

## Poland

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Injunctive relief can be found in all Polish patent statutes in the twentieth and twenty-first centuries.<sup>1</sup> The Industrial Property Law<sup>2</sup> (IPL) that currently regulates industrial property rights including patents also envisages this form of relief. Article 287 section 1 of the IPL provides that a patentee whose patent has been infringed, as well as exclusive licensees, may – apart from other remedies – demand injunctive relief. Generally, injunctions are perceived as a necessary corollary to patents. Patents, as exclusive rights, provide patentees with exclusivity to use an invention within limits provided in the law. The availability of injunctive relief allows patentees to protect that exclusivity.

Injunctive relief is generally regarded as one of the most important remedies available to the patentee.<sup>3</sup> Most importantly, when granted it allows the patentee to stop further infringement which, if continued, could lead to irreversible consequences for the patent holder.<sup>4</sup> Injunctions can be granted when the infringement is still ongoing or when that infringement has stopped but there is likelihood that the infringer will commence infringing activities in the future.<sup>5</sup> Injunctive relief does not require fault on the part of the infringer. Therefore, it does not matter whether infringement was intentional or merely negligent.

It is generally assumed, often tacitly rather than explicitly, that permanent injunctions should be granted automatically upon establishing infringement. Polish Industrial Property Law does not however require the injunctions to be granted automatically. Article 287 section 1 of the IPL only provides that the patentee *may* demand an injunction in case of infringement. It does not state that the court *must* in such cases grant injunctive relief. Unfortunately, the provisions of Polish law on

<sup>1</sup> Sikorski et al. 2019, 135.

<sup>2</sup> Dz.U. 2017, (poz.) 776, Dz.U. 2018, (poz.) 2302, Dz.U. 2019, (poz.) 501

<sup>3</sup> Du Vall et al. 2017, 618.

<sup>4</sup> *Id.*

<sup>5</sup> Podrecki & Traple 2017, 389.

patent injunctions are not worded in a similar manner to, for instance, the provisions of US law, where some degree of discretion stems directly from the wording of the patent statute.<sup>6</sup> As will be shown in Sections A and B, Polish law also has tools, including proportionality, that allow for injunctive relief to be applied more flexibly.

So far, however, there are no examples from the case law of the Polish courts where injunctions have been denied or have been tailored to allow for product redesign. Factors such as the nature of the party – for example the fact that a party is a non-practicing entity – have not yet been considered as a justification for denying injunctive relief. As will be shown – this does not mean that tailoring, for instance, would not be possible under Polish law. Rather, the reason for this is that Poland has so far not been a popular venue for patent litigation.

Beginning on July 1, 2020 all intellectual property (IP) disputes will be resolved by specialized IP courts. The reform that introduced specialized IP courts generally abolished the bifurcated system in which infringement proceedings and proceedings related to revocation and invalidity were conducted separately. Interestingly, however, the bifurcated system was not abolished with respect to patents. Thus, although patent infringement disputes will be now adjudicated by specialized IP courts, patents will still be presumed valid unless declared otherwise in separate revocation or invalidation proceedings conducted before the Polish Patent Office.<sup>7</sup> This certainly strengthens the position of patent holders and may also lead to a phenomenon well-known from the German bifurcated patent system and referred to as “an injunctions gap.”<sup>8</sup>

Speaking of injunctions, one should not omit interim (preliminary, temporary) injunctive relief. In Polish law, interim relief is regulated in the Civil Procedure Code. Without considering the conditions for obtaining interim relief, it is impossible to properly assess the actual leverage of both the infringer and patentee in the context of a patent dispute. Interim relief – when too easily available – may give significant leverage to the patentee and significantly affect the outcome of a dispute, including the propensity of the defendant to reach an unfavorable settlement agreement. As will be shown later, Polish Civil Procedure Code largely tilts the balance in favor of the patentee.

#### A. TOOLS ALLOWING FOR FLEXIBILITY IN GRANTING PERMANENT INJUNCTIVE RELIEF

Polish courts have generally not considered the need to apply patent injunctions in a flexible manner. Similarly, Polish patent literature has also only very briefly analyzed

<sup>6</sup> 35 USC § 283.

<sup>7</sup> Targosz 2015, 815.

<sup>8</sup> On the phenomenon of the “injunctions gap,” seen from a German perspective, see Cremers et al. 2014.

possibilities for a more flexible approach towards permanent injunctions.<sup>9</sup> Neither the adoption of the TRIPS Agreement, nor the adoption of Directive 2004/48 – which both make express references to the possibility of abuse of IP remedies or the requirements of proportionality<sup>10</sup> – has changed much in this respect.

Courts in other jurisdictions have adopted a more flexible approach towards injunctive relief. They have sometimes denied or tailored injunctive relief in disputes initiated by holders of standard essential patents and patent assertion entities as well as disputes between patentees and manufacturers of complex products implementing numerous patent-protected inventions. In these cases, courts have recognized that injunctive relief may be disproportionately harsh on technology implementers and may also negatively affect the protection of fundamental rights and freedoms such as freedom to conduct business.<sup>11</sup> Consequently, monetary relief was found to be a sufficient remedy for the protection of patentees' interests as well as the primary function of the patent system, namely, promotion of innovation. Unfortunately, because disputes like the ones described have not been initiated before Polish courts, these courts have had no or very little chance to consider injunctive relief more profoundly.

It seems that more and more often, striking a balance between protection of inventions and interests of users will require a more flexible approach towards injunctive relief. It seems that such flexibility could be achieved in a number of ways: Firstly, with the help of the alternative measure defined in Article 287 section 3 of the IPL, the origins of which can be traced to Article 12 of Directive 2004/48. Secondly, abuse of right doctrines, originating both in patent law<sup>12</sup> and the Civil Code,<sup>13</sup> may also be of assistance. Thirdly, competition law<sup>14</sup> – as the experience of other countries clearly shows – may be a useful tool in adapting injunctive relief to the requirements posed primarily by technology standardization and access to standard essential patents. At first glance, this seems to be a set of quite powerful tools, capable of addressing the concerns over patent enforcement already faced by the courts in more popular patent jurisdictions.

However, a deeper analysis shows that relying only on those tools may not suffice. Thus, the crucial question is whether the courts may directly refer to the more general principle of proportionality, based both on EU law – primarily Directive 2004/48 – as well as the provisions of the Polish Constitution. It seems that applying proportionality to patent injunctions would allow for the most comprehensive and systematic approach to justifying denial or tailoring of injunctive relief in cases where granting injunctive relief is not required to safeguard the interests of the rights

<sup>9</sup> See, e.g., Du Vall 2008, 410.

<sup>10</sup> Art. 3 and 12 Directive 2004/48; art. 41 TRIPS Agreement.

<sup>11</sup> Sikorski 2019a, 242–47.

<sup>12</sup> Art. 68 IPL.

