Belgium

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Ms Cappuyns studied law at the Catholic University of Leuven (KUL) and King's College London, and obtained an LL.M. in Trade Regulation at New York University. She is admitted to the Bar of Brussels and the Bar of New York. A native of Flanders, Belgium, Ms Cappuyns is fluent in Dutch, English and French.

Prior to joining Howrey, Ms Cappuyns was an associate in the intellectual property department at Linklaters De Bandt in Brussels and was also seconded to Linklaters' intellectual property department in London.

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Carl De Meyer

Carl De Meyer is head of intellectual property at the Brussels office of Howrey LLP. Recognized as one of Europe's foremost IP lawyers, he specializes in patent, trademark, and copyright litigation.

Mr De Meyer's broad experience covers national and international patent litigation, all aspects of trademarks and copyrights, as well as unfair competition and competition law. He represents clients in all major industry sectors, in particular pharmaceutical and biotech companies, food manufacturers, toy manufacturers, publishers, producers of electronic equipment, and other consumer product manufacturers. Amongst others, he obtained a landmark decision relating to a 3D Community trademark and has also conducted a number of high-profile cross-border contributory patent infringement cases.

Mr De Meyer has written extensively on IP issues and regularly contributes to leading journals in Europe. Recent publications include an article on cross-border injunctions, an analysis of the ECJ case law on the free movement principle and intellectual property rights, a study on the trademark related provisions of Trade-Related Aspects of Intellectual Property (TRIPs), an article on the likelihood of confusion criterion to assess trademark infringement, a study of jurisdictional aspects in patent

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Mr De Meyer earned an LL.M. from Georgetown University and a Dr Jur. from the KUL. He was also assistant professor at the Catholic University of Leuven from 1981 to 1984. Prior to joining Howrey, Mr De Meyer was head of Linklaters De Bandt's Intellectual Property Department.

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(1) APPLICABLE LAW

1 Patent law in Belgium is governed by the Belgian Act on Invention Patents of 28 March 1984 (hereinafter 'the 1984 Act').[1] The 1984 Act applies only in Belgium and does not apply in any oversees territory.

2 Treaty provisions (such as provisions in TRIPs or the Paris Convention) can have a direct effect in Belgium and will prevail over conflicting provisions of national law. Directive 98/44/EC of the European Parliament and the Council of 6 July 1988 on the legal protection of biotechnological inventions has been implemented in the 1984 Act by means of the Act of 28 April 2005. Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive) has been implemented in 2007 by Acts of 9 May 2007 and 10 May 2007. The Act of 15 May 2007, which implements European Customs Regulation 1383/2003 and also introduces criminal sanctions for patent violations, is outside the scope of this contribution.

[1] A number of Royal and Ministerial decrees regulate the formal and procedural aspects of patents and patent applications.

(2) VALIDITY

(2.1) GENERAL

3 The European Patent Convention (EPC) governs the validity of the Belgian part of a European patent. The 1984 Act governs the validity of Belgian patents.

4 The invalidity grounds listed in Article 49 of the 1984 Act are essentially the same as those summed up in the EPC, with the exception of the nullity ground in Article 138.1(d) EPC, which is not included in Article 49 of the 1984 Act.

5 As will be shown hereinafter, the approach of the Belgian courts in applying the material law on validity is similar to that of the European Patent Office (EPO).

(2.1.1) Novelty

(2.1.1.1) Definition

6 An invention is new if it is not a part of the prior art (Article 5 §1 of the 1984 Act). The prior art consists of all that has been made publicly available before the filing date[2] of the patent application by means of an oral or written description, by means of an application or by any other means (Article 5 §2 of the 1984 Act). The prior art includes the content of Belgian, European, and international patent applications in which Belgium is a designated country as filed, of which the filing date predates the filing date of the patent application and that have been published on or after this date (Article 5 §3 of the 1984 Act).

7 The standard for novelty is objective. Novelty-destroying prior art contains any disclosure prior to the filing date anywhere in the world, even when the patentee had no actual knowledge of it. A disclosure of the invention in a language that the patentee does not understand can be novelty destroying.

8 In order to be novelty-destroying, prior art must be 'compact'. All the characteristics of the patented invention and its technical result must be anticipated in their entirety in the relevant document of prior art.[3] Combinations of prior art are not novelty-destroying, but may result in invalidity of the patent due to lack of inventive step (see below). However, when a prior art document refers to another prior art document that contains, for example, more detailed characteristics, the latter is deemed incorporated in the former, so that the combination of these two pieces of prior art can be novelty destroying.[4] A general unqualified disclosure shall not be novelty-destroying for an invention that claims a specific application for a specific purpose.[5]

(2.1.1.2) Form Is Not Relevant, Substance Is

9 The way in which the invention is disclosed is immaterial. Prior art can be disclosed through use, commercialization, written or oral description, the publication of an article,

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[2] Or the priority date, where applicable.

