fast and slow*, Allen Lane 2011.

Some quotes from the judges I interviewed:

On the constantly changing criteria for protection or infringement:

“To keep coming up with new ‘labels’ for what is in fact the same sentiment, will not bring IP-law much further’.

On public opinion survey evidence:

“If it corroborates with our own perception, then we are grateful and use it. If we want to go the other way, then it is just a nuisance, because then we have to argue it away”.

According to some judges ruling on intellectual property cases is, in the end, all about the basic legal questions: What is property? What do you have to share? In the end it is about ‘improper behaviour towards someone else’, most judges say. When deciding on a decency norm, which is not very different from a wrongful act (tort), subjective and emotional arguments often play a part.

One judge had his own trinity:

Pretension: is it worth protecting? The claimant pretends to have created something that should be protected. Is this presumption justified?

Public: protection against confusion. What is the position of the public / is it being misled or confused?

Parasite: taking too much advantage of somebody else. Is it a matter of sponging on the success of another company?

The way judges look at intellectual property infringement cases is clear from their various remarks:

- ‘Let’s imitate; we’ll just make some changes here and there to pull wool over the judge’s eyes.’
- A first impression (which is often there to stay): ‘Has this person (suspected of the infringement) lost his mind?’ Or (about the claimant): ‘What a bore!’
- ‘Why do you have to do exactly that?’
- ‘Do come up with something better!’
- ‘Would you have been able to think of something else yourself?’
- ‘If it looks the same, it’s usually not by accident’.