

# Enforcing patents in Belgium

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# Enforcing patents in Belgium

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## What options are open to a European patent holder, whose rights cover your jurisdiction, when seeking to enforce its rights in your jurisdiction?

Depending on the circumstances and the chosen strategy, a patentee can either first send a warning letter to the alleged infringer or immediately sue it before a Belgian court. It is not required, and under the circumstances not recommended, to send a warning letter before instituting infringement proceedings. Starting with a warning letter nevertheless presents the advantage of paving the way for a possible out-of-court settlement of the dispute, which sometimes proves to be a very efficient solution. In the warning letter, the patentee may, for example, either propose a licence to the alleged infringer or, alternatively, ask it to stop infringement on a voluntary basis.

Alternative dispute resolution options, such as mediation or arbitration, appear to be currently not so popular in Belgium, at least in the intellectual property field. Arbitration is often a more expensive option, but has the merit, for those who consider it as an important feature, of being a confidential procedure.

## Does your jurisdiction have specialist patent courts? If not, what level of expertise can a patent owner expect from the courts?

Strictly speaking, Belgium does not have specialist patent courts. However, the Belgian Patent Act of 1984 voluntarily limited the number of courts having jurisdiction to hear patent cases, in order to indirectly generate a certain degree of expertise. Currently, only five courts have such jurisdiction in Belgium.

## Is it possible to cross-examine witnesses at trial? How far are proceedings based on written evidence? Are there restrictions on the use of evidence from experts?

In Belgium, patents lawsuits are civil matters. Therefore, the proceedings are mainly based on written evidence and witnesses are very seldom heard at trial. Should they be heard, a party must obtain authorisation from the judge prior to examining a witness of the opposing party.

## Are infringement and invalidity dealt with simultaneously? What level of proof is necessary to demonstrate one or the other?

When suing an alleged infringer, the latter often files a counterclaim requiring revocation of the patent on the grounds that the patent is not valid. In such cases, the same court will deal with infringement and validity simultaneously.

In the rare cases in which validity and infringement proceedings are brought before different courts, more complex *litispensens* and connexity provisions will apply. Yet, the objective will (or at least should) always be to avoid contradictory judgments being rendered by different courts.

The patentee can use any legal means at its disposal in order to demonstrate infringement, such as documents, testimonies and declarations under oath. The same holds for the alleged infringer when trying to establish that the patent is invalid.

It is to be noted that the Belgian Judicial Code provides for a very powerful means to establish the proof of an infringement (see below).

## To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted?

Pre-trial discovery is definitely permitted and is covered by Article 1481 sq of our judicial code, which provides for a very powerful unilateral discovery procedure called *saisie description* (descriptive seizure).

Under this procedure, the patentee may obtain from the judge of seizures a ruling that an expert, accompanied by a bailiff, can enter without prior notice into the premises of the alleged infringer (or any other suitable place), in order to obtain evidence of the infringement,

of its origin and of its extent. The task of the expert will consist in giving an accurate description of what he finds in relation to a potential infringement of the patent and in making a report thereof for the attention of the court and of the parties. His mission allows him to go anywhere he likes, to look into any documents and/or computer data, to take samples and to do generally anything he deems necessary in order to accomplish his task, provided he does not go beyond what the judge strictly authorises him to do.

Descriptive seizure orders can be obtained quite easily, including well before grant of the patent! The procedure is very effective because it is imposed on the alleged infringer unexpectedly and because the alleged infringer cannot immediately oppose the entry into its premises. Care must, of course, be taken not to abuse this procedure.

It is also not uncommon for the judge to order a real seizure of the allegedly infringing goods in addition to purely descriptive measures.

**To what extent does any doctrine of equivalents apply in an infringement action?**

The doctrine of equivalents (DOE) is applicable in Belgium to all cases where there is no literal infringement of a patent claim. To put it simply, DOE will apply, for example, when a patent claims a nail whereas the alleged infringer uses a screw.

Though the Belgian DOE is not as well established as in other major European countries, one could say that it is currently based on substantially the same principles as those which are applied in France. A means used by an alleged infringer will indeed be considered to be equivalent to a claimed means if it has the same function and yields the same or a similar result. This approach is moreover confirmed by recent case law, such as a decision rendered by the Court of Appeal of Antwerp on 24th June 2002 (IRDI 2004-3, p265).

Belgium often turns out to be more patentee-friendly than other countries that may apply further criteria limiting the scope of equivalence, such as possible limitations introduced by the patentee itself during prosecution of its patent (prosecution history estoppels).

