

Important change in Belgian patent litigation (2): Belgian Judges must take into account foreign judgments and cannot merely rely upon the suspensive effect of an appeal against an invalidity decision

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As already described in [a previous blog entry](#) the Belgian Supreme Court nullified a decision of the Antwerp Court of Appeal granting a descriptive seizure ("*beschrijvend beslag*"; "*saisie-description*") on the presumption of validity of (European) patents. The written decision of the Supreme Court is now available ([link](#)). The Supreme Court has followed the advice of the Advocate-General in his Opinion of 6 June 2014, although its judgment does not deal with all arguments developed by the Advocate-General ([link](#)).

To understand the reasoning of the Supreme Court, it should be noted that the descriptive seizure was based on a European patent and a related French patent. The UK part of the European patent had been invalidated in the UK (both in first instance and on appeal). The French patent had been invalidated in French proceedings, but was still the subject of an appeal. The Antwerp Court of Appeal disregarded both the French and UK judgments and granted the descriptive seizure on the basis of the *prima facie* validity of the French patent and the parallel Belgian part of the European patent.

With respect to the French judgment, the issue was the effect of an appealed first instance judgment of a French judge invalidating the French patent upon which the seizure in Belgium was based. The Antwerp Court of Appeal decided that the patentee could continue to rely on the *prima facie* validity of its French patent to obtain a descriptive seizure in Belgium, given the suspensive effect of the French appeal proceedings. The Supreme Court did not agree. The Supreme Court started its reasoning by referring to Article 1369bis(1, §1.1) of the Belgian Judicial Code that requires a judge, when assessing the *prima facie* validity of a patent, to take into account *all* facts and circumstances relating to the validity of the patent advanced by the parties. Consequently, if the validity of a patent is seriously contested, a judge cannot accept that the patent at stake is *prima facie* valid, merely referring to the suspensive effect of the appeal against the invalidity decision. In other words, a proper evaluation of the *prima facie* validity of a patent requires more than a simple finding that the invalidity decision at first instance is subject to appeal.

The UK patent was not the basis for the seizure in Belgium. The question, however, was whether the invalidity of a UK patent had an influence on the *prima facie* validity of a parallel Belgian patent stemming from the same European patent. The Antwerp Court of Appeal was of the opinion that this was not the case, but the Supreme Court disagreed. The Supreme Court started its reasoning by referring to Article 138, §1 of the European Patent Convention that implies that the same invalidity criteria are applied in national invalidity proceedings. As a result and notwithstanding the fact that an invalidity decision has only a national effect, a finding of invalidity in one jurisdiction and the underlying reasoning can be pertinent for assessing the *prima facie* validity of a European patent in another jurisdiction. Furthermore, the Supreme Court reminded again of Article 1369bis(1, §1.1) of the Belgian Judicial Code requiring a judge to take into account *all* facts and circumstances. Consequently, the Antwerp Court of Appeal could not disregard the UK judgments on the mere finding that these judgments related only to the UK territory.

This is an important development in Belgian patent law. Belgian judges will have to apply a less strict approach to the *prima facie* validity of (European) patents. The mere presumption of the validity of a (European) patent is not enough to grant a seizure or preliminary injunction. Belgian judges have to take into account *all* the invalidity arguments and evidence advanced by the parties, including foreign invalidity decisions. Furthermore, a proper evaluation of the *prima facie* validity of a patent will now require more than a simple finding that the invalidity decision at first instance is subject to appeal.