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Finland

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A. PATENT LITIGATION IN FINLAND: AN OVERVIEW

1. *Court System*

On 1 September 2013 the jurisdiction in intellectual property matters in Finland was reformed. The Market Court, which was created in 2002 for consumer protection and competition law cases, was now also given exclusive jurisdiction in patent, trademark and design registration appeals, and intellectual property disputes (infringement, invalidity etc.).¹ Previously, the District Court of Helsinki had exclusive jurisdiction in patent disputes and the Finnish Patent Office dealt not only with registration matters but also with registration appeals.

The Market Court is a specialized court with legally qualified judges and, in patent cases, technically qualified judges who take part in the proceedings with voting rights equal to those of legally qualified judges.² The judgments of the Market Court can only be appealed to the Supreme Court if leave to appeal is granted.³ Before the reform, judgments could always be appealed from the District Court to the Helsinki Court of Appeals, which in practice prolonged the overall duration of the proceedings by a further 1–2 years. The total duration of proceedings could thus be several (rough estimate: 3–5) years.

¹ Ch. 1 of the Market Court Proceedings Act (100/2013).

² Ch. 1, section 2 of the Market Court Proceedings Act. The technically qualified judges may either be full-time technical judges called “Market Court Engineers” or part-time “Expert Members”. See Ch. 5 of the Courts Act.

³ Ch. 7, section 4(1) of the Market Court Proceedings Act. In total, the number of applications for leave to appeal per year is about 2,500. A leave to appeal is granted in less than 10% of all civil and criminal cases. See <https://korkeinoikeus.fi/fi/index/muutoksenhakijalle/muutoksenhakemukselaatiminen/valituslupahakemusjavalitus.html>.

A reform was warranted for a number of reasons. It was felt that the quality of the judgments needed to be higher and the proceedings faster.⁴ Furthermore, by consolidating all IP-related cases to one court, fragmentation could be avoided. It is quite clear that these goals have been reached. The quality of judgments is high and fragmentation is avoided. The judges are very knowledgeable and thorough. Their decisions seem to be guided only by legal concerns. Non-legal concerns, have not, at least to my knowledge, played any part in the decision-making of the court.

The quality of the judgments is also in part contingent upon how well the cases are argued. Generally, I would say that the patent bar in Finland is quite knowledgeable. Half a dozen law firms specialize in patent litigation, and they have partners specializing in intellectual property (IP) law. Of these law firms, only one is a large multinational law firm. The others are large Finnish law firms offering services on all aspects of law relating to companies. There are also a couple of small boutique-type law firms doing patent litigation. In addition, patent attorneys' firms take on patent litigation. In some rare cases, even non-specialist lawyers have argued patent cases.

During the three-year period 2016–2018, the Market Court had on average 235 new IP cases.⁵ During that same period, the average number of new patent disputes was eleven per year. Patent litigation is thus not especially common, but patent cases are generally “big” and complex cases that require expertise from different fields (technology, law etc.).⁶ The average duration of patent litigation was 14.1 months during 2016–2019; the shortest was 9.6 months (2016) and the longest was 23.1 months (2019).⁷

2. *Types of Actions*

There are different types of patent actions available in Finland. In infringement actions the patent holder typically requests the court to grant a final injunction (section 57(1) of the Patents Act), damages for the economic loss due to an infringement (section 58) and/or destruction of infringing goods (section 59).⁸

⁴ See Government Bill no. 124/2012, p. 21.

⁵ For Market Court statistics, see Vuositilastot.

⁶ It is quite common that the legal fees for one party in patent litigation is several hundred thousand euros. In *Neste v. UPM* (Market Court decision MAO:866/15 *Neste v. UPM*), the plaintiff's costs were almost 900,000 euros and the defendant's were as high as 1.4 million euros. The Market Court found for the defendant and ordered the claimant to pay almost 1 million euros in legal fees (including expert's fees).

⁷ This figure includes all patent cases (infringement and invalidity actions), regardless of whether they ended with a judgment or were settled. The duration is shorter in years when a larger part of the cases ended through settlement. Type of litigation (invalidity, limitation of patent claims, infringement) may also have impacted the duration. The author wishes to thank Chief Judge Jussi Karttunen at the Market Court for the statistics.

⁸ Injunctions, damages and destruction are provided for in the Enforcement Directive. Finland opted for a minimum implementation making only the necessary changes to its legislation,

Sometimes the patent holder requests a positive declaratory judgment (section 63 of the Patents Act), in which the patent holder asks the court to find that the defendant's conduct infringes the patent. It is also, in principle, possible to request the court to order the infringer to pay for the costs of publishing the court decision (section 60a of the Patents Act⁹), but to my knowledge this provision has never been used in a patent case.

In addition, it is possible to apply for final and preliminary injunctions against intermediaries in the context of online infringements of IP rights. According to section 57b of the Patents Act, the court may, when hearing an action for a final injunction, at the right holder's request, prohibit "the keeper of a transmitter, server or other similar device or other service provider acting as an intermediary", under penalty of a fine, from continuing the use alleged to infringe the IP right unless it can be considered disproportionate in view of the rights of the alleged infringer or of the rights of the intermediary or right holder. The provision has never, to my knowledge, been used in a patent case.

Patent infringement may also lead to criminal liability (chapter 49, section 2 of the Criminal Code and section 57(2) of the Patents Act). To my knowledge, the criminal law route is not used in patent infringement cases.

Since patent litigation from start to enforceable judgment takes time, preliminary injunctions are available before and during the trial. Typically, the patent holder applies for a preliminary injunction according to chapter 7, section 3 of the Procedural Code already before instituting the infringement action proper (i.e. before making a request for final injunction, damages and/or destruction).

Although, typically, only the patent holder is in a position to institute infringement actions, an alleged infringer may file for a negative declaratory judgment, in which the claimant/alleged infringer asks the court to declare that the activities of the claimant do *not* infringe the patent-in-suit (section 63(2) of the Patents Act). Anecdotally, negative declaratory actions seem to be rather common in pharmaceutical patent litigation.¹⁰

The main type of action the alleged infringer can resort to in patent litigation is the invalidity action (section 52 of the Patents Act), in which the claimant requests the Market Court to find that the patent-in-suit is invalid, for instance due to lacking novelty, or inventiveness. It is not possible to question the validity of the patent in the infringement action simply by raising the issue in defence. Rather, for the court to take into account the invalidity of the patent, an invalidity action must be filed.

which meant that no changes were made to the provisions on injunctions, damages and destruction. See Government Bill 26/2006.

⁹ This provision implements Article 15 of the Enforcement Directive 2004/48/EC.

¹⁰ See, for example, Supreme Court decision KKO:2015:51, which is a case in point. The claimant had instituted a negative declaratory action, in which it asked the court to find that its generic pharmaceutical product (montelukast) did not infringe M's patent. M had, in turn, sued K for infringement of its patent.

According to chapter 4, section 20(1) of the Market Court Proceedings Act, if a defence of invalidity is raised in an infringement action, the court must set a time limit within which the defendant has to institute an invalidity action. Otherwise the invalidity defence is not taken into account. The Market Court has exclusive jurisdiction in both the infringement action and the invalidity action (sections 52 and 65 of the Patents Act) and both actions are as a rule joined in the same trial (chapter 4, section 20(2) of the Market Court Proceedings Act). Joining of the cases means in practice that the issues of validity and infringement are argued in the same trial and that the Market Court gives its judgment on both validity and infringement at the same time.¹¹ Exceptionally, the court may decide that the infringement action is to be postponed until the invalidity action has been decided.

