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Recovering lawyers' fees in Belgium: Antwerp court beats Mons court to first substantive ruling

Jan-Diederik Lindemans (Crowell & Moring) · Wednesday, May 24th, 2017

In [last month's blog](#) about the recovery of legal costs in Belgian IP enforcement proceedings, it was announced that the Mons Court of Appeal would probably be the first Belgian court to hand down a substantive ruling on the consequences of *United Video Properties / Telenet* (CJEU of 28 July 2016, C-57/15). A week later, on May 8, 2017 (despite its announced postponement), the Antwerp Court of Appeal issued its ruling in the *United Video Properties* (now: *Rovi*) / *Telenet* matter.

As far as the recovery of the cost of a technical advisor is concerned, the Antwerp Court of Appeal applied the same reasoning as the Mons Court of Appeal. The Court found that costs claimed from the losing party (63,804.25 EUR) were directly and closely linked to the enforcement of the invoked patent and should therefore be repaid. The Court rejected the plaintiff's reasoning that since the roles of technical and legal advisors in patent litigation overlap, these costs should be subject to the same treatment as lawyers' fees and therefore also capped by law.

For obvious reasons, this ruling was more eagerly awaited for the position the Antwerp Court of Appeal would take regarding the recovery of lawyers' fees in IP enforcement proceedings. In that regard, the ruling has left many stakeholders somewhat disappointed (although probably not surprised). The Court of Appeal confirmed that Belgian law, as it currently exists, prevents the granting of an amount that exceeds the maximum amount provided for by law, even if that amount is clearly not reasonable and proportionate as required by article 14 of the IP Enforcement Directive.

The Antwerp Court of Appeal accepted that certain provisions of European directives can have direct effect, but found that an individual can only invoke his rights under the directive against a Member State (vertical direct effect) and not against another individual (*i.e.*, no horizontal direct effect). The Court of Appeal also refused to recognize, at least in this case, the principle of priority of EU law. Although the Court of Appeal seemed to agree with this principle as applied in the *Bellone*- and *Ruiz*-decisions of the CJEU, it concluded that it did not apply in the *United Video Properties / Telenet* matter "*since article 14 of the Enforcement Directive does not grant the prevailing party its own claim*". This reasoning is hard to follow, since article 14 of the Enforcement Directive clearly grants the prevailing party the right to reimbursement

of a reasonable and equitable part of its lawyers' fees. Finally, the Antwerp Court of Appeal recognised its duty to interpret Belgian law insofar as possible in conformity with article 14 of the Enforcement Directive. It immediately added, however, that this does not allow the court to rule *contra legem*. The Court of Appeal therefore concluded as follows: *“Even if it were established that the amounts set by the King [in a Royal Decree containing all the fixed amounts] did not constitute a significant and equitable part of the reasonable attorney fees of the defendant in appeal, then – given the currently existing legal provisions – the plaintiff in appeal still cannot be required to pay a higher amount than that established by the King.”*

As if by way of consolidation, the Antwerp Court of Appeal added that the prevailing party could have a claim only against the Belgian government for not having implemented article 14 of the Enforcement Directive correctly or in a timely fashion. Because the Belgian government was not a party to the proceedings, the Court of Appeal ruled that it did not have to decide if the amount awarded under the existing Belgian rules was in fact reasonable and equitable. The Court therefore awarded an amount of 12,000.00 EUR for each instance, *i.e.*, less than 5% of the total amount claimed by the prevailing party.

Neither of the parties has made known any intention to appeal this ruling before the Belgian Supreme Court. The case is known as Court of Appeal of Antwerp *United Video Properties (now: Rovi) / Telenet*, 8 May 2017, n° 2012/AR/2489.

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