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Court reinforces presumption of validity in preliminary proceedings

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> Facts

> Decision

> Comment

In the case discussed in this article, the Patent and Market Court of Appeal reinforced the presumption of validity that applies when assessing a request for a preliminary injunction.⁽¹⁾ The Court found that the examination of a prior art document made in the course of the examination of a parent application under certain circumstances can be attributed to one of its divisional patents when it is subject to preliminary proceedings.

Facts

A licensee to a patent relating to a multiple sclerosis medicinal product commenced infringement proceedings and requested that a preliminary injunction be granted by the Patent and Market Court of Appeal. The patent in suit was based on a divisional application of a subsequently revoked European patent. The Court had to assess whether the defendant had succeeded in overcoming the presumption of validity that applies to a patent in the course of preliminary proceedings.

Decision

First, the Court noted that the presumption that a patent is valid which applies when ruling on a preliminary injunction can be overcome under certain circumstances – namely, when the defendant makes it probable that the patent will be found invalid when tried on the merits as a result of:

- new facts and evidence not considered during the prosecution of the patent; or
- inadequacies in the course of the application procedure.

The Court noted, regarding the case in question, that the presumption of validity was not affected by the fact that the patent in suit was based on a divisional application. The defendant had submitted that the European Patent Office (EPO) had not considered a certain prior art document. However, the Court noted that the EPO examiner had indeed considered the prior art document in the course of the examination of the patent upon which the divisional application was based – that is, the parent patent.

The Court held that this was significant as the patent in suit had had the same examiner and the revocation proceedings relating to the parent patent had been pending in parallel with the examination of the patent in suit. The Court therefore held that it was evident that the prior art document in question could not have escaped the EPO's attention when examining the patent in suit.

The Court thus found that the defendant had not made it probable that the patent in suit would be found invalid when tried on the merits. The Court also found that the remaining prerequisites for granting a preliminary injunction were at hand and thus granted the preliminary injunction.

Comment

The presumption that a granted patent is valid when assessing a claim for preliminary injunction is well established in Sweden. The presumption has been justified by the fact that patents are granted following a scrutinous examination already in the application stage. This case reinforces the strength of this presumption by attributing an examination made of another (parent) patent to the patent based on a divisional application thereof. Thus, the presumption of validity during preliminary actions such as a request for a preliminary injunction remains strong under Swedish patent law.

For further information on this topic please contact [Måns Ullman](#) or [Ludvig Holm](#) at Westerberg & Partners Advokatbyrå Ab by telephone (+46 8 5784 03 00) or email (mans.ullman@westerberg.com or ludvig.holm@westerberg.com). The Westerberg & Partners Advokatbyrå Ab website can be accessed at www.westerberg.com.

Endnotes

(1) PMÖÄ 11098-22.



MÅNS ULLMAN



LUDVIG HOLM