The alleged infringer may also request a compulsory licence in accordance with sections 45–48 of the Patents Act. Other types of patent litigation include ownership disputes and contract disputes (licences, patent assignments).¹²

B. THE SYSTEM OF INJUNCTIONS IN FINLAND

Injunctions in intellectual property infringement cases in Finland come in two forms: final and preliminary. The difference between the two types of injunctions is that a final injunction may be granted only after a full trial, whereas a preliminary injunction may be ordered in summary proceedings before or during the trial or even in the judgment until the matter is finally settled on appeal.¹³ Generally, however, the wording and scope of the injunction is the same: both types of injunctions prohibit the infringer, or alleged infringer in the case of preliminary injunctions, from continuing certain activities that infringe (or are likely to infringe) the rights of the plaintiff/applicant.

¹¹ In invalidity actions, the patent holder may request the Market Court to limit the patent-in-suit.

If the patent holder makes such a request and presents amended patent claims, the question of limitation must be decided before the invalidity action can proceed (section 52(2) of the Patents Act). If the Market Court accepts the limitation, the invalidity action continues on the basis of the amended patent claims. It is also possible to separately limit the patent claims, but such a request is made to the Patent Office, not to the Market Court (section 53a of the Patents Act).

¹² In contract cases the District Court (usually at the defendant's domicile) has jurisdiction (Ch. 10, sections 1–2 of the Procedural Code). A contract law claim may, however, be joined with a claim falling within the exclusive jurisdiction of the Market Court, if it is based on “essentially the same grounds” as the claim falling within the exclusive jurisdiction (Ch. 1, section 5(1) of the Market Court Proceedings Act). This might be the case, for example, in a breach of a licensing contract dispute where the licensor/patent holder wishes to pursue the matter as both infringement and breach of contract.

¹³ Preliminary injunctions may also be granted *ex parte* “if the purpose of the precautionary measure can otherwise be compromised”. See Ch. 7, section 5(2). *Ex parte* decisions are quite uncommon in patent cases, and will not be dealt with in this chapter.

The legal basis for *final injunctions* can be found in section 57(1) of the Patents Act, which provides that if someone infringes the exclusive right of the patent holder, the court may forbid that person from continuing or repeating the act. The text of the provision leaves many questions open. The fact that the court “may” enjoin the defendant could be construed as meaning that the court has a wide margin of discretion. In reality, however, an ongoing infringement combined with a risk of continued infringement has sufficed for a final injunction.¹⁴

Since final injunctions require a full trial, which necessarily takes time (usually 1–2 years), preliminary injunctions, which only require summary proceedings (with a duration of some months¹⁵), are often the more effective remedy of the two. It is quite common that patent litigation starts with an application for a preliminary injunction; if it is granted, main proceedings must be instituted within a month from the decision to grant the preliminary injunction.¹⁶ It is also possible, although not as common, to include a request for a preliminary injunction in the statement of claim in the main proceedings.

Preliminary injunctions in patent law find their legal basis in chapter 7, section 3 of the Procedural Code. This very general provision provides as follows:

If the applicant can demonstrate that it is probable that he or she has a right other than one referred to in section 1 or 2 that is enforceable against the opposing party by a decision referred to in Chapter 2, section 2 of the Enforcement Code, and that there is a danger that the opposing party by deed, action or negligence or in some other manner hinders or undermines the realization of the right of the applicant or decreases essentially its value or significance, the court may:

- (1) prohibit the deed or action of the opposing party, under threat of a fine;
- (2) order the opposing party to do something, under threat of a fine;
- (3) empower the applicant to do something or to have something done;
- (4) order that property of the opposing party be placed under the administration and care of a trustee; or
- (5) order other measures necessary for securing the right of the applicant to be undertaken.

¹⁴ See Supreme Court decision KKO:2003:127, where it was stated that a denial of an injunction, although the court has found that there is an infringement, is mainly possible when there is no risk of continued infringement. This brief statement means, first, that the main reason for a denial of an injunction is a lack of continued infringement and, second, that there might be other, more uncommon, reasons for denying an injunction. Neither the Supreme Court nor the Market Court has elaborated on what those other reasons might be.

¹⁵ See, for example, Market Court decision MAO:111/19 F. *Hoffman-La Roche AG, Roche Oy and Genentech Inc. v. MSD Finland Oy*, in which the applicant had applied for a preliminary injunction on the basis of a pharmaceutical patent, the validity of which the defendant disputed. There was conflicting evidence on the question of validity and infringement. Still, the decision was given in three months from the date of the application.

¹⁶ Chapter 7, section 6 of the Procedural Code.

When deciding on the issue of a prohibition or an order referred to in subsection 1, the court shall see to it that the opposing party does not suffer undue inconvenience in comparison with the benefit to be secured.

A prerequisite for the entry into force of the prohibition or order referred to above in subsection 1 is that the applicant applies for enforcement of a precautionary measure as provided in Chapter 8 of the Enforcement Code.

In essence, the applicant must demonstrate (a) that it is “probable”¹⁷ that there is an enforceable legal right against the defendant (that does not fall under section 1 (“debt”) or section 2 (“better right” to some property¹⁸), (b) that there is a danger that the defendant undermines the exploitation of the right and (c) that the opposing party does not suffer undue inconvenience. Translated into an intellectual property law context, this provision requires that (a) there is a likelihood of an ongoing or threatened infringement of the applicant’s exclusive right, (b) there is a risk of continued infringement and (c) the opposing party does not suffer “undue inconvenience”.

In preliminary injunction matters, a finding of a likelihood of infringement requires (i) that the patent is valid,¹⁹ (ii) that the court finds there is enough evidence that the technical solution used by the defendant falls within the scope of protection of the patent (section 39 of the Patents Act, Article 69 of the European Patent Convention), (iii) that an infringing act (making, offering, placing on the market, using etc. as specified especially in section 3 of the Finnish Patent Act) has taken place, and (iv) that there are no exceptions allowing the otherwise infringing act.

The Supreme Court has stated that the second requirement – the risk of continued infringement – is at hand if the risk “is not quite improbable”.²⁰ This is a very low standard of proof, and the court generally finds that there is a risk of continued infringement if the infringement is ongoing. The ongoing infringement creates a presumption of continued infringement.²¹

The “undue inconvenience” requirement looks at the consequences of the decision. The Market Court has, following suggestions in legal scholarship,²² taken the view that both granting and denying a preliminary injunction may have

¹⁷ I use “probable”, “likely” and “likelihood” interchangeably in this chapter.

¹⁸ “Better right” is a property law notion that comes into play, for example, in a situation where a person does not voluntarily give (back) certain property although the applicant has a stronger legal position. This might be the case, say, if a lessee refuses to return leased goods to the lessor after expiration of the lease period, or if a pledgee does not return a security after the legal basis for the pledge no longer exists.

¹⁹ As discussed below in Section D.6, a patent has traditionally enjoyed a strong presumption of validity. In light of Supreme Court decision KKO:2019:34, the presumption seems to have been weakened, at least to some degree.

²⁰ Supreme Court decisions KKO:1994:132 and KKO:1994:133.

²¹ MAO:457/h8 *AstraZeneca v. Sandoz*, which was a patent case where Sandoz’s generic medicine already was on the Finnish market.