<sup>13</sup> Art. 5 Civil Code.

<sup>14</sup> Art. 102 TFEU and art. 9 Act on Protection of Competition and Consumers.

holders or the public interest in having a patent system capable of stimulating innovation. Proportionality analysis requires considering interests of the patentee and the implementer, the circumstances of each case – such as the nature and value of the patent-protected technology as well as the circumstances of the particular infringing use, the interests of other parties, fundamental rights and the public interest.<sup>15</sup>

### 1. *Alternative Measure: Compensation in Lieu of an Injunction*

Article 12 of Directive 2004/48 introduced a measure by virtue of which the courts of the member states may order monetary compensation in lieu of an injunction. Though optional, in Poland Article 12 was implemented in both industrial property and copyright laws. By virtue of Article 287 section 3 of the IPL, the courts may, upon the motion of the liable party, order payment of monetary compensation in lieu of an injunction. This is only possible, however, when certain additional conditions have been satisfied; namely, when the infringer acted unintentionally and without negligence, the execution of an injunction would cause disproportionate harm to the infringer and pecuniary compensation would be satisfactory to the patentee.

This alternative measure has never been used by the courts with respect to patents. There is also no reported case law on its application to other IP rights.<sup>16</sup> Its reception has been much more favorable in legal literature. Scholars and commentators have welcomed the flexibility that comes with the measure,<sup>17</sup> and some have claimed that the measure could be used in disputes with non-practicing entities.<sup>18</sup> When ordering monetary compensation in lieu of an injunction, courts have a substantial degree of discretion.

That discretion would allow the court to tailor the injunctive relief to the circumstances of a given case. Thus, for example, the court would have discretion as to whether to apply the measure at all as well as discretion with respect to the payment arrangements and conditions for use of the relevant invention.<sup>19</sup> In particular, the court could allow use of the invention for a limited period so as to allow redesign or to limit the number of infringing products that could be sold on the market, in particular by allowing only the products already manufactured to be sold.<sup>20</sup>

<sup>15</sup> On the factors considered under proportionality analysis see Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with European Economic Area (EEA) relevance), OJ L 157, 15.6.2016, 1–18.

<sup>16</sup> Based on searches in leading databases in Legalis and Lex.

<sup>17</sup> Du Vall 2008, 410.

<sup>18</sup> Kubiak 2016, para. 11.

<sup>19</sup> Podrecki & Traple 2017, 415.

<sup>20</sup> Sikorski et al. 2019, 144.

Though the scope of discretion in applying the alternative measure is quite significant, there are boundaries within which such discretion can be exercised. The limitations result particularly from the conditions which must be met if the court is to order monetary compensation in lieu of an injunction. These conditions must be satisfied jointly, which might be difficult in many cases. For example, pecuniary compensation might not be satisfactory for the patentee, if the patentee exploits the patent by manufacturing and selling goods that implement a patent-protected invention or if the patentee grants exclusive licenses only.<sup>21</sup>

The requirement that the infringer acts neither intentionally nor negligently is also problematic. It is not clear when the assessment of the lack of fault should be made. It seems rather that absence or presence of fault should be assessed at the moment the infringement is initiated. Otherwise, if it is assessed at the time court proceedings are initiated, the measure will hardly ever be available for application, as the infringer will usually have been notified of the infringement prior to initiation of proceedings.

In addition, the assessment of the requisite degree of care may be difficult, especially since both jurisprudence and scholarly writings in this area are quite scarce. Though generally there is agreement that the degree of care required depends on the level of distribution or production of a given infringer and that more is required from manufacturers than those operating in distribution channels,<sup>22</sup> it is not entirely clear what standard of care could, for example, be required from a manufacturer of a complex product who uses multiple components obtained from third parties.<sup>23</sup> Should such a manufacturer be treated in the same way as a pharmaceutical manufacturer? Probably not, as it seems quite evident that a pharmaceutical manufacturer will usually be capable of conducting a search of all relevant product, use and process patents at reasonable cost whereas requiring the manufacturer of a complex product to conduct a comprehensive search of all possible inventions implemented in multiple components of such a product could turn out to be unreasonably costly and could also delay entry of new products to the detriment of consumers. However, the lack of case law and scholarly works in this area results in a substantial degree of uncertainty.

In an important case for injunctive relief such as implementation of technologies protected by standard-essential patents (SEPs), the application of the alternative measure will usually be excluded. This is because unlicensed users usually know that they are implementing a standard, so as a result they either know or could easily have learned that they are infringing one or more SEPs. Thus, in this case courts must resort to other tools to justify denying injunctive relief.

<sup>21</sup> *Id.*, 143.

<sup>22</sup> Podrecki & Traple 2012, 1407.

<sup>23</sup> Sikorski et al. 2019, 142.

## 2. Abuse of Rights Doctrines

Legal systems generally provide a defense against rights holders who formally act within the limits of their rights as defined in the law, but in a way that is considered abusive.<sup>24</sup> This is achieved by references to sets of non-legal norms introduced through such concepts as morality, fairness, good faith, proportionality and by reference to reasonableness or social and economic functions of particular rights.<sup>25</sup>

Polish law introduces an abuse-of-rights defense in Article 5 of the Civil Code which provides that rights may not be exercised contrary to their socioeconomic purpose and rules of good faith. This provision applies to the exercise of all private rights.<sup>26</sup> Additionally, Industrial Property Law introduced in 2001 an additional patent-abuse defense of its own in Article 68 sections 1 and 2.

Article 68 provides that:

- (1) A patentee or a licensee should not abuse their right, in particular by preventing the use of a patented invention by a third party, if such use is necessary to satisfy the demand on the national market, especially when this is in the public interest and the product is not available to the public in proper quantity or quality or is available but at excessively high price.
- (2) Preventing third parties from using a patented invention within the period of three years following patent grant shall not be deemed an abuse of right.

Patent abuse within the meaning of Article 68 opens the door to compulsory licenses that are granted by the Patent Office.<sup>27</sup> Article 68 of the IPL provides for a very narrow abuse doctrine. Reference to satisfying demand on the national market suggests that it will be applicable in a very limited number of cases and primarily when public interest is involved.<sup>28</sup> However, abusive exercise of patents does not have to result in not satisfying the demand on the national market. In such cases, the question is whether abusive exercise of a patent that lies outside Article 68 of the IPL could be challenged under Article 5 of the Civil Code.

The application of the general-abuse doctrine, as defined in Article 5 of the Civil Code, to the exercise of IP rights has not generally been questioned by the courts<sup>29</sup> or by commentators in the legal literature. Barta and Markiewicz, for example,

<sup>24</sup> *Ibid.*, 144.

<sup>25</sup> *Ibid.*

<sup>26</sup> Radwański & Olejniczak 2013, 107.

<sup>27</sup> Art. 68 sect. 1(2) IPL.