[3] Court of First Instance Mons, 9 Jan. 2004, J.L.M.B., 2004, 894. See more recently Court of First Instance Brussels, 28 Nov. 2008, *NV Bio Minerals / BVBA Pharma Nord – BVBA Sanodis*, unpublished but available through <www.darts-ip.com>.

[4] Court of Appeal Brussels, 17 Sep. 2004, *PL Consult and Cenadis* v. *Verrax Galland-Lamy*, unpublished.

[5] Court of First Instance Liège, 16 Dec. 2005, Polyfer, unpublished.

the exhibition of a prototype, the description of the invention during a conference, or in a commercial prospectus, provided, of course, that there is enabling disclosure.[6]

(2.1.1.3) Patent Applications

10 Patent applications can be novelty-destroying even though they were not publicly available on the filing or priority date (Article 5 §3 of the 1984 Act, see paragraph 1 above).[7] The purpose of this provision is to avoid double patenting of the same invention. Other types of prior art are only taken into account if it can be shown that they were made available to the public.

(2.1.1.4) Geographic Scope

11 There is no further restriction on the geographic location. The disclosure may have taken place anywhere in the world, provided of course that it is prior to the filing or priority date.

(2.1.1.5) Burden of Proof

12 The onus to prove that a prior art document or instance is novelty-destroying lies on the party who wishes to have the patent declared invalid.

13 If the date of prior art cannot be determined with certainty, it shall be construed to the benefit of the patentee. Undated publications or publications that only disclose results of an alleged invention without details as to how these results were obtained, will not qualify as an enabling disclosure or novelty-destroying prior art.[8]

(2.1.1.6) Disclosure in Confidence Shall Not Count

14 Prior art is considered to have been made publicly available when it has been disclosed to any person capable of understanding such prior art and not held by any confidentiality obligation.[9] An invention has not been made publicly available when it has been disclosed only to persons who are held by a confidentiality obligation due to the nature of their profession or due to an agreement or custom, or when it has been disclosed only internally in a company, inaccessible to third parties.

15 Disclosure of the invention shall also not be taken into account for novelty purposes if it occurs within six months prior to the filing date and directly or indirectly is the result of an obvious abuse of which the patentee or his legal predecessor is the victim (Article 5 §5 a) of the 1984 Act). For example, the patentee discloses his invention to a third party, expressing the confidential nature of the invention and his desire to file a patent application. The third party subsequently makes the invention publicly available or files a patent application less than six months before the patentee files his own patent application. The acts of such third party will not destroy the novelty of the patentee's patent.

16 Disclosure of the invention shall likewise also not be taken into account for novelty purposes if it occurs within six months prior to the filing date and directly or indirectly is the result of an officially recognized exposition (Article 3 of the Royal Decree of 2 December

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[6] Court of First Instance Brussels, 17 Jan. 2003, IRDI, 2003, 140.

[7] However, such patent applications must eventually be published in order to be novelty-destroying. Patent applications that were abandoned or withdrawn before publication shall not be taken into account.

[8] Court of Appeal Ghent, 19 Oct. 1964, RW, 1965–1966, col. 1688.

[9] Court of Appeal Brussels, 15 Apr. 1981, Ing. Cons., 1982, p. 333, note De Brabanter.

1986) by the patentee or his legal predecessor, insofar as the patentee declares upon filing the patent application that such an exposition took place and adds a certificate to this effect (Article 5 §5 b) of the 1984 Act).

(2.1.2) Inventive Step

(2.1.2.1) Criterion of Assessment

17 An invention is deemed to be the result of inventive step if, for the person skilled in the art, it does not obviously follow from the prior art (Article 6 of the 1984 Act). Inventive step is defined by the Belgian Supreme Court (Hof van Cassatie/Cour de Cassation) as something new, formerly unknown, that evidences an inventive contribution of the author and thereby distinguishes itself from the mere combination or arrangement of known means by any person skilled in the art.[10] Contrary to what is often thought, inventive step does not necessarily require the so-called flash of genius. Long-term and continuing meticulous efforts can also evidence inventive step. In both cases, however, the inventor must have achieved more than a simple development that is an obvious consequence of existing prior art.

18 If an independent claim fulfils the requirement of inventive step, its dependent claims automatically fulfil this requirement too.[11] However, if an independent claim does not fulfil the requirement of inventive step, each dependent claim must be examined separately to verify whether or not it fulfils the inventive step requirement.[12]

19 The unpublished patent applications, although capable of being novelty-destroying as described in Article 5 §3 of the 1984 Act, can not be taken into account for the assessment of inventive step.