²² Norrgård 2002.

consequences: if the injunction is granted, the defendant may suffer “inconvenience” and if the injunction is denied, the applicant may suffer. It is then for the Market Court to compare these inconveniences and decide whether the inconvenience to the defendant is “undue”. A case in point is MAO:457/18 *AstraZeneca v. Sandoz*, where the Market Court stated that, if the preliminary injunction were granted, the defendant would suffer inconvenience in the form of economic loss due to not being able to sell the allegedly infringing product. If the preliminary injunction were refused, the allegedly infringing product could be freely sold, which would decrease the sales of the applicant’s product. Further, due to generic substitution, the applicant would be forced to lower the price of its product in order not to lose further market share.²³ Further, the relative importance of the product to the applicant was stressed. Taking into account the inconvenience to both the applicant and the defendant, the Market Court found that the inconvenience to the defendant was not “undue” and granted the preliminary injunction.

If these substantive requirements are met, the court may make an order that in intellectual property law usually is an injunction to stop the infringing activities. It is possible for the court to order a seizure of the infringing products, but this is uncommon.

After the preliminary injunction has been granted, the enforcement of the injunction requires that the applicant post a security for possible loss the defendant may incur if it later turns out the preliminary injunction should not have been issued (chapter 8, section 2(1) of the Enforcement Code).

Final injunctions and preliminary injunctions are separate remedies with different requirements with the main difference being the “undue inconvenience” requirement for preliminary injunctions. Both types of injunctions require a showing of an infringement (or threat of infringement) and a risk of continued infringement. The difference is that in preliminary injunction proceedings a “likelihood” of infringement suffices, whereas “full proof” is required for a final injunction.²⁴ The difference in requirements stems from the fact that preliminary injunctions are meant to be temporary – in force only before and during the trial until the final judgment – whereas final injunctions are, as the name indicates, final.

In principle, the system of prohibitory injunctions in patent law is thus rather straightforward. A patent holder who wishes to put a stop to an infringement applies

²³ Generic substitution means that a medicinal product prescribed by a doctor is replaced with the cheapest suitable generic medicine (or with a product that is no more than 0.50 euros more expensive than the cheapest). See section 57b of the Medicines Act (395/1987).

²⁴ In light of Market Court case law, “likelihood” or “probable” stands for “more likely than not”, i.e. that infringement is more likely than non-infringement. See, for example, Market Court decision MAO:16/18 *Merck Sharp & Dohme B.V. and MSD Finland Oy v. Exeltis Healthcare S.L. and Exeltis Sverige AB*, where the Market Court did not grant a preliminary injunction. The Market Court found that it was (due to the summary nature of the proceedings) impossible to say whether infringement was more likely than non-infringement.

for a preliminary injunction on the basis of chapter 7, section 3 and continues within a month with a request for a final injunction.

In the 1990s it was exceedingly difficult to obtain a preliminary injunction in patent cases.²⁵ The infringement had to be very clear, which in practice meant that preliminary injunctions were not granted. Since patent holders knew this, they very seldomly even applied for them. This started changing in the early 2000s. Finally, in HelHO 16.2.2006 no. 421 *Pfizer v. Ranbaxy*, the Helsinki Court of Appeals created the more balanced formula for preliminary injunctions requiring, among other things, that “likelihood” is to be interpreted as “more likely than not” (instead of “clear showing” or a similar higher standard of proof). Thus, if the patent holder is able to show that the infringement is “more likely than not”, the first requirement – likelihood of infringement – is met. This formula is still applied today (now at the Market Court). This does not, however, mean that obtaining a preliminary injunction is easy. Often the technical issues are complex and it is difficult for the court to have a view on the likelihood of infringement.²⁶ It is particularly difficult in cases of equivalent infringement.

C. THE PRIVATE AND PUBLIC INTEREST

1. *Proportionality*

As noted, proportionality and balancing of interests has not been discussed in the context of *final injunctions*. The role of proportionality in final injunctions has only been discussed in the context of section 57b of the Patents Act. It provides for an injunction against internet intermediaries as required by Article 11, third sentence, of the Enforcement Directive. The provision has not yet been applied. However, section 60c of the Copyright Act provides for a rather frequently used identical injunction in copyright infringement cases. According to both provision, the court may at the patent holder’s request, when hearing an injunction action against an infringer, prohibit a service provider that is acting as an intermediary, under penalty of a fine, from continuing the use alleged to infringe the patent (or copyright) unless the cessation of that use can be considered disproportionate in view of the rights of the alleged infringer of the patent or the rights of the intermediary or patent holder.

Further the first sentence of subsection 4 requires that an “injunction issued under this section must not endanger the right of a third party to send and receive messages”. Thus, when discussing whether to issue an injunction against an

²⁵ Norrgård 2002.

²⁶ See, for example, MAO:111/19 *F. Hoffman-La Roche AG, Roche Oy and Genentech Inc. v. MSD Finland Oy*, where the court stated that – due to the summary nature of preliminary injunction proceedings and conflicting expert evidence – it was impossible to say whether it was more likely than not that MSD Finland’s pharmaceutical product Ontruzant® infringed the European patent FI/EP 1 308 455.

intermediary, not only the interests of the rights holder, infringer and intermediary are to be taken into account, but also third-party interests, as far as they relate to the right of the third party to send and receive messages. Thus, the injunction against intermediaries explicitly acknowledges private interests of the parties, but also of third parties and fundamental rights (since the right to send and receive messages is a matter of freedom of speech as guaranteed in section 12 of the Constitution of Finland).²⁷

Whether there is a spillover effect from the provision on intermediary injunctions to the regular injunction provision can be debated. The provisions on intermediary liability were drafted in a highly politicized environment in copyright law with different interest groupings lobbying for and against the provisions. Personally I am hesitant to draw analogies from the provision to the “normal” injunction provision since the context of intermediary liability is a very particular one. What is noteworthy, however, is that the legislature has, without any controversy, found that third-party interests and fundamental rights may have to be taken into account in injunction matters. Thus, since the “normal” injunction provision gives the court discretion (“may”) to grant an injunction, there is nothing stopping the court from taking into account third-party interests and fundamental rights. However, to my knowledge no case law exists.

Proportionality has a prominent role in *preliminary injunctions* as chapter 7, section 3 of the Procedural Code requires that a preliminary injunction may not unduly inconvenience the defendant. A natural starting point for assessing harm is to look at the relative *economic consequences*, on the one hand, to the defendant if an injunction is issued and, on the other hand, to the applicant, if the injunction is denied.²⁸ Taking into account the “relative” consequences means that it is not the absolute monetary value that is of interest, but the weight of the consequences to the party at hand.

A fairly standard way of balancing the economic interests of the parties can be found in the preliminary injunction decision MAO:457/18 *AstraZeneca v. Sandoz* handed down by the Market Court on 19 September 2018. The injunction was granted and the balancing of interests was conducted as follows:²⁹

According to Chapter 7, Section 3(2) of the Procedural Code, the court shall also see to it that the opposing party does not suffer undue inconvenience in comparison with the benefit to be secured.

In light of the evidence presented, the opposing party’s generic medicinal product is already on the market in Finland. In light of the evidence presented, four pieces of the product were sold in July 2018.

²⁷ See also the Government Bill HE 26/2006, 26.

²⁸ Norrgård 2002, 286.

²⁹ My translation.

