

# Kluwer Patent Blog

## Warning sign for 2019 Mobile World Congress seafarers

Miquel Montaña (Clifford Chance) · Monday, February 4th, 2019

During the 2018 Mobile World Congress (“MWC”), Barcelona Commercial Court number 1 ordered a preliminary injunction preventing a company that was taking part in the Congress from continuing to market mobile phones that allegedly used antennas protected by patents owned by the applicant. The defendant lodged an appeal before the Barcelona Court of Appeal (Section 15) which, in a decision dated 18 December 2018, lifted the preliminary injunction. In a nutshell, the main points of interest may be summarized as follows:

For the reader’s benefit, it will be useful to clarify that, under Spanish law, for the purposes of obtaining a preliminary injunction, the applicant has to essentially justify that it has a “prima facie” robust case (“fumus boni iuris”) and that its rights could be definitively frustrated unless a preliminary injunction is ordered (“periculum in mora” or danger in the delay).

In relation to the first requirement, the Barcelona Court of Appeal considered the “fumus boni iuris” to have been sufficiently established because the defendant did not present any alternative expert opinion that would challenge the infringement expert opinion presented by the plaintiff, and because “the parties have negotiated a potential license for several years, a negotiation that would only make sense based on the use by [...] of the technology covered by the plaintiff’s patent.” Moving on to the second requirement, the Barcelona Court of Appeal concluded that it did not concur because the plaintiff had consented for three years to the defendant carrying out the supposedly infringing acts. According to the Court, neither the end of the period set by the parties to negotiate, nor the proximity of the 2018 MWC “sufficiently justify the adoption of measures, even more so when these are of an anticipatory nature determining, according to article 726.2 of the LEC, the adoption of major cautions.” In this regard, the Court added the following:

“In the case at hand, the conclusion of the period to negotiate, after several attempts made on different occasions, does not imply a qualitative change, as nothing prevented the parties from extending the deadlines agreed to not litigate, or even from pursuing negotiations with an ordinary judicial procedure underway. In previous years, contacts and negotiations had already taken place without any type of judicial action having been filed.

The holding of a congress of global repercussion does not justify the adoption of measures, unless the launching of new models or ranges of infringing products was announced, or unless the presence of the alleged offender in the congress caused an objectifiable damage for the owner of the patent, objectifiable harm that should be different to that which could have occurred before the Congress or the holding of previous congresses.”

All in all, no doubt this decision will send a warning sign to the upcoming 2019 MWC seafarers, which will take place in Barcelona later this month.

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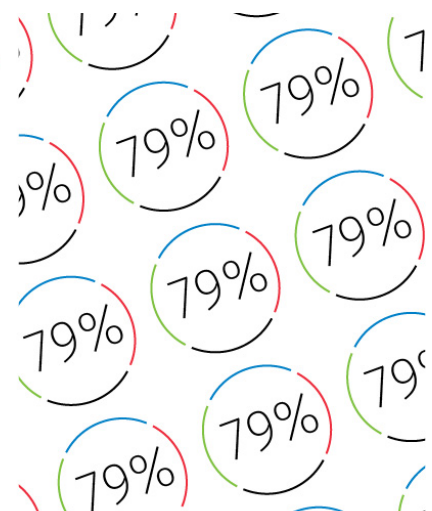
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