(2.1.2.2) Problem-Solution Approach and Could-Would Test

20 When assessing inventive step, the Belgian courts will generally follow the same approach as set forth in the European Guidelines, although courts may sometimes follow a slightly different methodology. The problem-solution approach and the 'could-would' test, well known from the EPO guidelines, are often applied.[13]

(2.1.2.3) The Skilled Man

21 The Belgian courts also apply the definition of the person skilled in the art set forth in the European Guidelines. The person skilled in the art is a normally qualified practitioner, specialized in the field that is the subject matter of the patent, able to resolve common technical problems. Although he must not necessarily be creative, he must be normally intelligent.

22 The person skilled in the art is deemed to be familiar with the prior art, including also published patent applications, known at the date of filing (or the priority date) of the patent.[14] Inventive step should not be evaluated in hindsight; one must undertake the mental exercise

[10] Cass. 2 May 1963, Pas. I, 932; Cass. 27 Feb. 1963, Pas. 1963, I, 719, Cass. 13 Sep. 1968, Pas., 1969, I, 47.
[11] Court of First Instance Liège, 7 Jan. 2005, IRDI, 2005, 157.
[12] Cass. 4 Jan. 1994, Dossiers Brevets, 1994, I, 1; Cass. 4 Nov. 1987, JCP 1989, II, 2122; Cass. 12 Dec. 1995, JCP éd. E, 1996, II, 844.
[13] Court of Appeal Brussels, 16 Jun. 2006, Ing. Cons. 2006, 503;
[14] Court of First Instance Brussels, 18 Sep. 1995, Ing.-Cons. 1996, 116.

to place oneself at the date of filing (or the priority date), thereby making abstraction of the invention itself and any art or insight that became available afterwards.

(2.1.2.4) Secondary Indications of Inventive Step

23 Belgian courts have also taken into consideration the so-called secondary indications of inventive step, such as the unexpected nature of a result[15] and the fact that the professional community had been searching for a long time for a solution for the technical problem resolved by the invention.[16] Other secondary indications of inventive step are time and cost efficiencies realized by the invention, commercial success and technical progress.

(2.1.3) Industrial Application

24 An invention is patentable only when it is susceptible to industrial application, meaning that it must have a practical use in the industry in its broadest sense (Article 7 paragraph 1 of the 1984 Act). In light of the broad interpretation of 'industrial application', this requirement is not invoked often when trying to invalidate a patent.

(2.1.4) Excluded Inventions

25 In line with the EPC, some inventions shall be excluded from patentability for policy reasons (Article 3 §1, Article 4 and Article 7 §2 of the 1984 Act):

(1) Discoveries, scientific theories and mathematical methods.
(2) Aesthetic creations.
(3) Plans, principles, and methods in the exercise of intellectual activities, games or the conducting of business.
(4) Computer programs, unless they have a technical effect.
(5) Presentations of information, although the means or process of presenting the information can be patentable.
(6) Methods (as opposed to products) of surgical or therapeutic treatment of the human or animal body and diagnostic methods applied to the human or animal body (as opposed to tissues and substances removed from the body).
(7) Inventions contrary to public policy or ethics.
(8) Plant varieties, animal races and biological processes of obtaining plants and animals.
(9) In line with Biotech Directive 98/44/EC, the human body and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions. However, an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element. The industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application.

[15] Problem-solution: Court of First Instance Brussels, 3 Feb. 2006, Malak, unpublished and Ghent, 19 Jan. 1993, RW, 1992-1993, 1243; Could/would: Brussels, 17 Sep. 2004, *PL Consult and Cenadis v. Verrax Galland-Lamy*, unpublished.

[16] Court of First Instance Liège, 7 Jan. 2005, IRDI 2005, 157; Court of First Instance Liège, 7 Sep. 1993, Ing.-Cons. 1993, 297.

(2.2) PARTIAL INVALIDITY

26 Belgian patent law knows the concept of partial invalidity. Not only shall each claim have to fulfil the above-mentioned requirements of validity, a claim can also be declared partially invalid only, resulting in a rephrasing of the claim (Article 49 §2 of the 1984 Act). In practice such restriction or limitation shall usually be suggested by a court-appointed expert and subsequently acknowledged by the court when ruling on the invalidity claim. If an independent claim fulfils the requirement of inventive step, its dependent claims will automatically fulfil this requirement too. However, if an independent claim does not fulfil the requirement of inventive step, each dependent claim must be examined separately to verify whether or not it fulfils the inventive step requirement.[17]

[17] Cass. 4 Jan. 1994, Dossiers Brevets, 1994, I, 1; Cass. 4 Nov. 1987, J.C.P. 1989, II, 2122; Cass. 12 Dec. 1995, J.C.P. éd. E, 1996, II, 844.