The Market Court notes that, as a starting point, the harm the opposing party may suffer from an injunction is the economic damage arising from lost revenue when the opposing party is unable to market and sell its own generic medicinal product.

The applicants have purported that selling the opposing party's generic product decreases the sales of their own Faslodex® original medicinal product. Further, the applicants have purported that admitting the generic product into the generic substitution system and setting a reference price would lead either to a situation where the applicants have to respond to the price competition by lowering the price of their medicinal product, or to a situation where the applicants' medicinal product would lose market share to the opposing party's generic medicinal product due to generic substitution. According to the applicants, the generic substitution and setting of a reference price could take place beginning on 1 October 2018. The applicants have further stated that their original medicinal product is a very important product in their business, but that the opposing party's generic product is but one of many products sold by the opposing party.

Taking all this into account and the fact that Chapter 7, Section 11 of the Procedural Code provides for strict liability for damages and costs the opposing party suffers from an unnecessary provisional measure, the Market Court finds that the opposing party does not suffer undue inconvenience in comparison with the benefit to be secured as required by Chapter 7, Section 3(2) of the Procedural Code.

It has also been found that putting a stop to an infringement that has only just started or has not yet started leads to less harm to the defendant than stopping an infringement that has continued for some time.

2. *Public Interest*

It has been suggested in legal scholarship that public interest or third-party interests could and should be taken into account as part of the balancing of interests when deciding a preliminary injunction, although the provision in chapter 7, section 3 of the Procedural Code expressly only recognizes the interests of the defendant.³⁰ There is thus no explicit public interest requirement in Finland for preliminary injunctions. The argument for taking into account third-party interests is that the law does not prohibit it and that it is likely that a court would, in any case, take into account, for example, the effect of massive layoffs when deciding what to do.³¹

In final injunctions neither public nor private interest is a requirement that the courts have to take into account. Although the provision (section 57(1)) states that the court "may" grant a final injunction, the courts have not exercised discretion,

³⁰ See Norrgård 2002, 329.

³¹ Norrgård 2002, 329; Westberg 1990, 174; Johansson 1991, 616.

but granted a final injunction if there has been an infringement and a risk of continued infringement.

D. PROCEDURAL ISSUES

1. *Public Bodies as Defendants*

Whether public bodies are subject to injunctions in patent suits is a question that has been dealt with to a lesser degree. In principle, the matter is rather straightforward. As for final injunctions, the court will in general issue an injunction if it has found that there is an infringement (and the plaintiff has requested an injunction). It should however be noted that the court has some discretion since the provision on final injunctions provides that it “may” order an injunction. The situation is thus, at least in principle, not so rigid that an injunction would necessarily follow a finding of infringement.

In Supreme Court decision KKO:2003:127 the question was whether the City of Pori was infringing a patent to an oil spill recovery apparatus although it was only storing it for a possible oil spill situation. The city had acquired the oil spill recovery device and fitted it in its oil spill recovery ship in order to fulfil its duties according to the legislation on oil spill recovery actions. It had not, however, acquired a licence for the use of the device.

The city contested that it had not infringed the patent since it had never used the patent-protected device. Furthermore, the city highlighted the fact that the use of the device was based on an obligation in oil spill legislation. Thus, the city purported to have a right to use the device without the patent holder’s permission.

The patent holder claimed damages and requested that the City of Pori be enjoined from continuing the infringement. As to the injunction, the Supreme Court noted that an injunction is a central remedy available to the patent holder and that, as a general rule, the patent holder has a right to an injunction. As to exceptions to this general rule, the court stated that an injunction may be refused mainly when there is no risk of continued or repeated infringement.

As to the lawful duties of the city to use the device in case of an oil spill, the Supreme Court, rather laconically, noted – taking into account section 47 of the Patents Act on compulsory licensing – that the reasons put forward by the city were not sufficient for a refusal of an injunction. The Supreme Court found that there was no reason to refuse an injunction, since the city still had the device in its possession, and intended to continue using it.

Although the decision is rather brief in some of its key findings, what is important to note is that the Supreme Court leaves the door open as to when an injunction may be refused. It does state the general rule (an injunction ensues when there is an infringement) and the main exception (refusal if no risk of continued infringement), but the decision acknowledges there could be other instances where an injunction

may be refused. The court does not, however, even *obiter dicta* mention any cases where this might be the case. What we do learn from the case is that a city/municipality is not immune from injunctions even where there is a regulatory obligation to supply certain services. According to Finnish public law, cities and municipalities are public legal persons and part of the governmental structure. From this I think it can be inferred that other public bodies, such as government agencies, wholly or partly state-owned companies, or public–private partnerships, may also be the subject of injunctions. So at least in 2003 it was quite clear that public bodies were not shielded from injunctions. It should probably be taken into account that the case predates any discussions on the US *eBay v. MercExchange*³² decision (which was decided in 2006). The general view in those days was that an injunction follows as a matter of principle. The decision KKO:2003:127 is however valid law, and there has been no discussion on the status of public bodies as defendants in injunction actions. Thus, I would say that public bodies can be subjected to injunctions.

The view of the Supreme Court can be criticized. The Supreme Court decision would have put the City of Pori in a tricky situation had there been an oil spill. On one hand, the city was under a legal obligation to render oil spill recovery services but, on the other hand, the injunction enjoined it from using the device. In practice, the patent holder gained, as a result of the injunction, a very strong negotiation position.

2. Public Bodies as Plaintiffs

There has been no discussion in Finland on whether public bodies can or cannot be plaintiffs in injunction actions or applicants, if the case concerns preliminary injunctions. Generally, the normal rules apply. If a person is the holder of a patent, it has standing to sue and to apply for a preliminary injunction. This applies also in the case of universities, government agencies, municipalities, state-owned companies, etc.

There has been no discussion whether universities or other similar patent-licensing entities (also called non-practising entities, NPEs) have a different status than other entities. Thus, I would say that general rules apply: an NPE may not be refused standing to sue or to apply for a preliminary injunction. In the case of final injunctions, the status of NPEs would need to be dealt with as part of the exceptions to the final injunction. The only, thus far, explicitly recognized exception to a final injunction in cases where the court has already found that there is an infringement is lack of continued infringement (Supreme Court decision KKO:2003:127). Thus, I would say that an NPE would, at least as a starting point, have the same right to a final injunction as other entities.

³² *eBay Inc. v. MercExchange, LLC*, 547 US 388 (2006).

In the case of preliminary injunctions, the situation might be a bit different due to the requirement of “undue inconvenience”. As highlighted in Section B, a preliminary injunction requires a showing of likelihood of infringement, a risk of continued infringement and, lastly, that the “opposing party does not suffer undue inconvenience in comparison with the benefit to be secured”. Since the “undue inconvenience” criterion requires the court to assess the negative consequences of the decision to the parties, it is possible that the court would take into account the fact that the NPE is primarily interested in securing monetary compensation for the use of the patent and not in securing exclusive use of the invention (as is often the situation for manufacturing companies). To my knowledge there is no case that has put this question to the test. I do, however, think that the court could accept that an NPE with extensive licensing activities pertaining to the patent-in-suit does not suffer as much “inconvenience” from not getting an injunction as a company with no licensing activities pertaining to the patent-in-suit that uses the patent-in-suit defensively to fend off competitors.