<sup>28</sup> Du Vall 2008, 291.

<sup>29</sup> *See, e.g.*, Judgment of the Court of Appeals in Warsaw of December 1, 2014, case VI ACa 517/13. The court found that in the circumstances of the case demanding an injunction did not constitute abuse of a patent, but in principle the application of the abuse doctrine was not excluded.

identify a set of factors which could justify the application of Article 5 of the Civil Code to the exercise of both moral and economic rights in the area of copyright.<sup>30</sup> These authors suggest considering whether the right is exercised: (1) without there being a fair and rational justification for such exercise; (2) to cause harm to the other party; (3) in a way that causes a greater burden for other party, when the right could be exercised in a less burdensome manner; (4) in such a manner that the benefits for the rights holder are disproportionate to the burden caused to the other party; (5) in a manner contrary to the right's purpose or function.

Thus, though generally it is accepted that Article 5 may apply to the exercise of IP rights, in the case of patents, things seem to be a bit more complicated. Some authors claim that Article 68 of the IPL precludes the application of Article 5 of the Civil Code to patents.<sup>31</sup> These authors claim that the intention of the legislature was to exclusively regulate the abuse-of-rights defense in IPL. This is a rather controversial conclusion. Article 68 of the IPL has a very different purpose: it regulates abuse of rights that can be detrimental from the perspective of the public interest and which therefore justifies compulsory licensing, whereas an Article 5 of the Civil Code defense does not require a threat to the public interest.

Consequently, one should assume that Article 5 allows for a defense to the exercise of rights by patentees when these are exercised contrary to the principles of good faith. This is the case when patentees induce reliance as to their future conduct but subsequently act contrary to the justified expectations of patent infringers. Thus, according to the literature, it would be abusive to demand an injunction when parties negotiate a license in good faith and with a view to concluding a license agreement and the licensee, in reliance on the ongoing negotiations, already practices the patented technology.<sup>32</sup> It might also be abusive to demand an injunction when the patentee has knowingly tolerated infringement for a period of time only to later exercise its right to cease infringing activities.<sup>33</sup> Equally, it would be abusive to demand an injunction when the patentee has promised to negotiate licenses on certain conditions and later refuses to do so (as in the case of FRAND commitments). In all these cases just described, Article 68 of the IPL would usually be of very little help. However, there is no reason why an Article 5 defense should not apply in such cases.

### 3. *Competition Law Defense*

Competition law provides a framework for conducting all economic activities on the market. It is also a framework for the exercise of all private rights, including

<sup>30</sup> Barta & Markiewicz 2013, 300–02.

<sup>31</sup> Du Vall 2008, 290; Żakowska-Henzler 2012, 712–13, 730.

<sup>32</sup> Żakowska-Henzler 2012, 729.

<sup>33</sup> *Id.*, 728–29.

patents.<sup>34</sup> Competition law, both national and EU, can provide a defense against patentees seeking injunctive relief. When a patentee holds a dominant position in a given technology market, patent enforcement can, in certain circumstances, constitute an abuse of such a position.<sup>35</sup> Polish and EU law can apply in parallel to a given anticompetitive practice.<sup>36</sup> However, when a given exercise of patent rights does not affect trade between member states, it can only be assessed under national law. Interestingly, national competition law can provide more rigid assessment of unilateral practices than EU law.<sup>37</sup> Generally, Polish competition law provides for similar criteria to EU competition law.<sup>38</sup> However, the experience of Polish courts with cases at the intersection of IP and competition is much smaller than that of the Court of Justice of the European Union (CJEU) or the Commission.

#### 4. Assessment

The tools described above allow a substantial degree of flexibility in the application of permanent injunctions in patent infringement cases. Each of the tools described has some limitations however.

First, the application of the alternative measure, modeled on Article 12 of Directive 48/2004, requires observing very strict conditions. The requirement of lack of fault may preclude the application of that provision even in cases where monetary compensation seems to provide satisfactory relief from the patentee's perspective or where the public interest would override the private interest of the patent owner.

Second, competition law has inherent limitations as well. The application of Article 102 of the Treaty on the Functioning of the European Union (TFEU) (or its national counterparts) requires establishing a dominant market position, which is usually not contested in the case of SEPs, but which may be missing in other typical cases where denying or tailoring of injunctions is usually considered.

Third, the application of the abuse-of-rights doctrine based on the general provisions of the Civil Code's Article 5 is problematic. Indeed, it seems that an abuse-of-rights defense can address a wide, though probably not the whole, spectrum of cases where denying or limiting injunctive relief would be justified. Most importantly, however, the abuse doctrine has always been regarded as an extraordinary measure, one that should find application in exceptional cases only. The problems with

<sup>34</sup> Ullrich 2014, 357.

<sup>35</sup> There is quite a significant number of EU Commission and CJEU decisions on the exercise of IP rights that may in certain special circumstances constitute abuse of dominant position. See, e.g., *Microsoft v. Commission of European Communities* (CJEU 2007) (with respect to copy-rights in software); *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH* (CJEU 2015) (with respect to patents).

<sup>36</sup> Art. 3(1) Regulation 1/2003.

<sup>37</sup> Art. 3(2) *in fine* Regulation 1/2003.

<sup>38</sup> Miąsik 2012, 422–95.

injunctive relief are of a systemic nature, as they involve considerations of the central purpose of the patent law, namely its ability to stimulate innovation.

Rigidity and automatism in the application of injunctive relief could result in patents being exercised in a way that may not further the goals of patent law, namely providing a reward to the patentee and more generally stimulating innovation and dynamic competition. Achieving these goals calls for a comprehensive approach from within patent law rather than via measures of exceptional nature found outside of the patent law itself. Seeing the inherent limitations of the tools described, the relevant question seems to be to what extent proportionality could play a role in ensuring a more flexible approach to injunctive relief.

## B. PROPORTIONALITY AND PERMANENT INJUNCTIONS

Interestingly, proportionality – derived from both the Polish Constitution and EU law – has already been successfully used by Polish courts in copyright cases, allowing the courts to alleviate the rigidity of some of the monetary remedies available to copyright holders.<sup>39</sup> It has also recently been successfully invoked in a case concerning the right to information under Polish Industrial Property Law. So far it has not been applied directly with respect to injunctive relief in patent cases. However, the analysis of Polish and EU law shows that there are no legal obstacles in applying proportionality to patent remedies, including injunctive relief. In fact, both EU law<sup>40</sup> and the Polish Constitution<sup>41</sup> require that proportionality is considered when deciding whether to grant, deny or tailor injunctive relief.

### 1. *Proportionality and Industrial Property Law Remedies before the Constitutional Court*

Article 286<sup>1</sup> section 1(3) of the IPL provided industrial property rights holders, including the patentees, with the right to obtain information from parties other than the infringer about the origin and channels of distribution of infringing products. The right to demand information was modeled on Article 8 of Directive 48/2004. However, whereas Article 8 allowed the rights holder to demand information in connection with infringement proceedings, the right to obtain information from third parties enabled information to be gathered irrespective of whether it would later be used in the proceedings against the infringer.

