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Damages may be considered proven when the facts speak for themselves

Miquel Montañá (Clifford Chance) · Monday, October 15th, 2018

A recurring topic of discussion in patent infringement proceedings in Spain is the degree of evidence required to prove the damage caused by acts of patent infringement. According to a line of case law handed down by the Supreme Court, the existence of the damage may be proved by demonstrating the existence of the unlawful act in cases where such damage is the logical consequence of the unlawful act considered. In such circumstances, the facts speak for themselves ("*res ipsa loquitur*").

The Barcelona Court of Appeal (Section 15), in a judgment handed down on 26 July 2018, used the following arguments to justify the applicability of this principle:

"*60. Case law has specified that the existence of losses or profits not obtained as a result of the infringing act must, in all cases, be proven, albeit "not with greater rigour or restrictive criteria than any which constitutes the basis of a claim" (Supreme Court judgments of 2 March 2001 and 7 July 2005). However, demanding this proof is compatible with the possibility of establishing their "ex re ipsa" existence, with it being sufficient to prove the unlawful act in those cases where its connection to the alleged damage allows it to be considered that, according to the rules of logic, the latter is a necessary, logical and inevitable consequence of the illicit action.*

Consequently, it is stated that there are times when the facts speak for themselves ("res ipsa loquitur") and that for this reason it is not necessary to prove the existence of the damage (Supreme Court judgments of 10 October 2001, 21 November 2000, 23 December 2004), although such doctrine should not be raised as a general rule (as noted by the Supreme Court judgment of 3 March 2004).

Once the reality of a loss or profit not obtained has been proven as a result of the infringement of his right, generally through a judgment of reasonable predictability, the holder may opt for the quantification of the loss by any of the parameters provided by Article 66.2 of the Patents Act.

61. In this case, on the basis of such doctrine, an "ex re ipsa" finding could be admitted as a consequence of the infringing act, since it is proven that defendant X supplied Y with an infringing installation when there were negotiations between the aforementioned co-defendant and the plaintiffs of the present proceeding (Z) aimed at making the aforementioned plaintiff carry out the supply. Therefore, we believe that the existence of damage is intrinsic to the nature of the infringement and does not require special proof."

Another interesting aspect of the decision is that the Court considered that when the patent holder has chosen damages to be calculated on the basis of a “notional” royalty, a percentage on sales is normally more appropriate than a “lump sum” annual figure, although the Court noted that the evidence filed in relation to this point was rather weak.

All in all, the main teaching of this decision, as far as damage is concerned, is that it may considered proven when the facts speak for themselves.

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