The view, as it stands now, is that public bodies have a right to apply for and be granted final injunctions, just like any patent holder. As to preliminary injunctions, the situation might be a bit different. As was noted in Section B, one requirement for preliminary injunctions is that the injunction does not cause undue inconvenience to the defendant in light of the benefit to be secured. Although the rather convoluted language may give the impression that only the inconvenience to the defendant is to be taken into account, the Market Court has quite clearly asked, on one hand, what would be the harm to the applicant if the injunction is not granted, and on the other hand, what would be the defendant’s harm if the injunction is granted. In this balancing of interests, it is possible (although no apparent case law exists) that the harm to the state or municipalities is held to be low due to its very large capacity to absorb harm.

3. *Abuse of Rights*

The abuse-of-rights doctrine is recognized as a general principle of law in Finland.³³ There are different definitions of the doctrine, but common to them is that abuse of rights is understood as an act which formally is legitimate, but which in the particular situation is unlawful due to the way in which the act is done or the purpose of the conduct.³⁴ As a general principle of law, the doctrine has not been incorporated into the Constitution of Finland, general civil code (because Finland does not have a civil law codification) or in any other statute. However, it has been enacted for particular purposes, such as section 33 of the Contracts Act, which provides for unenforceability of transactions that are “incompatible with honour and

³³ See, for example, Kulmala 2018, 894.

³⁴ Kulmala 2018, 895.

good faith”. Also, chapter 4, section 14 of the Enforcement Code is a particular enactment of the general principle of abuse of rights. It provides that attachment of property for the payment of a debt is not hindered by a plea that the property in question belongs to a third party, if the property arrangement is an artificial arrangement.

The abuse-of-rights principle has been applied or referred to in a number of Supreme Court decisions, none of which are concerned with intellectual property. The Market Court has, however, discussed the abuse-of-rights doctrine in one copyright case. Although it is a copyright case, a similar situation might arise in patent law. In case MAO:85/19 *Crystalis Entertainment and Scanbox Entertainment v. A* the defendant argued that it was a violation of privacy and an abuse of rights that the contact details of the defendant, which the internet service provider had been ordered by the court to give to Crystalis, had been used not only by Crystalis but also by Scanbox. The Market Court stated that it was uncontested that the decision to order the internet service provider to give contact details only covered Crystalis and that the information had also been used for Scanbox’s benefit. It was further uncontested that the information was to be kept confidential and that privacy legislation covered the use of the information. Still, the court found that since Scanbox based its infringement claims on its own copyright, the purpose of the plaintiff could not be objectionable as the abuse-of-rights doctrine requires. The court also noted that the way the information had come into the plaintiff’s possession was not of relevance when discussing damages for the infringement. All in all, the Market Court dismissed the abuse-of-rights doctrine rather quickly. Nevertheless, it is clear that the abuse-of-rights doctrine may be argued in intellectual property infringement cases, although the threshold seems to be quite high.

Although the doctrine of abuse of rights does exist, it is not something that would normally be argued, at least in final injunctions matters. Finnish law is quite straightforward in this sense: if a patent holder manages to fulfil its burden of proof and the court finds that there is an infringement, it is not very likely that an injunction would be refused on the basis of a doctrine of abuse of rights. It should, however, be remembered that since the court “may” order final injunctions, it is possible for case law to develop in a direction where abuse of rights is taken into account in the tailoring of the injunction. At this moment, however, there are no indications that would be the case.

4. *Unclean Hands*

Finnish law does not recognize an unclean hands defence, i.e. a defence that is based on the plaintiff’s bad faith or unethical behaviour. Unclean hands would generally fall under the broad category of abuse of rights.³⁵

³⁵ See also for Swedish law, Westberg (2004, 294), who proposes that unfair conduct could be taken into account in Sweden.

There is, however, at least one preliminary injunction decision that takes into account something that might be categorized as bad-faith behaviour, namely ambushing tactics by the plaintiff. In *Novartis v. Actavis*³⁶ the Helsinki District Court refused a preliminary injunction on the grounds that the generic pharmaceutical company Actavis did not act as it had promised. Actavis had stated that it would give Novartis two months' notice before entering the Finnish market. Actavis disregarded this and entered the market without forewarning. The court took this into account and granted the preliminary injunction. The Helsinki Court of Appeals refused the preliminary injunction on the grounds that the infringement was not likely enough.

Although the Court of Appeals did not decide the case on the basis of ambushing, the argument is, I think, valid and it could also be made and accepted in other situations. Thus "breaking a promise" could be taken into account at least in the preliminary injunction phase.³⁷

5. *Delay in Applying for a Final or Preliminary Injunction*

Delay in applying for a preliminary injunction may be taken into account. In 2002 it was suggested by Norrgård that delay should be taken into account in the balancing of interests. It was argued that passivity on the part of the applicant indicates that the applicant's interest in having an injunction or the harm it purports to suffer if the injunction is not granted is not as great as it claims.³⁸ The Supreme Court has not dealt with the question, but the Helsinki Court of Appeals decided in two cases in 2010 that delays of one year and two years, respectively, do not lead to a refusal of a preliminary injunction. In the preliminary injunction case *Janssen-Cilag v. Actavis*,³⁹ Janssen claimed that the fentanyl patches brought onto the market by Actavis infringed its patents. In the first instance, the District Court of Helsinki rejected the application on the basis of Janssen's passivity because an injunction would have greatly harmed the goodwill value of its products when the application for a preliminary injunction was brought one year after market launch. The Helsinki Court of Appeals, on the other hand, found that Janssen's laboratory analyses and other investigations were acceptable reasons for not applying for the preliminary injunction sooner.

In *Janssen-Cilag v. ratiopharm*,⁴⁰ the District Court rejected the application due to delay. Similarly, as in *Janssen-Cilag v. Actavis*, the Appeals Court found that

³⁶ HelHO 10.6.2010 no. 1612 *Novartis v. Actavis*.

³⁷ It should be noted that it was never argued that breaking a promise amounted to breach of contract. It was thus not a question of contract law (which would have required, among other things, a showing of the existence of a binding contract).

³⁸ Norrgård 2002, 320 *et seq.*

³⁹ HelHO 19.3.2010 no. 740 (S09/1812) *Janssen-Cilag v. Actavis*.

⁴⁰ HelHO 19.3.2010 no. 741 (S09/1706) *Janssen-Cilag v. ratiopharm*.

laboratory analyses and other investigations could warrant a two-year delay. Generally, it can thus be said that the passivity rules for preliminary injunctions are lax. Though the Market Court has not taken any stance on the matter yet, I would not be surprised if it held a stricter view on delay. Preliminary injunction matters are to be decided swiftly and granted in situations that need to be dealt with quickly (although Finnish law does not explicitly recognize a requirement of urgency). Filing a preliminary injunction application after a delay of one or two years feels like a very long time since it is likely the court could have given a final injunction in that same time.

There are no similar passivity rules for final injunctions. Also, delay as to final injunctions does not seem to be as big a problem since the question has not been argued, to my knowledge, in any final injunction case law. If a patent holder has a need for an injunction, the dispute will likely start with an application for a preliminary injunction, which must be followed up with an application for a final injunction within thirty days from the grant of the preliminary injunction.

