novelty had failed in both courts below, it was not renewed before the House of Lords.[105]

4. Summary

Whereas a specific prior art disclosure can take away the novelty of a generic claim, making it unpatentable, the reverse situation is more complicated.[106] In Germany, it seems that the Federal Court of Justice parts from the Fluoran decision, where a Markush claim disclosure in the prior art would be enough to be a novelty-destroying prior reference, and even selection of one out of two would be novel, unless the selected compound was enabled in the prior art. In the U.K., while the court declared its own old I.G. Rule on selection inventions as a part of history, a selection invention no longer has to satisfy this Rule, making it easier to meet the novelty requirement. In the U.S., the novelty requirement for an enantiomer was reconfirmed as having to be enabled by the invention, and for an invention claimed as Markush type it seems to depend on the finite number of class or compounds, which shifts the discussion to whether the non-obviousness requirement is met. Overall, thanks to the much lowered bar of novelty in major jurisdictions, challenging novelty of a selected class (compound, enantiomer) out of a Markush type disclosure, or even out of two genus (racemate) has become more difficult than ever.

C. Nonobviousness Requirement

1. From the German Perspective

a) Markush Claim – Olanzapine Decision[107]

The Federal Court of Justice held that olanzapine was not obvious to the person skilled in the art over neither 'Chakrabarti' document nor other prior art in any other manner.[108]

Interestingly enough, while doing so, the Federal Court of Justice confirmed that its position was not in line with the EPO's to determine obviousness, in "only"

105 Generics, the House of the Lords, *supra* note 98, at paras 11, 43, 65 (also noting that the patentee would not have intended to cover racemate.).
106 1 Donald S. Chisum, Chisum on Patents § 3.02[2][a]- [b] (2010).
107 Since the Federal Patent Court did not excessively discussed about the inventive step of the invention, the Federal Court of Justice decision would only be addressed under this section; *See also* Olanzapine, Federal Patent court, *supra* note46, at 4811.
108 *See* Olanzapine, Federal Court of Justice, *supra* note 57, at 601.