<sup>39</sup> These cases concerned primarily monetary remedies, namely right to remedy loss resulting from copyright infringement by demanding lump-sum payment equivalent to two or three times the amount of reasonable compensation for the use of a copyrighted work – art. 79 Copyright Law.

<sup>40</sup> Art. 3 and 12 Directive 48/2004.

<sup>41</sup> Art. 31 and 64 Polish Constitution.

This very broad scope of the information right was challenged before the Constitutional Court as limiting the freedom to conduct business guaranteed by Article 22 of the Constitution in a manner that was disproportionate.<sup>42</sup> The court observed that Article 286<sup>1</sup> section 1(3) of the IPL provided for a standalone right to information. It then stated that such a standalone right to information granted to the rights holder may be justified in order to safeguard industrial property rights of rights holders, but since it results in limitation of the third parties' freedom to conduct business, such a limitation must meet the proportionality test described in Article 31 section 3 of the Polish Constitution – which means that it must be adequate, necessary and proportionate *sensu stricto* in the sense that the measure must be the least intrusive one to achieve a legitimate goal.

The court found that the measure did not meet all elements of the proportionality test.<sup>43</sup> In particular it found the measure not to be proportional because it might be used not only for the protection of IP rights in the course of infringement proceedings. The court stressed that once information is obtained, infringement proceedings need not be initiated at all. The court added that the information obtained could later be used outside of IP infringement proceedings and that there were no safeguards against such use. Consequently, the court found that provisions on the right to information were disproportionately limiting the freedom to conduct business of those obliged to disclose the information on origin and channels of distribution of infringing products.

## 2. *Proportionality and Copyright Law Remedies before the Constitutional Court*

In a number of copyright cases, proportionality of monetary remedies was challenged. Polish copyright law provided the copyright holder whose economic rights were infringed with a choice of monetary remedies. According to Article 79 section 1 (3)(b) of the Copyright Law, the rights holder could either remedy the loss on the basis of general rules of tort law (this would mean that the burden of proof as to the amount of damages as well as fault and causal link, would lie with the plaintiff – the rights holder) or, in the event of a culpable infringement, by demanding payment of three times the amount of the appropriate fee that would have been due if the infringer sought permission from the copyright holder. The appropriate fee, in practice, equaled royalties that would be due had the parties concluded a licensing agreement.

<sup>42</sup> Judgment of the Polish Constitutional Court, December 6, 2018, case SK 16/19.

<sup>43</sup> It is interesting that the Constitutional Court in its opinion referred to art. 8 of Directive 2004/48 as the source for the Polish implementation but did not mention the proportionality principle in art. 3 of Directive 2004/48. The whole reasoning is based on the disproportionate character of the remedy in light of the provisions of the Polish Constitution.

The constitutionality of the lump-sum payment remedy was challenged before the Constitutional Court.<sup>44</sup> The main thrust of the claim lay in the argument that the remedy resulted in unduly harsh (disproportionate) consequences for the infringer. This in turn led to different standards of protection of property of the rights holder and infringer unjustly favoring the rights holder. Equal protection of property (Article 64), the equal treatment clause (Article 32) and the principle of proportionality (Article 31) were the legal basis for the constitutional challenge. The court agreed that infringement, if it leads to loss for the copyright holder, must also have negative consequences for the infringer. These consequences should not exceed certain limits however. The court found the right to a lump sum in the amount of three times the appropriate remuneration leads to disproportionate harm to the infringer and found that part of Article 79 section 1(3)(b) of the Copyright Law to be unconstitutional.

Later the Constitutional Court was asked to assess the validity of the right to payment of a sum corresponding to double the amount of fee that would have been paid had the rights holder given permission for the work to be used (Article 79 section 1(3)(b) of the Copyright Law).<sup>45</sup> Just as in the previous case, the appropriate fee corresponds to the amount of royalties that would be due had the parties concluded a licensing agreement. This remedy is available also when there is no fault on the part of the infringer. Again, the disproportionate nature of the remedy was the basis for the challenge of its constitutionality. And again, the principle of proportionality was derived from the Constitution rather than EU law. This time the court found that the right to demand double the amount of the appropriate fee would not be disproportionate from the perspective of the constitutional standards.<sup>46</sup>

### 3. *Proportionality and IP Remedies before the Supreme Court*

Of course, injunctive relief *as such* does not raise questions with respect to its compliance with the constitutional norms. In the case of injunctive relief, its disproportionate character becomes apparent only in certain types of IP infringement cases. Therefore, the issue is not whether injunctive relief is constitutional as

<sup>44</sup> Judgment of the Constitutional Court of June 23, 2015, case SK 32/14.

<sup>45</sup> Decision of the Supreme Court of April 9, 2019, case V CSK 108/18.

<sup>46</sup> Judgment of the Constitutional Court of November 5, 2019, case P 14/19. Interestingly, the CJEU in *OTK v. SFP* dealt with the right to demand double fees prior to the decision of the Constitutional Court and found the remedy to comply with the provisions of Directive 48/2004. The CJEU was persuaded by the arguments raised by the Polish government during the proceedings that the remedy of a lump sum in the amount of double compensation was not automatic and could be refused, especially if the court finds that the copyright holder abused its rights *see OTK v. SFP* (CJEU 2017), para. 31. These two cases raise an interesting issue as to whether and to what extent the assessment under “constitutional proportionality” might be different from the assessment under “EU proportionality.” In the case of the remedy to claim double compensation, the assessment under both principles of proportionality led the CJEU and Polish Constitutional Court to the same results.

such, but whether it is constitutionally applied in particular circumstances when it leads to disproportionate hardships for the IP-infringing defendants. Consequently, one has to ask whether the provisions of Polish law which provide for injunctive relief could be applied in such a way that would allow courts some flexibility in the application of that remedy so as to avoid unconstitutional results.

Polish courts are bound by the provisions of the Constitution. It is no different in the case of the constitutional provisions on proportionality, equal protection of property or freedom to conduct business. Courts are obliged to interpret and apply the statutes in a manner that would comply with the provisions of the Constitution<sup>47</sup>. Thus, if in a particular case the application of a remedy would be disproportionate the court should avoid applying a remedy in such a manner. In a patent dispute, for example, if the court establishes patent infringement but at the same time finds that an injunction would be a disproportionate limitation on the constitutionally protected freedom to conduct business – as would be the case with a SEP implementer – then the court should not grant an injunction.