(3) INFRINGEMENT

(3.1) STATUTORY PROVISIONS

27 The statutory provisions on infringement can be found in Article 27 paragraphs 1 (direct patent infringement) and 2 (indirect patent infringement) of the 1984 Act. The Belgian courts will apply Article 69 EPC when construing a Belgian patent. As to the Belgian part of European Patents, Article 69 EPC is directly applicable.

(3.2) WHAT ACTS CONSTITUTE DIRECT INFRINGEMENT?

28 A Belgian patent gives the patentee the right to enjoin any third party from committing the following acts without his consent:

(1) Manufacturing, offering, distributing or using a product that is within the claims of the patent, or importing or having it in stock for this purpose.
(2) Applying a process that is within the claims of the patent, or, if the third party knows or it is clear given the circumstances that the application of the process is not allowed without the consent of the patent owner, offering the process for application on Belgian territory.
(3) Offering, commercializing or using a product that was obtained directly according to the process that is within the claims of the patent, or importing or having it in stock for this purpose (Article 27 §1 of the 1984 Act).

29 Good faith will not be a valid defence for patent infringement. Also, the patentee is not required to show that the defendant has knowingly infringed the exclusive rights of the patentee. Patent infringement is established objectively by showing that the defendant committed one of the acts prohibited by Article 27 §1 of the 1984 Act.

30 The claim of infringement must be evaluated on the basis of the similarities between the allegedly infringing product or process and the patented product or process, rather than on the basis of the differences. Differences in details do not suffice to exclude an infringement. The differences must relate to an essential element of the infringement.[18]

31 If a patent concerns a process to manufacture a new product, such a product is deemed, in the absence of proof to the contrary, to have been manufactured by application of the patented process.[19] The burden is then on the defendant to show that the product was not manufactured by application of the patented process, but by application of a non-infringing process. When producing such evidence, the defendant's justified interest in protecting his trade secrets may be taken into account (Article 52 §1, section 2 of the 1984 Act).[20]

32 A Belgian patent or the Belgian part of a European patent offers protection on the Belgian territory only. Although this is controversial in legal doctrine and case law, mere transit will under common patent law generally not be actionable in Belgium. Transit can

[18] Court of Appeal of Brussels, 18 Sep. 2007, IRDI, 2008, 50. See also Court of Appeal of Ghent, 11 Mar. 2008, BVBA Herva/NV Waelkens, unpublished but available through <www.darts-ip.com>.
[19] This provision corresponds to Art. 34 of the TRIPs Agreement.
[20] This provision corresponds to Art. 42 of the TRIPs Agreement.

be actionable, however, when the goods in question are taken into custody by the customs authorities in application of the Anti-Counterfeit Regulation No. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights. The principles upheld by the ECJ in the Polo Lauren, Class International, and Montex judgments shall apply.[21]

(3.3) SCOPE OF PROTECTION

33 Pursuant to Article 69 of the EPC and the Protocol, the scope of the patent is determined mainly by its claims that shall be interpreted in the light of the description and the drawings. The courts will stay within the limits of the terms of the claims that are viewed as binding upon the patentee. When filing the application the patentee has defined the scope and boundaries of his own invention, and he shall be held to those self-imposed limitations. As a consequence, a patentee will generally not be allowed to extend protection to whatever falls within the same inventive concept but goes beyond what was claimed.

34 However, the scope of protection shall not be limited to the so-called literal infringements where all characteristics of the claim are implemented in exactly the same way as described and disclosed in the patent. Belgium was one of the first countries to adopt the doctrine of technical equivalents. Under this doctrine, embodiments that are not identical but substitute the patented means by alternative, equivalent means recognized as such by the person skilled in the art, shall also be considered to infringe upon the patent. Such means are considered equivalent to the patented means if they fulfil the same function and produce the same technical effect in substantially the same way as described in the patent.[22]

35 Belgian doctrine will consider the File Wrapper when construing the meaning of the claims.[23] Declarations made during the prosecution by the patentee in relation to his own invention or in relation to prior art references can be conclusive when determining whether a particular embodiment falls within or outside the scope of a claim. Likewise, arguments that are used during prosecution by the patentee, the Opposition Division or the Board of Appeal of the EPO may also play an important role when enforcing a patent before the Belgian courts. The Court of First Instance in Ghent applied these principles and dismissed an infringement action because the allegedly infringing embodiment was found to be identical to a prior art reference that was explicitly distinguished from the invention by the patentee during prosecution, which had induced the Opposition Division to maintain the patent.[24]

36 Although there is no formal recognition yet in Belgian case law of the so-called Formstein/Gillette doctrine, obvious variations of embodiments that are known in the prior art shall not be found to infringe upon a patent.

