



Local department Brussels

File number:	UPC-CFI-329/2023
Case type:	protection evidence
Request number:	574133/2023

Order

of the court of first instance of the Unified Patent Court (UPC)

Local agency in Brussels

Given on September 21, 2023

Regarding EP 2 331 036

Ordinance ex R.192 RoP for the protection of evidence and the establishment of
description

APPLICANT PARTY

Mr. xxxxxxx, residing in Schilde, Belgium; hereinafter:
applicant;

Represented by Mter. C. Ronse and Mter. K. Claeyé, lawyers Avenue Haven 86C, B414, 1000 Brussels, and Mter.
MW Rijdsdijk et Me DE Colenbrander, avocats à Amstelplein 1 (Tour Rembrandt, 28th floor), 1096 HA Amsterdam ;

DEFENDANT(S)

OrthoApnea SL, a company incorporated under Spanish law, with registered office at Flauta Mágica 22, 29006 Malaga,
Spain, and its OrthoApnea NOA products; hereinafter:
defendant or OrthoApnea

PATENT(S) TO WHICH THE DISPUTE RELATES:

Patent number	Patent holder(s)
EP 2 331 036	xxxxxxx

Document EP 2 331 036 B1 is entitled "Device for treating nocturnal respiratory problems"
and is hereinafter referred to as EP 036 or the patent.

The patent EP 036 was filed on July 6, 2009. For the patent, the priority of the Belgian patent application with
application number BE 200800374 and the filing date was July 7, 2008 was claimed. Patent EP 036 was granted.

on November 6, 2019 and is applicable in Belgium, Germany, France, Luxembourg and the Netherlands (in addition to the United Kingdom).

PANEL/DIVISION

Panel: N/A

Department: Local service in Brussels

DECISIVE JUDGE(S): ME

Kokke (as permanent judge of the local department of Brussels in accordance with R. 194.4 RoP)

LANGUAGE OF THE PROCEDURE:

Dutch

1. THE PROCEDURE

1.1 The petition was received on September 20, 2023 at 7:38 p.m. The petition must comply with this
The decision is attached and forms an integral part thereof.

1.2 No substantive proceedings relating to this request are yet underway. The request concerns the taking of
so-called separate measures on September 22 and/or 23, 2023.

1.3 Given the extreme urgency of this request, it will be processed by the person on duty
judge (standing judge).

2. SUMMARY OF FACTS

2.1 The applicant is the holder and inventor of the patent relating to a device to put in the mouth to combat
nighttime breathing problems, also called mouthpiece for snoring or sleeping.
The invention according to the patent relates in particular to an improved anti-snoring mouthpiece that is user-friendly
and can be worn comfortably. The patent has expired in several countries originally conceived and is
currently still valid in the countries participating in the Unified Patent Court (hereinafter: UPC): Belgium,
Germany, France, Luxembourg and the Netherlands.

2.2 The defendant is a Spanish company which offers a device for the treatment of
breathing problems. OrthoApnea offers this device under the product name OrthoApnea NOA (hereinafter: the "NOA"),
which is as follows:



2.3 The plaintiff declares that the defendant infringes with its NOP product claims 1, 9 and 10 of document EP 036. For an
explanation of the patent and the alleged infringement thereof, reference is made to the petition which must be
attached to this decision. For the explanation of the patent

For the invention made, reference is made to marginal numbers 7 to 13 and for counterfeiting, reference is made to marginal numbers 23 to 39.

2.4 September 22 and 23, 2023 [NB, marginal number 19 of the request indicates September 23 and 24; this seems to be an obvious error as the annexes show, judge], the iBEDSSMA association organizes an annual conference in Knokke-Heist (hereinafter: the conference). iBEDSSMA stands for "Belgian Interdisciplinary Academy of Dental and Surgical Sleep Medicine" and is an association aiming for a multidisciplinary approach to sleep breathing disorders. It is anticipated that OrthoApnea, which is a "gold sponsor" of this symposium, will most likely promote, offer and exhibit several of its NOA products at this symposium.

3. REQUESTED MEASURES

3.1 The applicant requests that measures of protection and description of evidence be imposed in accordance with the article. 60(2) UPCA and rules R. 192 and 196.1(b) and (c) RoP, which will take place during the symposium without hearing the defendant. In particular, he requests, in summary, 3.1.1 that immediate action be taken involving the seizure of allegedly counterfeit NOA products and technical, promotional and corresponding commercial and

3.1.2 appoint an expert and recommend that he draw up a reasoned report containing a detailed description of the characteristics of NOA products and the technical, promotional and commercial documentation relating thereto,

3.1.3 with additional requests.

