

# Kluwer Patent Blog

## Interesting decision on prima facie validity of European patents in Belgian PI proceedings

Kristof Roox (Crowell & Moring) · Thursday, February 17th, 2011

**Interesting decision on *prima facie* validity of European patents in Belgian PI proceedings: the respective claims of the parties have to be taken into consideration to assess the consequences of an affected *prima facie* validity.**

By a [decision of 16 November 2010](#), the President of the Antwerp Commercial Court held that the *prima facie* validity of a European patent is not absolute, taking into account the circumstances of the case. In almost all preliminary injunction proceedings Belgian courts however presume that European patents are *prima facie* valid, even if opposition proceedings are pending before the EPO. Also foreign decisions revoking parallel national patents stemming from the same European bundle patent are in principle not sufficient to rebut the *prima facie* validity of a European patent.

This dispute between the Antwerp Port Authority and the temporary partnership of three contractors (Dredging International, Hydro Soil Services and Smet F&C), relates to a public tender for the deepening of quay walls in the Antwerp port which was awarded to another contractor. Hydro Soil Services however owns EP 1 004 707 relating to a process for deepening of quay walls and considered that they are solely entitled to perform these works. Several proceedings were initiated, including *proceedings on the merits* relating to the validity of EP 1 004 707.

The Antwerp Port Authority also initiated *preliminary injunction proceedings* as they could not await the outcome of the proceedings on the merits to start the works. They actually filed a declaratory action of non-infringement as they asked the President of the Antwerp Commercial Court to state that -awaiting the outcome of invalidity proceedings on the merits- the works relating to the deepening of quay walls do not infringe EP 1 004 707. According to the Antwerp Port Authority, the process for the deepening of quay walls that they asked their contractor to apply, formed part of the state of the art at the filing date of EP 1 004 707 and, therefore, could not be considered an infringement of this patent. If the President would agree, the patent holder would not be able to invoke EP 1 004 707 to stop the works, until there was a final decision on the validity of EP 1 004 707.

The President firstly considers that the claim of the Antwerp Port Authority is an implicit (or indirect) nullity claim. They indeed *de facto* state that the EPO should never have granted EP 1 004 707 as it cannot be considered novel (the process relating to the deepening of quay walls allegedly formed part of the state of the art).

Secondly, the President considers that in preliminary injunction proceedings, he does not have to make a full legal analysis of the parties' intellectual property rights, but can only order measures if there is a *prima facie* right (or an "appearance of right") to obtain the requested measures. In patent cases, the validity of European patents is in most cases presumed (*prima facie* validity) as an assessment of the validity of a patent requires an extensive technical investigation, which is not possible in preliminary injunction proceedings requiring an urgent decision.

Thirdly, the President however considers that this *prima facie* validity of a European patent is not absolute and can be affected taking into account the circumstances of the case. The assessment of the *prima facie* validity is in this case even more important, according to the President, as parties agree that, if EP 1 004 707 is to be considered *prima facie* valid, there is also a *prima facie* infringement thereof. After a careful analysis, the President holds that the *prima facie* validity of EP 1 004 707 is affected because the patent holder did not inform the examiners of the EPO of all relevant prior art that they were aware of. The President then decided that the consequences of such affected *prima facie* validity depend on the claims of the parties and their standing. This is a new view in Belgian case law on the *prima facie* validity of European patents.

In light of the above, the President came to the conclusion that the *prima facie* validity of EP 1 004 707 prevails in this case, taking into account that the Antwerp Port Authority's claim has to be considered an implicit nullity claim. The President indeed considers that he cannot decide on the invalidity of a European patent, even if there are some indications that the patent is invalid, within the frame of preliminary injunction proceedings. The Antwerp Port Authority's claim is therefore rejected. The outcome might have been different if the patentee would have initiated a counterclaim to prevent the infringement.

This decision is interesting as it offers a more nuanced opinion on the *prima facie* validity of European patents than most other Belgian case law. Certainly the Brussels courts seem to presume that European patents are almost always *prima facie* valid, even if there are several indications that the patent at hand is invalid. It will be interesting to see whether this is a one time judgment or the beginning of a new trend.

With thanks to Mr. Jan-Diederik Lindemans.

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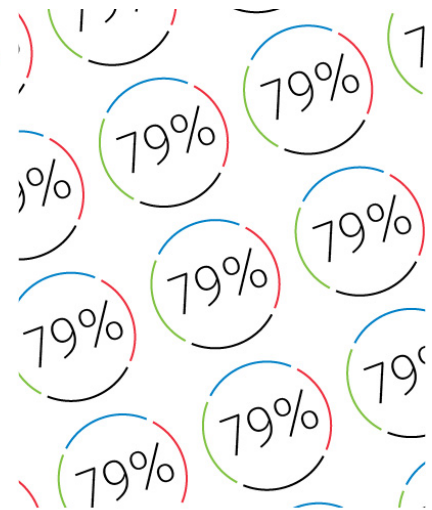
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