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[21] C 383/98, C 405/03 and C 281/05; For more details see C. De Meyer & C. Gommers, 'Het Montex arrest van het Hof van Justitie, een gemiste kans' IRDI (2006), 390.

[22] For a recent application, see Court of First Instance Ghent, 4 Apr. 2007, J. Talpe – *NV Locinox/Fratelli Comunello Spa – Mauriks Import Nederland*, unpublished, in which it was held that there was no infringement by equivalence.

[23] See generally C. De Preter & K. Roox, 'De interpretatie van octrooien aan de hand van het verleningsdossier en andere extrinsieke elementen. Mag wie A heeft gezegd naderhand nog B zeggen?' IRDI (2008), 134.

[24] Court of First Instance Ghent, 12 Jun. 2002, IRDI, 2003, 122, with comments by Bruno Vandermeulen and Ruben Peeters.

(3.4) INDIRECT INFRINGEMENT

37 The patent gives the patent owner the right to prohibit any third party from offering or supplying on Belgian territory to anyone not authorized to apply the invention means relating to an essential element of the invention, for the application of the patented invention on the territory, if such third party knows or it is clear from the circumstances that these means are suitable and intended for such application (Article 27 §2, section 1 of the 1984 Act).[25]

38 If the means are staple products, that is, products that are generally available on the market, such acts are only prohibited if such third party incites the person to whom he/she supplies to do the acts prohibited in Article 27 §1 of the 1984 Act (Article 27 §2, section 2 of the 1984 Act).

39 Persons that benefit from the exemptions in Article 28 §1 a) (private use), b) (experiments) and c) (individual pharmaceutical preparations) are not deemed to be 'authorized to apply the invention' under Article 27 §2, section 1 of the 1984 Act. Therefore, a third party who offers or supplies means relating to an essential element of the invention to those recipients under the conditions described in those provisions, commits indirect patent infringement even though the recipients themselves do not commit direct patent infringement.

40 The first precedent in Belgian law regarding indirect patent infringement concerned the coffee pads sold for use in the popular Senseo coffee machine.[26] This seminal and landmark judgment extensively sets forth the Belgian position on indirect patent infringement and is therefore summarized below in some detail.[27]

41 The Senseo system, consisting of the Senseo coffee machine and Senseo coffee pads, is the result of a cooperation between Philips and Sara Lee/DE, whereby the former produces the machine and the latter produces the coffee pads. Sara Lee/DE and Philips co-own the European patent that covers the container used in the machine, the coffee pad, and the assembly of the two.

42 Six months after the introduction of the Senseo system in Belgium in 2002, three local competitors brought an alternative and less expensive coffee pad on the market for use in the Senseo coffee machine. In a judgment of 8 November 2005, the Court of Appeal of Antwerp held that the offer and supply of these alternative coffee pads in Belgium constitutes an indirect patent infringement.

43 The Court of Appeal found that the essence of the patented invention was the particular assembly of the coffee pad and the container, whereby the coffee pad must correspond with the bowl-shaped inner space of the container. The Court of Appeal concluded that the coffee pad is a means relating to an essential element of the patented invention within the meaning of Article 27 § 2, section 1 of the 1984 Act.

44 The Court of Appeal considered that the purpose of the prohibition of indirect patent infringement is to prevent third parties from indirectly taking advantage of a new market that has come into existence as a result of the invention. Indirect patent infringement is an

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[25] Article 27 §2 corresponds to Art. 26 of the Agreement on Community Patents done in Luxembourg on 15 Dec. 1989. This agreement has never been ratified.

[26] For a more recent decision on indirect patent infringement, see Court of First Instance Ghent, 4 Apr. 2007, *J. Talpe – NV Locinox/Fratelli Comunello Spa – Mauriks Import Nederland, unpublished.*

[27] Court of Appeals Antwerp, 8 Nov. 2005, Juristenkrant 2005, issue 119, 7; IRDI, 2006, 134; Ing. Cons. 2005, 502, Observations Eric De Gryse. Other aspects of the judgment of 8 Nov. 2005 are dealt with below.

independent type of infringement that does not depend on the existence of direct patent infringement. Further, it is not even required for the means offered or supplied to be an essential element of the patent invention, it suffices that they relate to an essential element of the invention. This is the case when the means are suitable to functionally cooperate with such an element for the realization of the patented invention.

45 The Court of Appeal also confirmed that it is not required for a finding of indirect patent infringement that the coffee pad itself be new on the priority date of the European patent. Even existing elements can infringe the patent if one knows that they are intended for the application of the patented invention. The fact that the local competitors used the word 'new' on their packaging and advertised the pads as being suitable for the Senseo machine convinced the court that the pads were offered for the application of the patented invention. The Court of Appeal dismissed the argument that the coffee pads could be used in other machines, and confirmed that the means do not have to be exclusively suitable for the invention. It suffices that the means are offered and knowingly intended to apply the invention in order to render their 'neutral' character (i.e., a possible non-infringing purpose of the means) irrelevant.

