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First Belgian ruling on costs in patent proceedings post *United Video Properties/Telnet*

Jan-Diederik Lindemans (Crowell & Moring) · Thursday, May 4th, 2017

On April 3, 2017, the latest decision was handed down in the patent revocation battle between medical device manufacturer Nouvag and Jean Malak, a plastic surgeon specialized in liposuction. This conflict has taken on epic proportions, in part because of the ruling rendered by the Belgian Supreme Court on February 3, 2012 confirming that the concept of literal infringement of a patent claim should not be interpreted too strictly. While the Mons Court of Appeal, in its decision of April 3, 2017, did not address this issue, it did provide an interesting ruling on the consequences of *United Video Properties / Telenet* (CJEU of 28 July 2016, C-57/15).

United Video Properties is best known for confirming that a legal system (such as the Belgian one), that provides for a flat fee compensation for the prevailing party's legal costs, can be compliant with Article 14 of the IP Enforcement Directive. The CJEU did add, however, that the flat fee should cover a significant and appropriate part of the reasonable costs incurred by the successful party (see below). What is less well known is that this decision also addressed the reimbursement of the costs of technical advisors, such as patent attorneys, whose services have been relied on within the framework of IP proceedings. In this regard the CJEU ruled that as a result of Article 14 of the Directive Member States are not allowed to make the reimbursement of the costs of a technical advisor dependent on fault on the part of the unsuccessful party. According to the CJEU, the only requirement of Article 14 of the Directive in this regard is that those costs be directly and closely linked to a judicial action seeking to have an IP right upheld.

In its decision, the Mons court of appeal did nothing more than literally apply the reasoning of the CJEU with respect to the costs of technical advisors. First the court established that Dr. Malak had submitted a complete and fully substantiated file on the costs of his technical advisors. Significantly, the court seemed to attach great importance to the fact that the invoices were very detailed and clearly showed that all interventions by the technical advisors related to the enforcement of Dr. Malak's patent rights. The "direct and close link" required by the CJEU had therefore been proven, said the Court.

As regards the flat fee for legal costs, the Belgian Judicial Code, Article 1022, states that the party prevailing in court proceedings cannot claim a higher compensation for lawyer fees than the flat fees stipulated by Royal Decree. These amounts are applied horizontally, i.e., regardless of the type of matter argued in court. Whether the dispute is about the delivery of a set of dining room furniture, or concerns a complex invalidity action about recombinant DNA technology, the same compensation will, in principle, apply. In the vast majority of patent-based Belgian court

proceedings this flat fee will therefore be insufficient to cover even the most reasonable and proportionate legal costs and expenses. Under the existing Belgian rules Dr. Malak would only have been awarded a 12,000 EUR flat fee to cover his lawyer costs. He therefore invoked *United Video Properties* to convince the Court that he should receive a higher compensation to cover this part of his legal costs. Of course, *United Video Properties* has attracted quite some attention, not least on this [blog](#). It therefore comes as no surprise that the Mons Court of Appeal did not want to rule on this point, at least not immediately. It therefore reserved judgment on this aspect of the discussion and requested the parties to comment on the existing Belgian system, and in particular regarding whether, in IP proceedings, the Belgian system allows for a substantive and appropriate part of the reasonable costs of the prevailing party to be recovered. No dates have been set for the further treatment of this case by the Court, so it can be assumed that several more months will pass before we have what to my knowledge will be the first, and (I hope) well-reasoned ruling on this subject to be handed down in Belgium.

The discussed decision is known as Court of Appeal of Mons *Nouvag AG a.o. / Malak, Jean*, 3 April 2017, n° 2016/RG/263.

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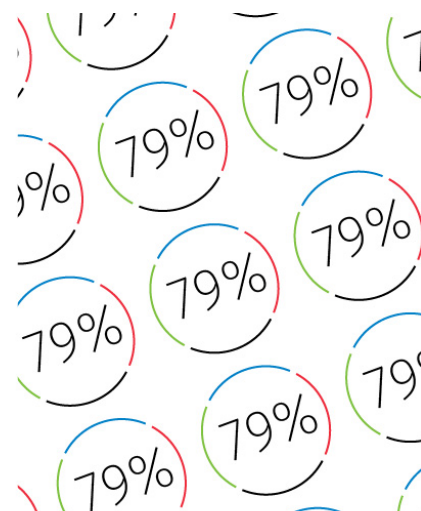
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