Polish courts, by virtue of also being EU courts, are bound to interpret and apply their laws in a manner that complies with the provisions of EU law. This covers interpretation in a manner that complies with the EU directives, including Directive 2004/48 and its Article 3, which explicitly requires that remedies in IP law be applied in a proportional manner. The CJEU has repeatedly confirmed the obligation of member state courts to observe proportionality,<sup>48</sup> firstly in a copyright case concerning intermediary liability,<sup>49</sup> and later also in trademark cases – *L’Oreal and Others*<sup>50</sup> and more recently *Hilfiger*.<sup>51</sup>

As the analysis conducted so far shows, the duty of the courts to consider proportionality has very strong basis in both the Constitution and EU law. In fact, the courts have already resorted to the principle of proportionality to deny the application of various remedies in a number of IP cases. Interestingly, it is not always clear whether the courts invoke the Polish Constitution or EU law as the source for this requirement of proportionality. As the case law analysis later in this section shows, sometimes the courts refer to proportionality or the potential disproportionate effects of a remedy without making a direct reference to the source for the proportionality analysis, while on other occasions the courts directly refer Article 3 of Directive 2004/48. What is more, the courts invoke proportionality when deciding on the application of various types of remedies, both pecuniary (damages) and

<sup>47</sup> Gutowski 2018, 95–97.

<sup>48</sup> See also the presentation by Lord Justice Arnold, who discusses the cases in the following footnotes in Ludwig-Maximilians Universität International Conference on “Injunctions and Flexibility in Patent Law,” see [www.en.zr11.jura.uni-muenchen.de/conference-april/index.html](http://www.en.zr11.jura.uni-muenchen.de/conference-april/index.html).

<sup>49</sup> *Promusicae* (CJEU 2008).

<sup>50</sup> *L’Oreal and Others* (CJEU 2011).

<sup>51</sup> *Hilfiger* (CJEU 2016).

nonpecuniary (injunctions, publication of judicial decisions or statements by infringers).

In case I CSK 563/13,<sup>52</sup> the Supreme Court dealt with a dispute between a software producer and software user concerning the unauthorized use of software. The plaintiff claimed damages and publication of the court decision establishing copyright infringement in one of the national journals as well as on the websites of the defendant and the journal. The court of first instance ruled for the plaintiff. The case was appealed, and the appeals court lowered the amount of damages but otherwise upheld the first-instance ruling. The case was further appealed to the Supreme Court. In its decision, the Supreme Court vacated the decision of the appeals court and explained what factors should be considered by the appeals court when deciding upon the remedies.

In its opinion, the Supreme Court observed that the provisions of the copyright law on remedies available to the rights holder in case of copyright infringement were worded in a very general manner. The court emphasized that these remedies find application to all types of copyright infringements, and when applied in a particular case they need to be adapted to the circumstances of that case. The Supreme Court observed that in each case, the nature of infringement, its intentional or negligent character, effectiveness of protection and proportionality of a remedy must be considered.

In case V CSK 203/12,<sup>53</sup> the Supreme Court dealt with a dispute between a cable network operator and a collecting society representing holders of copyrights to audiovisual works. Polish copyright law requires cable network operators to conclude licensing agreements with collecting societies. Such societies have an obligation to conclude licensing contracts with all willing licensees. The cable network operator and the collecting society were initially bound by the licensing agreement. The collecting society terminated the agreement and proposed to conclude a new contract with higher royalty fees. The parties were unable to conclude a new agreement because they differed with respect to royalty rates.

The collecting society sued and obtained an injunction against the defendant cable operator from the first-instance court. The injunction was later upheld by the appeals court. The injunction was a sweeping one. The court ordered the cable network operator to cease retransmissions of all audiovisual works, even though the collecting society had rights to represent copyright holders of only some of the audiovisual works. Thus, the injunction did not distinguish between audiovisual works whose retransmission required entering into a licensing agreement with the plaintiff and works which could be retransmitted without the permission of the plaintiff.

<sup>52</sup> Judgment of the Supreme Court of October 9, 2014, case I CSK 563/13.

<sup>53</sup> Judgment of the Supreme Court of March 27, 2013, case V CSK 203/12.

The Supreme Court again pointed to the fact that the provision on injunctive relief in the copyright law is formulated in a very general manner. Thus, when the remedy is applied, the court has to take into account particular circumstances of the case. Otherwise, there is a risk that the remedy will be disproportionate, excessively burdensome for the defendant and not adequate. The court also added that injunctions that are formulated too broadly affect the freedom to conduct business.

Case V CSK 102/11<sup>54</sup> concerned yet another dispute between a collecting society and a cable network operator. The case is very similar to the case already discussed, but it is interesting because the court in its opinion referred directly to Directive 2004/48 as the source of an obligation to consider proportionality when deciding on the remedies.

The court very clearly pointed to the fact that although EU directives were not capable of producing direct effect in disputes between private parties, even in such cases member state courts were obliged to interpret and apply their own national laws in compliance with the provisions of those directives. Consequently, said the Supreme Court, in copyright cases courts should also interpret the provisions on copyright remedies in the copyright law in a way that complied with the general principles set out in Article 3 of Directive 2004/48. The court cited Article 3 of Directive 2004/48 when stating that the remedies should be fair and equitable, effective, proportionate, dissuasive and applied in a manner so as to avoid barriers to legitimate trade and should also provide safeguards against their abuse.

As these cases show, courts in various cases resort to proportionality to justify granting remedies in IP disputes or to define the scope of the remedies granted. So far, proportionality has mostly been used in copyright disputes, but there are absolutely no reasons for not resorting to proportionality in the case of all other remedies including injunctive relief. Courts have also cited both national constitution or EU law as the source of proportionality, but it seems that the source does not influence how proportionality is understood and later applied by the courts. Thus, there are no substantive differences in the understanding of what proportionality means. Certainly, Polish law does not require automatism in granting injunctive relief in patent infringement cases. No provision of the Polish Industrial Property Law requires that an injunction be granted in all cases where patent infringement is established, and the plaintiff files a claim for injunctive relief. Thus, there are no legal obstacles to adopting a more flexible approach towards injunctive relief in patent law that includes denying such relief or tailoring it to the circumstances of a particular case.

### C. ENFORCEMENT OF PERMANENT INJUNCTIONS

A decision of the first-instance court is not final. As such it cannot be enforced. It may however become final if not appealed in due time. Otherwise, only the

<sup>54</sup> Decision of the Supreme Court of March 8, 2012, case V CSK 102/11.

decisions of the second-instance courts are final and enforceable. When injunctive relief is granted, and the infringer does not comply with an injunction, the patentee may initiate enforcement proceedings. Such proceedings are conducted within the framework provided by the provisions of the Code of Civil Procedure. The primary objective of the enforcement proceedings in case of a permanent injunction would be to make the infringer obey the injunctive order.