46 An earlier decision of the Opposition Division of the EPO, at the time of the judgment on appeal before the Technical Board of Appeal, to invalidate the one claim in the European patent that concerned only the coffee pad, did not render the coffee pads a staple commercial product in the meaning of Article 27 §2 of the 1984 Act. The decision to invalidate the claim was based on prior patent rights rather than the availability of such coffee pads on the market. Therefore, the patentees were not required to show that the local competitors 'incited' the persons supplied to commit acts of direct patent infringement.

47 The Court of Appeal dismissed the argument that there was no indirect patent infringement because the coffee pads were only supplied to supermarkets that do not apply the patented invention themselves and only supply to consumers. The Court of Appeal held that Article 27 §2 of the 1984 Act does not require the buyers to whom the means are supplied to actually apply the invention themselves.

(4) FURTHER DEFENCES TO INFRINGEMENT

48 The most important defences to infringement are obviously a defence of invalidity or a defence of lack of infringement. Additional defences are provided in Articles 28 and following of the 1984 Act. The defences listed in Article 28 §§1 c) through f) are of lesser importance and shall not be discussed in detail in this chapter.

(4.1) EXPERIMENTS

49 Prior to the amendments introduced into the 1984 Act by the Act of 28 April 2005, acts done for experimental purposes relating to the subject matter of the invention were exempted from patent infringement by Article 28 §1 b) of the 1984 Act. There was limited case law from the Belgian courts regarding the experimental-use exception. The standard for experimental use was very strict. Only acts committed out of sheer scientific curiosity were exempt. Any trace of a commercial transaction or benefit could exclude the application of the exception. A defendant who had used the invention (a heating device) not only to examine it and discover its strengths and weaknesses, but also to heat office space, was barred from the experimental-use exception.[28] Belgian legal scholars considered that clinical trials performed with the aim of obtaining market authorization for a pharmaceutical had a commercial goal and could therefore not benefit from the experimental use exception. But there was controversy: other scholars disagreed and argued that such trials are in the general interest and should therefore be exempt from patent infringement. In summary proceedings, the Court of Appeals of Brussels allowed a prima facie application of the experimental-use exception for a generics manufacturer before the expiry of the supplementary protection certificate. The court held that under a prima facie analysis, no infringement took place as the generics manufacturer had only performed preparatory administrative acts short of an actual commercialization of the patented pharmaceutical. The generic manufacturer had filed an application for the registration of the generic equivalent, without adding any samples or making the generic drug available to any third party.[29]

50 One of the aims of the Act of 28 April 2005 was to clarify and codify the experimental-use exception. Pursuant to the new wording of Article 28 §1 b) of the 1984 Act, entered into force on 23 May 2005, henceforth all acts that are performed on or with the object of the patented invention shall be excused from prosecution under the patent if they are committed 'for scientific purposes'. The new regime is broader than the old experimental-use exception. Not only experiments in the strict sense but any and all act in general can benefit from the exception provided that the act is committed with an objective scientific purpose or intent. As a consequence, the experimental-use exemption is not limited to research institutions or universities that are solely dedicated to science without any commercial aim or benefit. Commercial undertakings are also allowed to proceed with experimental use of the invention, in the broad sense, and such research cannot be challenged by the patentee.

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[28] Brussels Court of Appeal, 11 May 1995, Ing.Cons. 1995, 254.

[29] Brussels Court of Appeal, 10 Nov. 2000, IRDI, 2001, 63. In 2006, the 'Bolar exception' was written into the Pharmaceuticals Act of 25 Mar. 1964, which provides that performing tests to obtain a marketing authorization for a generic equivalent of a pharmaceutical product and to comply with all the related practical requirements, do not amount to infringement of a patent or a supplementary protection certificate for human use.

(4.2) COMPULSORY LICENSES

51 A compulsory license can be granted when the patentee fails to use, apply, or otherwise exploit the invention in Belgium within four years from the application or within three years from grant, whereby the longest term will be applied. Such license is also possible when another patented invention cannot be applied without infringing a prior patent when it can be established that the later invention entails a 'substantial technical progress'. The Articles 31 and following of the 1984 Act set forth the requirements to obtain such license. Amongst others, the prospective licensee must establish that negotiations to obtain a voluntary license have failed. Noteworthy is that any request to be granted a compulsory license shall be suspended when an infringement action is pending before the court. When said action is held well founded, the compulsory license shall be refused (Article 31 §3 of the 1984 Act).

