

# Kluwer Patent Blog

## Limitation of the reach of a preliminary injunction and no absolute application of the prima facie validity of a patent

Kristof Roox (Crowell & Moring) · Friday, July 25th, 2014

PI proceedings have always been a powerful weapon for patentees in Belgium. In such proceedings before the President of the Commercial Court a full legal analysis of the parties' rights cannot be made. The President will only prima facie assess the parties' rights and claims. As a result, invalidity arguments are not taken into account given the presumption of validity of a European patent, even if the patent has been revoked in EPO opposition proceedings or if there are foreign decisions invalidating the parallel national patents.

In the Belgian escitalopram-litigation Lundbeck was able to obtain a PI under its escitalopram SPC despite the fact that an earlier first instance decision on the merits had declared that SPC invalid. The main reasoning of the Brussels Court of Appeal awarding the PI was that, given the suspensive effect of the pending appeal against the nullity decision, this first instance decision did not stand in the way of finding the SPC prima facie valid and eligible for provisional protection pending the outcome of the appeal on the merits (which appeal was eventually decided in favour of Lundbeck). The Supreme Court found that the PI judge, when determining the apparent rights of the claimant, is not bound by the res judicata effect of the earlier decision on the merits and can still take into consideration the plaintiff's patent (or SPC) even if it was revoked in first instance, for as long as no final decision is rendered on appeal against the nullity decision.

In the drosperinon and quetiapine-litigation the Brussels Court of Appeal went even a step further by granting a PI and stating that the PI would stay in place even if the patent would be invalidated in the proceedings on the merits. Again this finding was based on the suspensive effect of a pending appeal against a nullity decision. In the proceedings on the merits in the drosperinon-case the Brussels Commercial Court did not agree with this and decided that a PI comes to an end once a judge on the merits dismissed the plaintiff's claim.

This issue had to be decided by the Belgian Supreme Court as the Brussels Court of Appeal as petition was filed with the Supreme Court against the drosperinon and quetiapine PI decisions. The Advocate General with the Supreme Court is of the opinion that the PI decision of the Brussels Court of Appeal should be nullified. According to the Advocate General the Brussels Court of Appeal could not decide that the PI would stay in place pending an appeal against a judgment on the merits invalidating the patent at stake. A judgment on the merits implies the end of the PI and a PI judge cannot decide otherwise (although a new PI can still be rendered after a judgment on the merits). The opinion was followed by the Supreme Court in its [decision of 26 June 2014](#).

The judgment, however, contains a very important development. The Supreme Court confirms its escitalopram-judgement by accepting that a PI is still possible after a finding of invalidity/infringement in first instance proceedings on the merits, but the PI judge is no longer bound by the *prima facie* validity of the patent and the suspensive effect of the appeal against the first instance decision on the merits. The Supreme Court decided that a PI is possible if the patentee sufficiently demonstrates that the appeal against the first instance decision will be successful and if the PI is necessary given the circumstances of the case, like the length of the proceedings and the size of the possible damages. In other words, a PI judge cannot start from the assumption the a patent is *prima facie* valid if this patent has been invalidated in first instance proceedings on the merits. This seems to obvious but in practice the *prima facie* validity of a patent was virtually unquestionable, even after nullification in first instance proceedings on the merits.

Please click on the following link to see the full text of the decision: [Supreme Court of Belgium, 26 June 2014](#).

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