There are two ways to enforce an injunction. Firstly, the patentee may ask the court to impose a fine on the noncompliant defendant.<sup>55</sup> Secondly, the patentee may ask the court to order the defendant to pay a specified amount of money to the patentee for each case of infringement.<sup>56</sup>

In the first case, if the court finds that the defendant has not complied with a permanent injunctive order, it will impose a fine in the amount not exceeding 10,000 Polish PLN (ca. €2,300). Separate fines may be imposed for each case of infringement. The total amount of fines may not exceed 1,000,000 Polish PLN<sup>57</sup> (ca. €230,000). Failure to pay the fine may lead to imprisonment.<sup>58</sup> Total period of imprisonment may not exceed six months. In the second case, the patentee may demand that the court orders the noncomplying defendant to compensate the patentee for each case of infringement. The court has a substantial degree of discretion when deciding on the amount of monetary compensation. However, such compensation should on the one hand deter the infringer, and on the other hand should not be unnecessarily burdensome, yet be capable of providing the patentee with adequate satisfaction.<sup>59</sup>

#### D. PRELIMINARY INJUNCTIONS

##### 1. *General Picture*

Preliminary injunctions are very important in Polish patent litigation practice. While there is no available statistical data, most litigators would struggle to recall a patent dispute where the patent owner has not applied for a preliminary injunction. Most aspects of the preliminary injunction procedure are favorable to the patentee. Some of the reasons may be explained by the law, but the attitude on the part of the courts seems to be even more significant.

There are no special rules on preliminary injunctions in patent law, or even in intellectual property law.<sup>60</sup> Consequently, courts must act within the general

<sup>55</sup> Art. 1051 § 1 CCP.

<sup>56</sup> Art. 1051<sup>1</sup> § 1 CCP.

<sup>57</sup> Art. 1052 CCP.

<sup>58</sup> Art. 1053 § 1 CCP.

<sup>59</sup> Adameczuk 2015.

<sup>60</sup> A first reading of the relevant statutes could suggest otherwise, but these appearances are misleading. See Targosz 2019, 66 ff. This is mostly because in industrial property law the applicable provisions misleadingly call the right of information a preliminary injunction.

framework of the Code of Civil Procedure (CCP),<sup>61</sup> which has a chapter on interim relief.<sup>62</sup> These provisions are mostly broad and rely on open concepts. There are two main requirements for the applicant to show: (a) credibility of the claim and (b) legal (legitimate) interest. The credibility of the claim is often described in a rather hazy manner, resorting to *idem per idem* definitions (e.g. “Making a claim credible means justifying . . . the assumptions about the existence of a claim to be secured, which creates a conviction of its probability”)<sup>63</sup> but it is, in essence, the question of probability.<sup>64</sup> In the main proceedings (on the merits) the plaintiff must prove the claim, whereas in preliminary injunction proceedings it suffices that the claim look credible. Of course, even the former is in fact only a probability assessment, though the probability must be fairly high to justify a preliminary injunction.<sup>65</sup> The leading works in the field of civil procedure<sup>66</sup> show a surprising lack of awareness when it comes to the differences between the required standard of evidence known as “proving the case” and a less demanding standard such as making a claim credible. It is often difficult to infer from them more than that the latter is lower than the former. One could probably settle with the assessment that the credibility of the claim is tantamount to stating that the probability of the applicant’s claim being justified is higher than the opposite conclusion. Credibility of the claim in patent infringement cases must be referred to the necessary conditions of a successful claim, i.e. that the applicant owns the infringed right, the defendant/respondent has undertaken actions typically falling within the scope of protection (selling, offering, manufacturing, etc.) and such actions would infringe the litigated patent claims. Since making a claim credible is a lower standard than proving infringement in the main proceedings, types of evidence usually insufficient in the proceedings on the merits (especially private expert opinions)<sup>67</sup> are deemed admissible. The terminology used (credibility of the *claim*) is not accidental. In Poland, it is understood that in any civil litigation, the plaintiff/applicant pursues rights resulting

<sup>61</sup> Kodeks postępowania cywilnego, Journal of Laws 1964 No. 43, it. 296, consolidated text Journal of Laws 2019, it. 1460.

<sup>62</sup> Part II, art. 730 ff.

<sup>63</sup> Jagieła in Marciniak & Piasecki 2015. In the same vein, Jakubecki 2002, 267 (defining credibility as a “justified conviction that the claim exists”).

<sup>64</sup> Iżykowski 1980, 73.

<sup>65</sup> In Poland, even in civil cases it is assumed that to prove the case goes beyond the standard of preponderance of evidence, although it cannot, for obvious reasons, mean absolute certainty (no matter what courts and commentators have to say on this matter).

<sup>66</sup> These are often commentaries to the code of civil procedure written by practicing judges.

<sup>67</sup> In civil and commercial litigation in Poland, an expert opinion commissioned by a party, even from a very respected expert, is not regarded as a proper “expert opinion,” for the latter must be requested by the court. However, since preliminary injunction proceedings do not have to meet all the requirements of the proceedings on the merits, private expert opinions are widely used.

from substantive law. These are then translated into procedural claims. For example, a patentee whose patent has been infringed has a right to demand that the infringement be stopped. The remedy satisfying this purpose is an injunction. In court proceedings, the patentee files a claim for an injunction, and it is this claim that must be (in preliminary injunction proceedings) made credible.<sup>68</sup>

The requirement of legitimate interest is intended to restrict preliminary injunctions to cases in which the applicant could not achieve the legitimate goals of litigation if it were necessary to wait for the final verdict on the merits<sup>69</sup> (sometimes involving a delay of a few years). The concept of legal interest is very broad (which is in no way specific to IP cases) and may accommodate various considerations related to the need for a court intervention before the final verdict is delivered. In patent infringement cases this addresses situations in which the applicant may lose a large part of the market to an infringing entrant if the infringement is not immediately halted.

As a third layer of legal assessment, preliminary injunctions should strike a balance between offering effective protection to the applicant and avoiding excessive burdens on the respondent.<sup>70</sup> This provision may be read, at first glance, as explicitly introducing the principle of proportionality into the law on interim relief. Its literal interpretation, however, would suggest that proportionality and balancing are only applicable to the scope of the injunction, not the decision whether to grant it in the first place.

Any decision granting or refusing a preliminary injunction may be appealed<sup>71</sup> and there is also a separate measure to have a final injunction revoked due to a change of circumstances.<sup>72</sup>

The general picture of the Polish law on preliminary injunctions, including preliminary injunctions in patent matters, would, therefore, seem to be reassuring in that it makes it possible to have a reasonable and just policy of preliminary injunctions.<sup>73</sup> There seem to be enough built-in flexibilities and corrective measures to arrive at fair and balanced decisions. To reveal the reasons why this has not been the case one must go deeper into the details and the, at first glance innocuous, wording of some crucial CCP provisions. As with permanent injunctions (or even more so) it is not the law itself that is (in our view) primarily responsible for a manifest failure to use preliminary injunctions in patent law fairly and efficiently.