52 The already mentioned Act of 28 April 2005 introduced the compulsory license 'in the interest of public health' into Belgian patent law. Such license can be granted to allow for the manufacturing of a pharmaceutical compound or a medical device, or for the application of a therapeutic or diagnostic method, when this is deemed to be in the interest of public health. The procedure provides for a consultation process before the Advisory Board of Bio Ethics but substantial discretion is left to the Government when deciding whether the application can be granted or not. Contrary to the other compulsory license regime discussed in the previous paragraph, an infringement action shall not suspend the procedure to be granted a compulsory license. Rather, the infringement proceedings will be suspended until a decision is taken on the application to be granted a compulsory license (Article 31*bis* §3 of the 1984 Act).

53 We have no knowledge of any compulsory license granted in Belgium.

(4.3) PRIOR USE

54 Article 30 §1 of the 1984 Act contains an exception of prior personal use. If a person (the 'prior possessor' of the invention) has made the same invention in good faith, but decided not to file a patent application or make it public, he should be allowed to benefit from it even when later patent protection for the same invention is obtained by another inventor.

55 The 'prior possessor' must have had practical, complete and legitimate, good faith knowledge of the invention, so that he/she was able to start the exploitation of the invention at the time when the patent application was filed (or on the priority date)[30]. Under existing doctrine, it is not required that the prior possessor actually used the invention before the filing or priority date. It is sufficient if he/she had complete knowledge of the invention, insofar as his/her knowledge was sufficient to put the invention into practice. However, there is a requirement that the prior possessor used or came into possession of the invention on the Belgian territory. The burden of proving prior personal use rests on the prior possessor. The prior possessor is allowed to profit from the invention either by continuing or even commencing his/her exploitation of the invention.

56 Pursuant to Article 30 §2 of the 1984 Act, the patentee shall not only be barred from enforcing patent rights against the 'prior possessor'. He/she may not enforce his/her rights against any act on the Belgian territory that concerns a product that has been put on the

[30] Cass. 14 Nov. 1980, Pas., 1981, I, 322.

Belgian market by the prior possessor. In practice, this means that the patentee has no cause of action against the commercialization by any third party of the product manufactured and put into commerce by the prior possessor.

57 The prior use exception is a personal right that vests only in the prior possessor. As of the date of filing or priority of the later patent, the prior use right can only be assigned together with the prior possessor's entire business (Article 30 §3 of the 1984 Act). However, before the filing or priority date, the prior use right can be assigned separately from the prior possessor's business to any third party.

(4.4) EXHAUSTION

58 The principle of national exhaustion is explicitly and formally acknowledged in the 1984 Act. In the preparatory works to the 1984 Act, the Belgian legislator expressly refers to the German doctrine of exhaustion, accepted in the Netherlands, France and the United Kingdom, and to case law of the ECJ judgment of 31 October 1974 in the *Centrafarm* case. Article 28 §2 of the 1984 Act stipulates: 'The rights resulting from a patent do not extend to acts that concern a product that is protected by this patent and that take place on the Belgian territory, after this product has been put on the Belgian market by the patent holder or with his express approval'.

59 The doctrine of exhaustion was adopted in the 1984 Act primarily to offset the effect of another change in Belgian patent law. Before the 1984 Act, a distinction was made in Belgian patent law between (i) primary patent infringement, which consisted of the manufacture of a patented product or the application of a patented process, and (ii) secondary patent infringement, which consisted of having in one's possession, selling or importing an infringing product. Secondary infringement required a prior act of primary infringement: secondary infringement could only exist if the product owned, sold or imported was inherently 'tainted' because it was the result of primary patent infringement. This was changed in the 1984 Act: the distinction between primary and secondary patent infringement was abolished. Any of the acts listed in Article 27 of the 1984 Act now count as patent infringement in their own right. This meant that an object produced with the consent of the patentee could nonetheless in theory, regardless of such consent, become counterfeit later on. In order to avoid such an undesirable effect, the doctrine of 'Belgian' exhaustion was included in the new 1984 Act in Article 28, right after the enumeration of the patentee's exclusive rights in Article 27.

60 If a patented product was put on the Belgian market by the patentee or with his consent (e.g., by an authorized licensee insofar as he/she is not in breach of the license agreement), the patentee will have exhausted his patent rights in Belgium (Article 28 §2 of the 1984 Act). The patentee can then no longer invoke his patent rights to prevent the product from being commercialized further by others, for example, by reselling the product, renting it out, exporting it to other countries etc. The patentee's consent must be clear and unequivocal. Consent shall not be presumed.

61 Applying these principles in the Senseo judgment discussed above in paragraph 38, the Court of Appeal of Antwerp rejected the infringers' claim that the patentee's rights were

exhausted due to the absence of an explicit prohibition in the user's manual to use other pads than authentic Senseo pads in the Senseo machine.[31]

62 Belgian courts shall obviously also apply within the EU the exhaustion doctrine of the ECJ. The requirements of this European doctrine are outside the scope of this contribution.

