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Will the CJEU uncap the recovery of IP litigator fees?

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This question has been on the minds of many European IP litigation stakeholders since January 26, 2015. On that date, the Court of Appeal of Antwerp in *United Video Properties v. Telenet* referred some preliminary questions to the Court of Justice of the European Union (“CJEU”) regarding the (in)compatibility of Belgium’s system of capped recovery of lawyers’ fees with article 14 of the IP Enforcement Directive. This article provides for the recovery of reasonable and proportionate legal and other costs by the party prevailing in an IP case.

Recovering lawyers’ fees in Belgian litigation, in particular when it relates to intellectual property (“IP”), is an old sore. Many assumed that it would be healed in 2007 by the implementation of Directive 2004/48/EU of 29 April 2004 on the enforcement of intellectual property rights, and more particularly by its article 14. This article obliges Belgium as an EU member state to “ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.” But that same year the Belgian Law on the Recovery of Lawyers’ Fees (“LRLF”) threw a spanner in the works for Belgian IP litigators. The LRLF provides for a “fixed reimbursement” of lawyer costs and fees. More specifically, the LRLF established a horizontal system for all possible types of litigation, including IP litigation. An occasionally updated Royal Decree sets out the fixed compensation tariffs, the level of which depends on the amount of damages claimed in the proceedings in question.

Since the fixed compensation tariffs are low, particularly when compared to the average budget required for IP litigation, the application of the LRLF virtually never results in a reasonable and proportionate reimbursement of the legal costs incurred by the successful party. Not surprisingly, this issue has been discussed several times before the competent Belgian IP courts. The few judges that have specifically ruled on the issue have always refused to establish that the Belgian legislator made a mistake in 2007. Different reasons have been invoked, among others that:

- the actual lawyer’s fees had to be recovered as part of the damage suffered by the successful party,
- the fact that the LRLF allows the court to increase the amount of the reimbursement to up to double the base amount shows the correct implementation of the Enforcement Directive,
- a preferential treatment of IP-litigation would constitute a discrimination with respect to other types of litigation, and

- a judge cannot rule *contra legem* and therefore has no other option but to respect the amounts imposed by the LRLF.

Obviously, the foregoing reasons did not satisfy parties that anticipated winning their IP-proceedings in Belgium. This has particularly been the case in patent proceedings. It is therefore no surprise that several of these parties have requested the competent IP courts to refer the issue to CJEU. To our knowledge, with its ruling of January 26, 2015, the Court of Appeal of Antwerp is the first court in Belgium and even in Europe to have accepted to do so.

Telenet suggested that the following question would be addressed to the CJEU:

“Does article 14 of Directive 2004/48/EG of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights prevent a national legal provision implying that in court proceedings such as the one at hand, the successful party, as compensation for the lawyer costs it has made, can recoup only a fixed amount from the unsuccessful party that is lower than the reasonable and proportionate costs made by the successful party while there are no reasons of equity against sentencing the unsuccessful party to the payment of these costs?”

Unfortunately the Court of Appeal rephrased the question suggested by Telenet quite drastically:

“Does the notion “reasonable and proportionate legal and other costs” in article 14 of the Enforcement Directive prevents that Belgian legislation provides the judge the possibility to take into account the specific characteristics of the case at hand and that provides for a system of varied fixed amounts with respect to the costs for assistance by a lawyer?”

This is probably due to the fact that the Court clearly struggles with the idea that parties prevailing in IP proceedings risk being treated differently from parties prevailing in other proceedings. According to the Court there seems to be no objective justification for this difference. This is incorrect. There is a clear legal basis for this specific treatment of a party prevailing in IP proceedings: article 14 imposes “as a general rule” that reasonable and proportionate legal costs shall be borne by the unsuccessful party. One of the reasons is to ensure that the enforcement of IP rights does not become “unnecessarily complicated or costly” (article 3 IP Enforcement Directive). To our knowledge, such rules do not exist for other types of Belgian court proceedings, even though they might be equally expensive or complicated as IP proceedings. Parties prevailing in Belgian IP proceedings do not find themselves in the same legal situation as those prevailing in other Belgian proceedings and can therefore be treated differently.

The formulation of the question that the Court submitted to the CJEU is also regrettable for other reasons:

- the focus on the words “reasonable and proportionate legal and other costs”, rather than on article 14 as a whole, does not correctly take into account other elements of article 14 such as the role of “equity”.
- the words “the judge can take into account specific characteristics of the case at hand” creates the impression that the Belgian judge has unlimited margin of appreciation, which is not the case. The judge is limited by the fixed amounts and can at the most double the base amount if “the characteristics of the case at hand” justify this. Even if this doubled amount would be unreasonably and disproportionately low, the court cannot exceed this doubled amount.

- the reference to “varied fixed amounts” creates the same incorrect impression of unlimited margin of appreciation, whereas it is clear that the variation is directly and solely related to the monetary value of the claim that is at stake. The current system does not allow for the technical or legal complexity of the facts and the arguments to be taken into account, and yet these have an enormous impact on the cost of the IP litigation.
- with respect to the “monetary value” it can also be noted that the question does not seem to address one of the core issues of the current Belgian system when applied to IP litigation: a fixed indemnity of 1 320 EUR (maximum 11 000 EUR) when claims of a non-monetary value are at stake. This is the case in most Belgian IP proceedings: (third party opposition proceedings against) counterfeit search and seizures, preliminary injunction proceedings, accelerated cease and desist proceedings on the merits, etc. Nobody would contest that the current indemnity for such proceedings is clearly, by definition, unreasonable and disproportionately low, despite the fact that “the judge can take into account specific characteristics of the case at hand”.

It remains to be seen how the CJEU will decide upon the referred questions and if in the meantime additional questions, addressing the comments above, will be submitted to the CJEU. A decision is likely by the end of 2016. In any event, if the CJEU rules that the Belgian system does not comply with European law, then a successful party in IP litigation in Belgium will be likely to recover much more of its lawyers’ fees than is currently the case. The same should also apply to IP litigation in other EU member states with a similar capped or otherwise “unreasonable” recovery system.

While awaiting the ruling of the CJEU, a party that is convinced that it will prevail in Belgian IP-litigation will for now have no other option but to claim the maximum (doubled) indemnity under the LRLF. A reservation can then be made for the reasonable and proportionate lawyers’ fees that would not be covered by this maximized indemnity, and the Belgian IP court in question can rule on all aspects of the case in an intermediate ruling and suspend its decision regarding the recovery of the balance of the claimed lawyers’ fees.

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