<sup>68</sup> And “proven” in the main proceedings.

<sup>69</sup> Art. 730[1] para. 2 CCP.

<sup>70</sup> Art. 730 [1] § 3 CCP; Jakubecki 2002, 318–19.

<sup>71</sup> Art. 741 CCP.

<sup>72</sup> Art. 742 CCP.

<sup>73</sup> This might have been one of the reasons why the legislature did not consider it necessary to amend the CCP when implementing the Enforcement Directive. It was argued that the law already in place was in full compliance with art. 9 of the Directive. See Targosz & Tischner 2007, 129.

## 2. What Tilts the System in Favor of the Patentee

The first advantage for the patent owner is the fact that preliminary injunction (PI) decisions are made *ex parte*. Although the law allows for a court hearing, this option is rarely used (i.e. the defendant is not notified of the application and cannot present any arguments, either in writing or orally). The court knows only the plaintiff's point of view unless the defendant has diligently monitored the courts where a PI application can be filed<sup>74</sup> and managed to file a reply.<sup>75</sup> While most courts take such replies into account, some reject the very idea, arguing that the applicable procedure makes no mention of them.<sup>76</sup> Protective briefs are not known as a legal institution.<sup>77</sup> For a non-specialized judge, a well-prepared PI request is hard to resist. To this, a factor rarely featuring in the theoretical analysis should be added: the standards of lawyers' professional integrity. It is unfortunately not unheard of that in preliminary injunction applications applicants present a distorted picture of their case, which exacerbates the usual consequences of the *ex parte* system.

One of the reasons that courts are reluctant to hear the defendant's side of the story is the expectation of speed. Since Polish courts are, for various reasons, not particularly fast,<sup>78</sup> a simple step of, e.g., holding a short hearing during which the respondent could present its case is usually barred by insurmountable organizational obstacles.<sup>79</sup> Consequently, to issue a decision promptly (as is expected in preliminary injunction cases) often *requires* the court to look only at the application.

<sup>74</sup> There are often more than one, e.g., the court of the defendant's seat or the court of the place where the damage occurred or where the action causing damage was taken.

<sup>75</sup> This monitoring has become harder since the Supreme Court held in its resolution of December 15, 2017, III CZP 82/17 that courts of the place where the damage occurred also have jurisdiction to hear tort claims. In patent cases, this may sometimes mean any court in Poland.

<sup>76</sup> Decision of the Regional Court in Łódź, August 12, 2019 r., X GCo 176/19 (unpublished).

<sup>77</sup> The difference between a response to a PI application and a protective brief is that to submit the former, one must know the case file number. A "blind" response will not reach the case files and the judge will not even know it has been filed. The European Commission explains that: "With a protective brief, a defendant fearing to be sued for an IPR infringement (for instance, because it has received a warning letter from the rightholder) informs the competent judicial authorities in advance (i.e. even before an application has been made), why the potential infringement claim is, according to the defendant, not founded. The main purpose of the protective brief is to provide the judicial authorities with as much relevant information as possible, without hearing the defendants once the application for a preliminary injunction has been made, before taking a decision on that application." Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, point 6. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017DC0708>

<sup>78</sup> A typical IP case will take approximately 3 years before the first instance and 1.5 years on appeal. A permanent injunction granted in the first-instance decision is not enforceable.

<sup>79</sup> Organizing a hearing where the defendant could reply to the plaintiff's claims would usually take at least weeks, if not months, because courts do not have free time slots into which preliminary injunctions cases could be fitted.

A first-instance decision is not final but is, in principle,<sup>80</sup> immediately enforceable. Appeals take approximately three months, sometimes longer. In some cases (depending on the characteristics of the market), a preliminary injunction, even wrongly granted, may cause the defendant significant financial harm not only before the final judgment is handed down, but before the respondent's appeal against the preliminary injunction is decided.

The second advantage is that – mainly due to bifurcation – courts rarely take the probability of invalidity into account, not only during infringement proceedings, but also when deciding upon preliminary injunctions. There are exceptions<sup>81</sup> and it is possible to find legal grounds for considering the issues of validity, but it is often simpler for the court to hold that it must treat the patent as valid as long as it formally exists. This issue is, of course, more complex in practice. There are two likely reasons that courts are reluctant to consider validity. The first is often spelled out and may be described as formal. Since courts are not allowed to invalidate patents and are bound by decisions granting patents, it is fairly easy to provide a legitimate legal argument that the question of validity cannot be entertained by a court deciding a preliminary injunction case. Courts usually argue that they must treat the patent as valid as there is a presumption of validity of an administrative decision. They also reason that the only relevant date for assessing the credibility of the claim is the date of the preliminary injunction decision.

There would be a simple way around this impediment, though. Since preliminary injunctions of the type issued in patent infringement proceedings are meant to preserve the current state of affairs until the case on the merits is decided (the Polish legal term for a preliminary injunction is the “securing decision” – the securing part referring to the *secured* claim), it would be straightforward to reason that what the court should really consider is the probability that the applicant will prevail on the merits in the main proceeding. Under this approach, if the patent is likely invalid, the probability of success would be insufficient to warrant a preliminary injunction.

Why, then, has this way out of the bifurcation conundrum not been used? While it is impossible to provide a definitive answer, one can speculate that for a non-specialized court, considering the issue of validity has been even more daunting than understanding the infringement itself. There may of course be exceptional situations in which a judge may start doubting the patent's validity, for example because national patents derived from the same European patent have been declared invalid in a

<sup>80</sup> When appealing a preliminary injunction, the respondent may request a stay of enforceability until the appeal is decided. This may be granted (though rather exceptionally) if the court finds the arguments raised in the appeal convincing.

<sup>81</sup> Decision of the Appeal Court in Poznań issued in preliminary injunction proceedings in which the plaintiff sought to enforce a patent of dubious validity, September 1, 2016 r., I ACz 1632/16 (unpublished).

number of jurisdictions, but they are not the norm.<sup>82</sup> Consequently, it is much easier to maintain that the question of validity *cannot* be taken into account.

The full implications of this position are even worse than one might initially guess. Invalidation proceedings before the Polish Patent Office may drag on for years. A scenario in which the plaintiff wins before the patent is invalidated is not that rare. Furthermore, decisions of the Patent Office may be appealed to the Regional Administrative Court in Warsaw, and the judgments of this court can be further appealed to the Supreme Administrative Court. In both cases, the nature of judicial control is formal – administrative courts are not supposed to replace administrative decisions with their own but may quash them if they find violations of procedural or substantive law.<sup>83</sup> Consequently, if the appeal is successful, the matter returns to the Patent Office and the Office must issue a “new” decision. During this time a preliminary injunction will stay in force, even in cases where the same patent has been declared invalid in nearly all other jurisdictions.