If, however, a defendant raised a passivity defence in a final injunction case, it would likely be based on a theory of implied consent. The argument would then be that the patent holder had through its passivity permitted the activities of the defendant and thus implicitly accepted the infringement. Although this argument in itself is valid and recognized in other fields of law, the delay would probably need to be long.⁴¹

6. Patent Validity

For preliminary injunctions, the classical view was that the patent's validity presumption was very strong.⁴² If the patent had been granted and was still in force, the invalidity defence would not succeed. The reason for this view was that preliminary injunction proceedings, which by their nature are summary (i.e. the court is not supposed to look into the evidence presented as thoroughly as it would have to in a full trial) are not the right place for in-depth argumentation as to the validity of a patent. Instead, the preliminary injunction court should rely on the fact that the patent had been examined, granted and was still valid.

This patentee-friendly view steered the discussion in preliminary injunction proceedings quite quickly away from validity into a discussion of whether the defendant's technical solution was within the scope of protection of the patent or not. A case in point is Helsinki Court of Appeal's decision in *Novartis v. Mylan*.⁴³ Mylan raised invalidity as a defence in a patent infringement matter. Mylan argued

⁴¹ In a real property case (Supreme Court decision KKO:1993:35) a twenty-year period in which a party had accepted the conduct of the other party was seen to be sufficient.

⁴² See, for example, HelHO 10.6.2010 no. 1659 *Novartis v. Mylan* and HelHO 19.3.2010 no. 740 *Janssen-Cilag v. Actavis*.

⁴³ HelHO 10.6.2010 no. 1659 *Novartis v. Mylan*.

that the infringement was not sufficiently likely due to the fact that the parallel patents in the Netherlands and United Kingdom had been invalidated and the patent-in-suit had been revoked by the Opposition Division of the European Patent Office. The Court of Appeal found that the patent's validity is to be presumed and that since the decision by the Opposition Division does not finally settle the question of validity, the patent was to be regarded as valid. Further, the Court of Appeals found that the foreign judgments did not make the infringement so uncertain that the likelihood of infringement was not met.

However, Supreme Court decision KKO:2019:34 *Mylan v. Gilead* (decided on 11 April 2019) has, at least on the face of it, changed this approach. The pharmaceutical company Gilead applied, and was granted, a preliminary injunction against the generic pharmaceutical company Mylan in December 2017. Gilead was the proprietor of a supplementary protection certificate (SPC), which was based on a European patent for a combination of tenofivir disproxil and emtricitabine, which is used for the treatment of HIV/AIDS. After the grant of the preliminary injunction, in July 2018 the Court of Justice of the European Union (CJEU) gave its preliminary ruling in C-121/17 *Teva v. Gilead*,⁴⁴ in which it laid down the criteria for when a medicinal product composed of several active ingredients with a combined effect is "protected by a basic patent in force" as required by Article 3(a) of Regulation 469/2009 concerning the supplementary protection certificate for medicinal products. Applying the criteria set forth in this judgment, the referring court, the English High Court, invalidated the SPC on 18 September 2018.

Four days after the CJEU judgment, on 29 August 2018, Mylan applied to the Market Court for cancellation of the preliminary injunction on the ground that circumstances had changed and that the SPC's invalidity was now more likely than its validity, and that there was thus no longer any basis for the preliminary injunction. Mylan argued that the Market Court should follow the English High Court decision and the decisions in Germany, France and Portugal, where the SPC had also been invalidated. Gilead, for its part, argued that the SPC was valid and there were insufficient reasons to cancel the injunction.

The Market Court followed the classical view (very strong presumption of validity) and rejected the application for cancellation. It stated that in light of the evidence and argumentation, and taking into account the summary nature of preliminary injunction proceedings, it was impossible to find that it was more likely than not that the SPC was invalid. Thus, the validity presumption had not been sufficiently challenged, and the requirements for a preliminary injunction were still met.

The Supreme Court, which granted Mylan leave to appeal, stated that a preliminary injunction may be cancelled due to a change in circumstances, if the requirements for a preliminary injunction are no longer fulfilled. According to the

⁴⁴ CJEU, 25 July 2018, C-121/17 *Teva v. Gilead*, ECLI:EU:C:2018:585.

Supreme Court (*Mylan v. Gilead*, para. 13) a change in circumstances may concern not only changes in facts but also in the legal situation.

The Supreme Court noted that preliminary injunction proceedings are summary proceedings, where the question is not whether the right in question is valid and whether the defendant has infringed that right. The question is rather whether the requirement of likelihood of validity and infringement is met.

The Supreme Court noted further the validity presumption in preliminary injunction proceedings. According to the court, the registration as such makes the validity of a registered intellectual property right sufficiently likely. The basis for the validity presumption is the granting office's substantive examination. According to the court, the requirements for effective provisional measures as laid down in Article 50(1)(a) of the TRIPS Agreement and Article 9(1)(a) of the Enforcement Directive 2004/48/EC also support the validity presumption.

From the validity presumption it follows that when the defendant contests a preliminary injunction application or applies for cancellation of the injunction, it has the burden of proof, i.e. it is under an obligation to produce evidence to support the grounds for invalidity of the registration. The strength of the validity presumption is dependent upon the kind of registration and when the registration was made. The Supreme Court further stated that the general principles of weighing evidence apply and that when the defendant has made the invalidity sufficiently likely, the burden of proof shifts to the applicant (*Mylan v. Gilead*, para. 17).

As to the application of the norms to the factual situation at hand, the Supreme Court followed the criteria laid down in C-121/17 *Teva v. Gilead* and found that it was not likely in light of what could be deduced from the patent that the basic patent protected the combination of tenofivir disproxil and emtricitabine. Thus, the presumption of validity had been sufficiently challenged, and the burden of proof shifted to the applicant. Whether a skilled person, despite the wording of the patent, would understand that the patent covered the combination was, according to the Supreme Court, something that required production of evidence (*Mylan v. Gilead*, para. 32). The burden of proof as to whether this was the case was on the applicant since the burden had shifted. Gilead was not able to convince the Supreme Court in these summary proceedings that the patent covered the combination. The preliminary injunction was thus cancelled.

The decision of the Supreme Court poses several interpretative challenges. On one hand, the Supreme Court clearly points out that there is a presumption of validity in preliminary injunction proceedings, which according to the court means that the threshold for likelihood of the patent's validity is met by having a right that has been registered. The court does, however, note that the level of examination and the "age" of the registration play a role. In this case, the SPC had been granted in 2009 and, according to the court, the interpretations as to SPCs had since developed quite significantly (*Mylan v. Gilead*, para. 28). The view put forth by the Supreme Court also means – as far as I understand – that Finnish utility models, which are

only examined as to formalities and not as to substance, do not enjoy the same level of presumption of validity (if at all).

The problem with the presumption of validity is that the Supreme Court does not very clearly address the question of how much is needed to overturn the presumption. The court, rather laconically, states that the general principles of evidence are applied and the burden of proof may shift when a party has presented “sufficient likelihood”. In essence, this means that the only thing we know for certain is that the presumption of validity is not as strong as it used to be. As is evident from the Market Court decision, a patent/SPC that has not been revoked or invalidated was, according to the old interpretation, still presumed valid, although there might have been reasons to view it as invalid. The court simply would not take the arguments for invalidation into account. The new interpretation forces the court to look into the evidence for and against validity and decide whether the patent’s or SPC’s validity is likely. So from a situation where the preliminary injunction court was effectively shielded from invalidity argumentation we have now moved to a situation where invalidity argumentation must be taken into account. What we do not know, however, is how likely the invalidity must be. It should be remembered that Gilead’s SPC had been invalidated in other European countries. Also, the question of invalidity in this case was first and foremost a question of legal interpretation. The Supreme Court clearly stated that due to the summary nature of the proceedings, the applicant had not made it likely that the skilled person might have understood the patent to include emtricitabine despite the patent’s language (*Mylan v. Gilead*, paras. 32–34).