**Are there certain types of patent right that may be granted by the EPO – biotech or computer software-related, for example – that are more difficult to enforce than others?**

A patent whose subject matter is technically complex will be more difficult to enforce since Belgian courts do not have technical judges. However, whenever needed, courts do call upon technical experts to overcome that difficulty.

The enforcement of biotech and software patents may have to face an additional hurdle where the validity of such patents is challenged by a defendant who argues that their subject matter is excluded from patentability. As in many other European countries, this issue is currently subject to much controversy.

For software-related inventions, we do not yet have enough Belgian case law to be able to distinguish a clear trend. It can, however, be expected that our judges will follow the case law of the boards of appeal of the European Patent Office in this domain, given that the European Commission's proposal for a directive on the patentability of computer-implemented inventions has now been definitively rejected.

For biotech-related inventions, it is to be highlighted that the European biotech directive (98/44/EC) was very recently transposed into our national patent law and entered into force on 23rd May 2005. This will hopefully facilitate the enforcement of such patents in Belgium.

**To what extent are courts willing to consider, or are bound by, the opinions and decisions of other courts that have dealt with similar cases?**

As is the case in the major part of the world, including in the major part of Europe (except the UK and Ireland), Belgium follows civil law principles instead of common law principles. This means that our judges are exclusively bound by the statutory provisions of our laws.

They are in no way bound by judicial precedents such as opinions and decisions rendered by other courts, even if the cases are very similar. Nonetheless, judges are often willing to consider case law as well as authors' views in order to find guidance when making their reasoning.

**To what extent are courts willing to consider the reasoning given by foreign courts that have handed down decisions in similar cases?**

The reasoning and the decisions handed down by foreign courts, particularly those coming from France and, occasionally, also from Germany or the Netherlands, may be worth pointing out to Belgian courts hearing similar cases. This is due to our cultural and judicial heritage as well as to our language affinities (official languages in Belgium are French, Dutch and German). At the end of the day, however, the final decision will be completely and exclusively that of the judge.

**What options are open to a defendant seeking to delay a case? How can a plaintiff counter delaying tactics?**

The classic delaying tactics consist in requiring an expert appraisal or a counter-appraisal in cases where the claimant used its own expert appraisal. Judges are generally keen to grant such requests, particularly when the case presents some level of technical complexity.

Other options may consist in introducing counterclaims, in delaying the filing of conclusions, in introducing new facts, etc. Some provisions in the Judicial Code are available to counter such tactics.

#### **How available are preliminary injunctions and how do you get them?**

Preliminary injunctions against an alleged patent infringer are available in Belgium. There are basically two ways to obtain them.

The first way is through the *saisie-description* procedure which has been previously discussed. Under this procedure, the judge of seizures may, in addition to purely descriptive measures, order conservation measures. This may include a real seizure or placement under seal of the allegedly infringing goods, pending a judgment on the merits, or a possible appeal from the alleged infringer against the decision of the judge of seizures.

The second way is through the institution of summary proceedings, which allow for fast-track preliminary injunctions aimed at preserving the patentee's rights, also pending a judgment on the merits.

The *saisie description* procedure is chosen in most cases since it is a unilateral procedure, which is very effective, and since the conditions to obtain it as well as to obtain a preliminary injunction can be met rather easily.

On the other hand, summary proceedings may give rise to wider-reaching injunctions. They, however, require a certain degree of urgency, which is not the case for the *saisie description*.

In both cases, the balance of interests of both parties will be considered and the payment of a deposit amount is often required from the plaintiff if it obtains a preliminary injunction. Care must also be taken that such injunctions are not obtained abusively, as sanctions may be inflicted on the abuser. A very recent decision of the Supreme Court (Cass 11/3/2005), however, ruled quite in favour of the patentee in this respect.

#### **How long does it take to get a decision at first instance? Is it possible to expedite this process?**

The time needed to obtain a first instance decision depends strongly on the case, on the court and on the adverse party.

Although Belgian courts may be perceived

as being slower than their foreign counterparts, a case may nevertheless proceed quickly to a decision if it is simple, and particularly if does not require a technical expert, if the court is not too busy, and if the adverse party does not put up too much resistance or does not make use of delaying tactics.

For a standard case, it would take on average two to three years to get to a decision. As said before, provisional measures can nevertheless be obtained well before getting that decision, and even well before grant of the patent!

#### **What avenues for appeal are open to the defeated party in a first instance case? What criteria are there for granting an appeal? How long does the appeal process take?**

There are two successive levels of appeal possible for a defeated party.