The third advantage is more general in nature. As explained, there are two conditions that must be met in order to obtain a PI: the credibility of the claim and legal interest. What is manifestly lacking as a condition of *granting* a PI is what the UK courts refer to as “balance of convenience.”<sup>84</sup> In other words, in Poland, the prevailing view is that once the plaintiff/applicant has persuaded the court the infringement is more likely than not and there are reasons why waiting for the final decision will cause harm to the applicant, a preliminary injunction should be granted. The proper balancing is practiced only in the context of deciding the *details* of the provisional measures.<sup>85</sup> Thus, according to this interpretation, a preliminary injunction should be granted even if the overall assessment of all implications of such a grant would speak against it. The balancing is therefore limited to the *how* not the *if* or *whether*. In patent cases, the *how* may of course be relevant, but the room for maneuver is limited. In most instances, preliminary injunctions will simply bar the defendant from continuing the alleged infringement. It should also be stressed that the process of balancing applied to the scope of preliminary injunctions should not be overestimated. In the majority of patent cases there is no sophisticated tailoring of the contours of preliminary injunctions. Courts may, e.g., refuse to order seizure of infringing products or make the enforceability of

<sup>82</sup> E.g., Decision of Regional Court in Gdańsk, January 12, 2017, IX GC 1008/14, upheld on appeal. In this case, the patent in question had been revoked by European Patent Office, but due to the suspensive effect of appeal, the decision had not yet become final. The court nevertheless held that invalidity seemed likely and stayed the proceedings.

<sup>83</sup> Hauser et al. 2003, 21.

<sup>84</sup> *Merck Sharp Dohme Corp & Anor v. Teva Pharma BV & Anor* (COURT 2012). The EU law term would be “balance of interests” – see Castillo de la Torre 2007, 283.

<sup>85</sup> According to art. 730 § 3 CCP: “When deciding on the type of security or injunction, the court shall take into consideration the interests of the parties to or participants in proceedings insofar as is necessary to provide legal protection to the obligee without excessively burdening the obligor.”

the injunction subject to the lodging by the applicant of adequate security. While there are valid reasons why one may have some reservations about the constant “balancing”<sup>86</sup> in the context of permanent injunctions,<sup>87</sup> preliminary injunctions are a different matter. A preliminary injunction in patent litigation constitutes a serious interference with the defendant’s business and economic freedom before a final decision on the merits has been reached. Thus, the fact that Polish courts have persisted with a literal interpretation of the law, though a different approach is certainly feasible even without statutory intervention, may signal a worrying trend.

Two other issues revolving around the condition of legal interest complete the patentee-friendly picture. The first is the understanding of the legitimate interest as a situation when the claim cannot wait for the regular decision on the merits. A typical justification, as previously mentioned, is a scenario in which the patentee can lose a substantial market share and future actions for damages may be inadequate to reverse all the consequences of the infringement. Unfortunately, another interpretation of legitimate interest remains popular. It posits that since patents are exclusive rights, the interest of the patentee may lie in the exclusivity being enforced regardless of the economic ramifications of the infringement. Future damages will not restore exclusivity, only repair some consequences of its violation. This argument, when applied in its extreme form, renders the condition of legitimate interest almost meaningless in patent cases. If legitimate interest can be derived from the very essence of the exclusive right, the applicant will always be able to demonstrate it. Again, nothing in our view forces courts to follow such a theory, and it must be stressed that some do not. Alas, many decisions and a large part of legal literature seem oblivious to the unfairness of equating legitimate interest with the exclusivity of IP rights.

The other issue that is usually associated with the requirement of legitimate interest is the urgency of issuing a preliminary injunction.<sup>88</sup> It would appear tacitly settled that the applicant should not wait too long<sup>89</sup> as such delay could raise doubts regarding its legitimate interest. Even this, however, seems to be far from obvious. The dispersion of patent cases and the lack of specialized courts (before July 2021) meant that one can find decisions in which a court would consider the condition of urgency reasonable, but at the same time conclude it has not been expressly mandated by the law and consequently refuse to apply it.<sup>90</sup>

<sup>86</sup> According to Lev-Aretz 2014, 640 (stating that “Dr. Annette Kur pointed out, the word ‘balance’ has become so hackneyed in this context that scholars began referring to it as ‘the B word’ in her Address at the Columbia Law School Kemochan Center Symposium: Who’s Left Holding the [Brand Name] Bag? Secondary Liability for Trademark Infringement on the Internet”).

<sup>87</sup> Though we generally endorse it – see Section B.

<sup>88</sup> Targosz 2012, 29; Cieśliński 2011, 856.

<sup>89</sup> No specific timelines have been developed.

<sup>90</sup> Decision of the Regional Court in Łódź, August 12, 2019 r., X GCo 176/19 (unpublished).

It should not come as a surprise that what ultimately fails in Poland as far as preliminary injunctions in patent cases are concerned is the human factor. Polish lawyers often like to complain about the law they have to apply, though in many instances it is more than adequate to the task. There is nothing in the law that would preclude courts from hearing the arguments of the defendant, taking the probability of invalidity into account or looking more closely at the real economic interest the plaintiff has demonstrated in obtaining immediate protection. Yet they rarely do. Even a cursory review of the leading jurisdictions reveals that the attitude Polish courts display in patent cases is, judged against the international background, exceptionally patentee-friendly. It remains to be hoped that the introduction of specialized IP courts<sup>91</sup> will rectify most of the highlighted deficiencies.

#### E. CONCLUSIONS

The fact that Poland is not one of the major patent jurisdictions in the European Union results in a small number of patent disputes and court decisions. It is therefore still largely a theoretical and abstract intellectual exercise to establish how Polish courts would react when faced with aggressive litigation strategies initiated by patentees.

It seems that at least with respect to permanent injunctions, the Polish legal system would be ready to address challenges posed by litigation initiated with respect to standard essential patents, patent assertion entities or in the case of complex products. Similarly, the Polish legal system would be able to address cases when granting an injunction would raise valid public interest concerns. Proportionality, though not practically tested within the context of patent disputes, is by no means a stranger to Polish courts. First, it is expressly recognized in the Polish Constitution. And because courts should interpret statutes in conformity with the Constitution, proportionality already has affected the manner in which courts apply remedies in IP cases. Secondly, courts do recognize an obligation to interpret national laws in line with EU law. Proportionality, derived from Article 3 of Directive 48/2004, has also already been a factor in IP litigation.

Finally, in the Polish courts interim injunctive relief seems to be immune to proportionality concerns. Though Polish courts could theoretically apply preliminary injunctions in a manner that would take into account the interests of alleged infringers, legislative changes are likely to be necessary to change the long-standing practice of granting interim injunctions in what seems to be the most extreme version of *ex parte* proceedings.

<sup>91</sup> These courts started operating in July 2020. Only one court (in Warsaw) has been designated to hear patent cases.

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