Trying to understand the decision, my interpretation of the current situation is thus the following. (1) A registered patent is presumed valid. (2) The defendant has the burden to show that the patent is likely invalid. (3) If the defendant fulfils its burden, the burden shifts to the applicant. (4) Showing likelihood of invalidity on grounds of legal interpretation is easier than showing invalidity on the basis of factual grounds. (5) Preliminary injunction proceedings are still summary proceedings, which makes taking into account evidence on complicated technical matters more difficult and leads more easily to a non-showing of likelihood. (6) The value of foreign judgments was not discussed at all by the Supreme Court. It seemingly took the CJEU decision and applied its criteria without any recourse to the foreign judgments. Whether this means that they are of no value or that they have hidden persuasive authority is unclear.

In light of these findings, more traditional situations where invalidity is invoked may still face an uphill battle. Let us assume, for example, that a defendant in a preliminary injunction case argues that a patent lacks novelty and inventiveness. These are standard defences in a patent case, and they usually require technical evidence. This in turn might mean that the court is only under an obligation to look into the evidence summarily and that conflicting evidence might mean that the defendant’s burden of proof is not met.

As for final injunctions, there is, in principle, a presumption of validity. The role of the presumption is, however, rather limited since questioning the validity of the patent requires an invalidity action, as was noted. In practice this means that if an invalidity action has been instituted alongside an infringement action, the judgment on validity is given at the same time as the infringement judgment. If the court finds that the patent is invalid, then no final injunction or other remedy will be granted. If, on the other hand, the patent is found to be valid, a final injunction may be granted, if the requirements for a final injunction (infringement and risk for continued infringement) are met. The presumption of validity is thus relevant only in cases where no invalidity action has been instituted. In those cases, the court is under an obligation to presume that the patent is valid.

E. ALTERNATIVES AND MODIFICATIONS

1. *Limited Duration of Final and Preliminary Injunctions*

A preliminary injunction has effect from the moment the applicant posts the security required by the enforcement authority (chapter 8, section 2(1) of the Enforcement Code) or from a later point in time, if the court decided so when issuing the preliminary injunction.

A final injunction follows the normal rules for enforcement of judgments. Market Court judgments may be enforced immediately after they have been rendered unless the court has in its decision decided otherwise. The Market Court may decide that the enforcement of the final injunction is to take place at a later date. This is possible at least in two situations. First, if the claimant has asked for a delay, the court would most likely view this as a narrowing of the claim. Since the court cannot give more than has been asked for, it would have to order the final injunction to start at a later date, even in cases of clear infringement. Party autonomy is a very important and clear-cut principle in these kinds of civil cases, and the court cannot go against the plaintiff's wishes. Second, and perhaps more interestingly, it is at least in principle possible for the court to decide that a final injunction is to take effect only at a later date, especially in case it takes some time for the defendant to wind down its infringing activities. Although possible in theory, no case law exists, as far as I know.

For both preliminary and final injunctions, it is possible to apply for a stay of enforcement. The Supreme Court may decide that a decision may not be enforced or that enforcement that has already started is to be halted (chapter 7, section 4(3) of the Market Court Proceedings Act).

It is also possible for the court to decide on an end date for a final injunction. A natural way of explicitly setting an end date is to refer to the term of the patent-in-suit. In literature there have also been discussions on so-called post-expiry injunctions. It has been held possible that they could be granted in order to stop the

defendant from enjoying a springboard effect (i.e. the defendant would not be allowed to take advantage of infringing preparations).⁴⁵ Although possible in principle, neither legislation nor case law has acknowledged the possibility. Whether in some cases there might be a need to set an end date before the patent expires has not been discussed.

2. *Ongoing Royalties*

Finnish law does not recognize royalties or damages in lieu of injunctions. It should be noted that Article 12 of the Enforcement Directive on “alternative measures”, i.e. pecuniary compensation instead of an injunction or destruction, if the infringer has acted unintentionally and without negligence, was not explicitly implemented in Finland. The relation between injunctions and compensation was never discussed during the implementation. The relation between destruction of infringing products (section 59 of the Patents Act) and compensation was, on the other hand, discussed, albeit briefly. The government argued and the parliament accepted that section 59 (3) of the Finnish Patents Act fulfils the requirements of Article 12 of the Enforcement Directive 2004/48/EC.⁴⁶ Section 59(3) provides that “the court may order, on request, if there are special reasons for this, that the holders of [infringing] objects . . . shall be able to dispose of the objects for the remainder of the patent term or for a part thereof, against reasonable compensation and on reasonable conditions”. Although this provision has never, to my knowledge, been applied, it still shows quite clearly that there could be cases where the infringer is allowed to keep the infringing product and instead pay a monetary compensation.

Since no such provision was put in place for injunctions, it seems that, in order to reach a similar outcome as for destruction, the patent holder would most likely have to withdraw its request for an injunction and instead claim compensation for future losses.

3. *Compulsory Licences*

Compulsory licences are provided for in sections 45–48 of the Patents Act. A compulsory licence requires a public interest and a decision by the Market Court. The compulsory licence is always a non-exclusive licence, which means that the patent holder is always entitled to use the patented invention and grant licences to other parties. The patent holder is always entitled to a licence fee from the licensee for any use based on a compulsory licence.

Compulsory licences are available in five instances: (1) Non-use (section 45 of the Patents Act); (2) Dependent invention (section 46 of the Patents Act); (3)

⁴⁵ Norrgård 2002, 75.

⁴⁶ Government Bill (HE) 26/2006, p. 13.

Compulsory licence to holder of plant breeder's right (section 46a of the Patents Act); (4) Considerable public interest (section 47 of the Patents Act); and (5) Prior use (section 48 of the Patents Act).

According to section 45 of the Patents Act, if three years have elapsed since the grant of the patent and four years from the filing of the application, and if the invention is not worked or brought into use to a reasonable extent in Finland, any person who wishes to work the invention in Finland may obtain a compulsory licence to do so unless there are legitimate grounds for failing to work the invention.

According to section 46, the proprietor of a patent for an invention whose exploitation is dependent on a patent held by another person may obtain a compulsory licence to exploit the invention protected by such patent if it is deemed reasonable in view of the importance of the invention or for other special reasons.

According to section 46a, if a breeder cannot acquire or exploit a plant variety right without infringing a prior patent, they may apply for a compulsory licence for non-exclusive use of the invention protected by the patent if the licence is necessary for the exploitation of the plant variety. The patent holder is entitled to a cross-licence on reasonable terms to use the protected plant variety.

According to section 47, a person who wishes to commercially exploit a patented invention may obtain a compulsory licence to do so, if there is a considerable public interest.

Section 48 provides for a compulsory licence in cases where a person who, at the time the application documents were made available, was commercially exploiting in Finland an invention which is the subject of a patent application (and which leads to a patent), provided there are special reasons for this and also they had no knowledge of the application and could not reasonably have obtained such knowledge. The same applies if a person has made substantial preparations for commercial exploitation of the invention.