At a first level, an appeal procedure can be initiated before a court of appeal. The appeal must be initiated within one month of notification of the first instance judgment. The review will relate both to factual and legal issues and the process takes on average two to three years.

At a second level, a procedure can be initiated before the Supreme Court (*Cour de Cassation*). The review will only relate to a restricted number of issues and the process takes on average two years.

#### **To take a case through to a first instance decision, what level of cost should a party to a litigation expect to incur?**

The costs to obtain a first instance decision depend principally on the costs of the barrister (attorney at law) and of the patent attorney, who both charge hourly fees. It is therefore almost as difficult to indicate how much proceedings will cost as it is to indicate how long they will take. If one were to give a number, then it would be safe to say that costs would range somewhere between Euros 50.000 and Euros 100.000 for an average case.

Compared to other European countries, this is probably in the lower cost range. This is partly due to the fact that Belgian attorneys are generally multilingual (French, Dutch, English and often German), and that translation costs (for example, for prior art documents and/or foreign decisions referred to) are therefore reduced.

It is worthwhile noting that yet another recent decision of the Supreme Court (Cass – 2/9/2004) is pointing to the direction of the defeated party having to bear the attorney costs of the winning party, provided they are reasonable and requested in advance. If this

is the case, such a fundamental change will, of course, have a considerable impact on the way cost risks will be assessed.

**Who can represent parties in court?**

Only barristers (attorneys at law) can represent parties in court. They do not need to be specialists in patent matters and are mostly assisted by patent attorneys for technical matters and for some specific aspects of patent law.

**What remedies are available for infringement and how are these typically applied? Are punitive damages available and in what circumstances?**

The following remedies for infringement are available:

- A cease and desist order obliging the infringer to stop any further infringement and ordering it to remove all infringing goods from the market.
- This order is often accompanied by what is called *une astreinte*, the effect of which is that the infringer will usually have to pay a substantial fine if it does not respect the order.
- The payment of damages and interests for an amount which is equivalent to the prejudice suffered by the patentee. An expert may be appointed by the judge in order to evaluate these damages. Though not common practice, punitive damages have occasionally been awarded on top of and above this amount.
- The publication of the judgment, for example, in newspapers. The publication costs are to be paid by the infringer.
- In cases of bad faith, the judge must also order the confiscation of the infringing goods and of the means specifically intended for their manufacture.

**Are there any realistic alternatives to litigation in cases relating to patent disputes?**

Negotiation is certainly an alternative which might prove to be very effective. It really depends on the circumstances and has therefore to be assessed on a case-by-case basis.

**Are there any other features of the enforcement system in your jurisdiction that you would like to point out?**

Without going into the details, here are a few additional typical Belgian features:

- Infringement proceedings are barred after five years as from the day on which the infringement was committed.
- The threat of the Belgian torpedo, which is

a nickname for a tactics used by infringers for sinking or at least freezing an infringement action brought against them, appears to be extinguished.

- Court proceedings are to be held in the language of the defendant, which may be either French, Dutch or German.

And, for our American friends, I would just like to add a couple of crucial aspects which are unfortunately too often overlooked, probably because the American patent system is so different from ours. They relate to enforceability insofar as they relate to the prerequisite of obtaining a strong patent before starting litigation. These aspects are not typically Belgian but nevertheless fully apply in Belgium, as they do in all other European countries.

Firstly, one must know that the right to the patent belongs here to the first who files a patent application and not to the first who invented. It is therefore crucial not to delay unnecessarily the filing of a patent application.

Secondly, one should bear in mind that the disclosure of one's own invention prior to filing a patent application will render the invention fundamentally unpatentable because it will lack novelty. There is no grace period in such circumstances.



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*Christophe De Groot graduated as an engineer in electronics and started his career in the nuclear industry as a developer of machine-vision based quality control systems. He built up his technical experience in the fields of image sensors, real-time data acquisition, image treatment software, systems integration and industrial process automation in general.*

*He then worked for a long period with a major Japanese car manufacturer where he was responsible for proposing a technological strategy for the European market, particularly in the field of advanced electronic systems and alternative propulsion systems. Work involved the taking into account of regulatory and intellectual property constraints. He also became well acquainted with Japanese culture and had the opportunity to visit Japan on several occasions.*

*When subsequently joining Kirkpatrick, he started as a patent attorney in charge of the prosecution, enforcement and exploitation of patent rights for a portfolio of clients. He now manages Kirkpatrick's patent department, and continues to specialise in the field of patent litigation.*