

ES – FRACTUS v. WIKO / Preliminary injunction / Mobile World Congress IP Fast Action Protocol

Fractus S.A. v. Wikomobile Iberia S.L., Barcelona Commercial Court No. 5, 16 February 2018, Docket No. 4/2018

In the context of the IP Fast Action Protocol adopted for the 2018 Mobile World Congress (see more information [here](#)), the Spanish company FRACTUS, owner of several patents related to antenna technology for wireless devices, filed an *inter partes* urgent interim injunction application against the smartphone manufacturing company WIKO.

The Spanish company FRACTUS is an early pioneer in the development of internal antennas for smartphones, tablets and wireless Internet of Things devices. The company holds an intellectual property rights portfolio of more than 40 inventions protected through more than a hundred patents and patent applications, amongst which patent EP 1592083 (EP 083) entitled “Space-filling miniature antennas”.

On 22 January 2018, FRACTUS filed an *inter partes* preliminary injunction request – which was filed together with the main complaint – against Wikomobile Iberia S.L., the Spanish subsidiary of WIKO.

In its interim injunction application, FRACTUS claimed that WIKO was using without authorization its antenna technology as protected by patent EP 083. Thus it was requested to prevent WIKO from continuing the alleged infringement of FRACTUS’ patent rights, ordering it to cease the manufacturing and commercialization of 27 mobile phones, within the Spanish territory and more specifically during the 2018 Mobile World Congress.

It must be noted that prior to the admission of FRACTUS’ request, WIKO had already filed a protective brief before the Barcelona Patent Courts, in order to appear at Court in case FRACTUS filed an urgent preliminary injunction request against it.

Thus, in view of WIKO’s protective brief, and given that FRACTUS filed an *inter partes* interim injunction application, a hearing was held on 14 February 2018 before the start of the MWC.

On 16 February 2018, in compliance with the deadlines set out in the MWC IP Fast Action Protocol, Barcelona Commercial Court No. 5 granted an interim injunction order against WIKO based on the infringement of patent EP 083. As requested by FRACTUS, WIKO was ordered to cease the

manufacturing and commercialization of 27 mobile phone models within the Spanish territory, and in particular during the 2018 Mobile World Congress.

First, regarding the *fumus boni iuris* requirement (according to which the plaintiff must show that the case has good chances of being successful on the merits) the Court considered that FRACTUS established a prima face case regarding the infringement of its patent rights due to the implementation in certain WIKO phone models of FRACTUS' antenna technology for wireless devices related to patent EP 083. The applicant filed an expert report in this regard, showing the use by WIKO of FRACTUS' patented technology. WIKO did not discuss this point. Thus, in view of FRACTUS' strong prima facie case, the Court concluded that FRACTUS' patent EP 083 was being allegedly infringed.

Secondly, regarding the *periculum in mora* requirement (danger in delay) the Court had to decide whether the plaintiff did not incur in undue delay in request interim relief after it first became aware of the infringement. In this sense, WIKO argued that no urgency could be retained since FRACTUS became aware of the infringement at least on January 2015, when FRACTUS first contacted WIKO in order to start negotiations to reach a license agreement due to the use of its antenna technology. According to WIKO, in view of the long period of time that elapsed between the first communications and FRACTUS' request for precautionary measures, FRACTUS would have consented to a de facto situation that it can not pretend to alter now (after having tolerated it for years) by means of an urgent preliminary injunction application.

However, the Court did not follow this argument. It was held that in view of previous correspondence between the parties, it could be concluded that FRACTUS did never tolerate WIKO's infringing activities. On the contrary, the Court recognized the significant efforts deployed by FRACTUS in order to put an end to the infringing activities by signing a license agreement in an amicable manner, so no consent to an infringing situation could be retained.

Furthermore, the Court concluded that regardless the negotiations between the parties (which are ongoing) it was in fact WIKO's delaying tactics who forced FRACTUS to file an interim injunction application.

In consequence, Barcelona Commercial Court No. 5 agreed to FRACTUS' request by issuing a preliminary injunction order. However, although the injunction was granted, it was further substituted by a guarantee (cross-bond) filed by WIKO.

These proceedings are ongoing and subject to the outcome of the proceedings on the merits.

It should be also noted that, apart from the preliminary injunction request filed against WIKO, FRACTUS further filed, in the context of the MWC IP Fast Action Protocol, *ex parte* preliminary injunctions against three Chinese companies for infringement of the same patent EP 083. In this case, the injunction applications included a prior request for urgent verification of facts (*saisie-type* of proceedings).

The products subject to these preliminary injunctions were mobile devices supplied by the three defendant companies: SHENZHEN DOKE ELECTRONIC CO., LTD., SHENZHEN BOWAY ELECTRONICS CO., LTD and SHANGHAI NIUYU NETWORK TECHNOLOGY CO. LTD / SHENZHEN NEW-BUND NETWORK TECHNOLOGY CO. LTD, which sell mobile phones under the brands BLACKVIEW, BOWAY and VERNEE, respectively.

The Barcelona Patent Courts issued favorable decisions to those requests on 14 February and 21 February 2018. Then the injunctions were enforced on Monday, 26 February, the first day of the Mobile World Congress, in where a Court Commission served the injunctions on the *prima facie* infringers and went on to seize the infringing products. The Barcelona Courts also ordered a raid in order to seize new products exhibited for the first time at the show, to be urgently examined by a Court-appointed expert. After receiving the expert report confirming the infringement, the Court Commission came back on Tuesday, 27 February, to serve and enforce the injunctions granted upon condition of the expert's prior verification of facts.

Finally, we must also note that FRACTUS was not the only company which filed actions in the context of the MWC IP Fast Action Protocol. This year, as reported by the Board of Judges of the Barcelona Patent Courts, 35 cases in total were resolved within the framework of application of the Protocol and in particular (apart from the FRACTUS cases) 22 protective briefs were filed by companies such as SAMSUNG, LG, WIKO, ZTE, HUAWEI, etc. and other *ex parte* preliminary injunction was filed by Spanish Company Tot Power Control, S. L. against the Chinese manufacturer XIAOMI (which was admitted but further substituted by a guarantee).

In total, there has been a 40% increase in cases filed before the Courts in the context of MWC IP Fast Action Protocol the as compared with the previous year.

This is evidence of the great litigiousness the MWC can bring out, which is confirmed every year since the adoption in 2015 by the Barcelona Patent Courts of the first IP Fast Action Protocol (which has been renewed each year since then). Indeed, the Protocol is proving to be an efficient tool to deal with the urgent interim relief that companies need during the Congress.