To my knowledge there are no decisions on compulsory licences in Finland. In Supreme Court decision KKO:2003:127 the defendant raised the issue of compulsory licences as a defence. It argued that a final injunction should not be issued since it had, among other things, a right to a compulsory licence. However, the Supreme Court takes the view that raising the issue merely in defence in infringement proceedings is not enough. A denial of a final injunction in a situation where the court has found that there is an infringement and a risk of continued infringement requires a judgment granting a compulsory licence.⁴⁷

⁴⁷ See also Helsinki Court of Appeals preliminary injunction decision HelHO 30.6.2011 no 2120 *Novozymes A/S v. Genencor International Oy and Finnfeeds Oy*, where the defendant argued that it had a right to a section 48 compulsory licence since it had been commercially using its solution before the utility model applications had become public. The Court of Appeals noted that the right to a compulsory licence "had remained unclear" and therefore the compulsory licence issue had no bearing on the decision to refuse the application for a preliminary injunction.

F. DRAFTING AND ENFORCING INJUNCTIONS

1. *The Wording of Injunctions and Their Interpretation*

The scope of an injunction can be said to have an objective and a subjective dimension. The objective dimension of the scope can further be divided into local and temporal. The objective dimension of the scope of the injunction answers the question of which acts may be enjoined (local), and when the injunction starts and ends (temporal). The subjective dimension of the scope deals with who may be enjoined.

The injunction should always be worded so that it is possible to clearly determine the scope of the injunction as to the objective and subjective reach. An unclearly worded injunction may lead to several problems. First of all, it is difficult for the parties and the enforcement authority to know exactly which acts are allowed and which are prohibited. This, in turn, may lead to unnecessary litigation in the enforcement phase. Second, unclear injunctions are problematic from the point of view of the principle of legality. In criminal law, the principle of legality (which includes for example the rule *nullum crimen sine lege* – no crime without law) has a very strong position. Since breaching an injunction may lead to the payment of a conditional fine, it comes close to a criminal sanction. Therefore, I argue that a similar principle of legality should apply for injunction language. Although this is not settled law, courts try to give injunctions a clear and unambiguous wording. Still in the 1990s and early 2000s it was possible to see injunctions worded in a very broad manner, such as “the defendant is enjoined from infringing the patent”. This type of language was rightly criticized.⁴⁸

In accordance with the procedural principle of party autonomy, the plaintiff decides the extent of the injunction. In line with general principles of procedural law, the court may order a narrower injunction than the claimant requested, but it may not broaden it: i.e. the injunction may not go further than what was requested. The court’s role, if the wording is contested, is to ensure that only a wording that has support in the grounds of the decision and that can be enforced is allowed. The question of what can be enforced can be a very tricky one and it is rarely discussed. The court, however, needs to ensure that the injunction is specific enough for the enforcement authorities to be able to decide which acts are covered by the injunction. One example of an unenforceable injunction might be the abovementioned overly broad injunctions only stating that the “defendant is enjoined from infringing the patent” since it would not specify which acts fall within the injunction. It would create a very difficult situation for the enforcement authority, which is not specialized in intellectual property law, to try to figure out whether certain acts are infringing or not.

⁴⁸ Norrgård 2002, 74 *et seq.*

For an injunction to have support in the grounds of the decision, one needs to look at the requirements for injunctions. Simply put, an injunction can, first of all, cover infringing acts that are already taking place and for which there is a sufficient risk of continued infringement. Second, the injunction may also cover acts that have not yet taken place, but the threat of which is deemed to be sufficient. Thus, an injunction may cover not only those acts that are taking place, but also sufficiently probable variants that have not yet taken place. The exact scope of the injunction is decided on a case-by-case basis.

For quite a long time, injunctions have been worded in a fairly standard, but sufficiently clear way. One typical example would be an injunction that is worded as follows (freely translated and simplified): “The court prohibits the defendant from offering, putting on the market or using [product X] during the term of the patent [number N].” If the defendant were to, for example, market and sell a product, the injunction would cover such marketing and selling as long as it takes place during the term of the patent and the marketing and/or selling activities are interpreted as “offering” the product and/or “putting [it] on the market”. The injunction is thus not limited to exactly the same infringement that was the object of the infringement trial. On the other hand, the injunction is not a broad “do not break the law” type of order. In our example, “product X” may be identified in a number of ways. A common way is using the trademark of the product (“Ezetimib Sandoz 10 mg”⁴⁹), but far from the only one.

2. *Flexibilities in the Enforcement Phase*

The National Administrative Office for Enforcement (Enforcement Authority) is the government authority in charge of enforcing decisions in civil and administrative matters and collection of fines in criminal matters (chapter 1, section 2 of the Enforcement Code).

Enforcing a preliminary injunction takes place as follows. The enforcement of the preliminary injunction requires, first, that the applicant posts a security for any damage the defendant may suffer if it later turns out that the preliminary injunction should not have been granted (chapter 8, section 2 of the Enforcement Code).⁵⁰ Usually, a government official at the Enforcement Authority called the District Bailiff decides the amount of the security (chapter 3, section 43(1) of the Enforcement Code).⁵¹ No security needs to be posted when enforcing a final

⁴⁹ See Market Court decision MAO:708/17 *Merck v. Sandoz*.

⁵⁰ The applicant may be freed from the obligation to post a security if the applicant lacks means to do so and the applicant’s right is “evidently founded”. This provision is, as far as I know, applied only in very exceptional cases. Both criteria (lack of means and high standard of proof for right) are very strict.

⁵¹ There are certain other government officials that also have the right to make enforcement decisions. See chapter 1, section 7 of the Enforcement Code.

injunction judgment granted by the Market Court (chapter 7, section 7(3) of the Market Court Proceedings Act).

After the security has been posted or if a security need not be posted, the enforcement continues with notifying the defendant of the injunction. If the defendant complies with the wording of the final or preliminary injunction, nothing further will happen. If, however, the defendant breaches the injunction, the District Bailiff has several options after becoming aware of the breach.

The District Bailiff can enforce the breached injunction by making an application to the court requesting that the defendant shall be ordered to pay the conditional fine set in the injunction decision. If the decision does not include a conditional fine, the enforcement authority has to set it first (chapter 3, section 74 of the Enforcement Code). Then only the *second* breach could lead to the defendant being ordered to pay the conditional fine. When the District Bailiff makes the request to the court, they may at the same time decide on a higher conditional fine.

According to chapter 7, section 17 of the Enforcement Code, if the District Bailiff can put a stop to further breaches of the injunction by using appropriate measures, there is an obligation to take such measures. However, this is only possible after a first breach and only after the defendant has been heard (unless a hearing makes the enforcement significantly more difficult).

In most cases, the defendant will follow the injunction order without any further need for specific enforcement orders by the District Bailiff. However, if a defendant were to oppose a granted injunction and continue its infringing activities, the District Bailiff would have rather wide discretion as to when and how vigorously to pursue the case for payment of the conditional fine and whether or not to make an order for a new, higher, conditional fine. The District Bailiff does not, according to my own personal experience, want to get deeply involved in the substance of the case. The Bailiff's competence is not within intellectual property law, but primarily in the enforcement of different types of payment obligations. Thus, difficult questions relating to the interpretation of the injunction is something the enforcement authority would rather see the courts deal with. Such difficult questions can reach the court either after the District Bailiff has applied for payment of the conditional fine at the court, if the District Bailiff makes a decision that the defendant appeals, or if the defendant contests the enforcement by bringing an action in the court in accordance with chapter 10, section 6 of the Enforcement Code.

All in all, there are some flexibilities in how the District Bailiff deals with the conditional fine and with measures putting a stop to the infringement.

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