4. JUSTIFICATION FOR THE DECISION

4.1 The UPC has international jurisdiction to hear the application since the measures are based on an issued European patent which is also in force in Belgium, a signatory Member State (which has ratified the UPCA). No opt-outs have been recorded. The local service in Brussels is already authorized to take the requested protective measures because the alleged offenses will probably take place in Belgium. (art. 32.1(c) and 33.1(a)

UPCA). The applicant indicated that he intended to bring the main case, which is not yet pending, to the local department of Brussels, so that local jurisdiction also arises from Rule 192.1 RoP.

4.2 The request is urgent given the conference which will take place on September 22 and 23, 2023 and the expectation that the evidence will no longer be available in the territory concerned thereafter.

This does not change the fact that the documents demonstrate that the applicant was already aware of the expected presence of the accused at the conference on June 30, 2023. It is a shame that this request was submitted at the last moment.

4.3 The request is granted without hearing the defendant in accordance with RoP 197.1.

The plaintiff has sufficiently explained that irreparable harm may occur to him if the defendant is heard, because it is feared that in this case the counterfeit products will no longer be available at the symposium (Rule 192.3 RoP).

Since the defendant has not been heard, he may request a review of this decision (rule 197.3 RoP). This will be specified in the decision.

4.4 The plaintiff has shown that it is plausible that he holds a valid patent and that the defendant is threatening to deprive him of it. violated in Belgium with NOA products. The interest of the applicant in preserving the evidence relating to this alleged infringement by the reliefs to be granted prevails, because irreparable harm to the applicant is expected if the application is rejected due to the disappearance of the evidence from the territory where the patent is valid.

4.5 The precautionary measure must be executed in accordance with Belgian national procedural rules rules, i.e. by calling a bailiff, as requested (rule 196(4) RoP). It is also necessary to appoint an expert, on request, to provide a detailed technical description and write a report.

4.6 Unless requested, the report will be ordered as soon as it is ready, but at the latest within one week after the execution of the protective measures, to be presented in the manner indicated below due to the delay in filing the case on the merits. Since no seizure of confidential documents is requested and the seizure of documents publicly present during a conference will be seized, there is no reason to impose a confidentiality regime and the report can be transmitted directly to the parties . If the situation is different, the defendant or expert must make a request to the court.

4.7 Due to the lack of basis for this, the cooperation order is issued by the defendant rejected under penalty of penalty.

5. THE DECISION

The court of first instance, local chamber of Brussels, accepts the request for provisional protective measures taking into account the plausibility of a threat of infringement of claims 1, 9 and 10 of the patent, as follows:

5.1 allows the applicant to preserve evidence, through the competent authority in Belgium (the bailiff), during the two-day iBEDSSMA Symposium "Multidisciplinary Treatment of Sleep Disordered Breathing" which will take place on Friday 22 and Saturday September 23, 2023 at Réserve Resort. Elizabethlaan 160, 8300 Knokke-Heist, Belgium, to seize the NOA products mentioned in the petition, as well as all technical, promotional and commercial documentation relating thereto, which OrthoApnea y propose ;

5.2 designates Stéphanie Sarlet, from the Pitch office, as expert, with the possibility of withdrawal replaced by an officer;

5.3 allows the bailiff to be assisted by the expert in carrying out the procedures referred to in 5.1. said measures;

5.4 orders the expert to prepare a reasoned report containing detailed information description of the characteristics of NOA products and the corresponding technical, promotional and commercial documentation, and to submit this report via the CMS to the local Brussels agency of the UPC, and to also provide this report to the parties or their advisors in a period of one month. week from the day of implementation of this decision;

5.5 states that the report mentioned above can only be used at the moment in the case at ten o'clock. sun;

5.6 states that this decision and the request must be made in accordance with national rules notified to the accused at the latest when the measures are implemented;

5.7 allows the applicant's advisors and a technical advisor, to the extent necessary (where these are not publicly available products and information to which any person can be present/have access), to be present during the execution of the precautionary seizure;

5.8 determines the time limit within which the proceedings on the merits must be initiated, as referred to in the regulation 198.1 ROP, within 31 calendar days after service of the decision on the defendant, failing which the court may, upon request of the defendant, order that this decision be revoked or otherwise cease to have effect.

5.9 orders the applicant to pay the "flat fees" in accordance with RoP 317.3 no later than Monday September 25, 2023, if this has not already been done;

5.10 declares this decision immediately enforceable.

5.11 The decision regarding costs will be reserved until the main trial.

5.12 The defendant may, within thirty days following the start of execution of the measures, submit a request for review of this decision in accordance with RoP 197.3;

5.13 This decision may be appealed within 15 days of notification to the applicant (art. 72.2 (a) and 60 UPCAs; rules 220.1 (c) and 224.2 RoP).

Done on September 21, 2023

NAMES AND SIGNATURES

INFORMATION ABOUT THE PROFESSION