(4.5) PRIVATE NON-COMMERCIAL USE

63 Article 28 §1 a) of the 1984 Act exempts from patent infringement those acts committed in private for non-commercial purposes. In the *Senseo* judgment discussed in Chapter 3.4, the Court of Appeal of Antwerp held that the private non-commercial use exception was of no avail to the defendants in an action for *indirect* infringement. As indirect patent infringement is an independent type of patent infringement, it does not require a finding of direct patent infringement by the consumer. Therefore, the local manufacturers committed indirect patent infringement by supplying the pads to the consumer, even if the consumer did not commit direct patent infringement by using them.[32]

[31] Court of Appeal Antwerp, 8 Nov. 2005, Juristenkrant 2005, issue 119, 7; IRDI, 2006, 134; Ing. Cons. 2005, 502, Observations Eric De Gryse.

[32] Court of Appeal Antwerp, 8 Nov. 2005, Juristenkrant 2005, issue 119, 7; IRDI 2006, 134; Ing. Cons. 2005, 502, Observations Eric De Gryse.

(5) COURT SYSTEM

(5.1) COMPETENT COURTS

64 Only five courts have jurisdiction to hear patent cases in Belgium, namely the commercial courts of Antwerp, Brussels, Ghent, Liège and Mons (Article 73 of the 1984 Act). These courts shall decide over all infringement and nullity actions, entitlement actions (revindication of ownership), as well as disputes relating to patent assignment or license agreements. Without prejudice to the EC Civil Jurisdiction Regulation, an infringement action must be commenced either before the court of the district where the infringement took place, or of the district where the defendant is domiciled (Article 73 §2 of the 1984 Act). Also without prejudice to the EC Civil Jurisdiction Regulation, when the defendant does not reside and is not domiciled in Belgium, the action may be commenced before the court of the district where the plaintiff is domiciled (Article 73 §5 of the 1984 Act).

65 To date no specific magistrates or divisions within the five commercial courts have been appointed to systematically handle patent disputes, but recent changes in legislation allow for a more centralized and specialized approach to patent litigation. Further initiatives are being considered. Also, although Belgium is sometimes considered a suboptimal jurisdiction to try patent cases, the Belgian courts have in recent years made significant progress, and both the quality and the speed with which cases are being resolved have improved substantially. The Belgian courts are patent-friendly, and are cautious in excluding or limiting patent protection on the basis of invalidity. As the magistrates lack any technical background, they will generally rely either on decisions of the EPO and/or court-appointed technical experts. Patent disputes can be resolved by way of arbitration insofar as they concern the ownership of patents or patent applications, validity and infringement of patents, and non-compulsory patent licenses (Article 73 §6 of the 1984 Act).

(5.2) PATENT OFFICE

66 The Belgian Patent Office grants Belgian patents. The Belgian Patent Office is not called upon to render opinions in ongoing patent disputes. It is fair to say that, due to the success of the European patent, Belgian patents are not in high demand. Currently, legislation is being considered to improve and amend the grant procedure. The changes will include the possibility of a substantive examination by the EPO. The fees and legal taxes to be paid will also be reviewed so as to make a Belgian patent more attractive to the business community.

(5.3) CONSERVATORY MEASURES

(5.3.1) Preliminary Injunction

67 Interlocutory proceedings are available in patent cases under the general conditions of the Code of Civil Procedure that are applicable to any request for urgent preliminary measures pending a judgment of the merits (Article 1035 and following of the Code of Civil Procedure). Because of the availability of *saisie-contrefaçon* proceedings[33], interlocutory

[33] Discussed in Ch. 5.3.2.

proceedings were not very popular in Belgium in intellectual property matters generally and patent cases in particular. However, recent case law shows that effective interlocutory injunctions can be obtained in patent proceedings as well.[34]

68 The general requirements for interlocutory proceedings are:

(1) Urgency to put an end to a wrongful situation which otherwise would cause the plaintiff harm that is irreparable or at least difficult to adequately indemnify and
(2) *Fumus bonus iuris*: the patent is prima facie valid and is prima facie infringed. Prima facie validity is readily accepted by the Belgian courts when the claim is based on (the Belgian part of) a European Patent and no relevant new prior art (i.e., prior art that has not yet been examined during the prosecution phase) is invoked to challenge the patent. Pending opposition proceedings and even a revocation decision in first instance does not per se exclude a finding of prima facie validity. But when the opposition or validity challenge is sufficiently serious, prima facie validity may become difficult to establish. Prima facie infringement can be literal or even by equivalence.

69 To the extent compatible with accelerated proceedings, the course of interlocutory proceedings is similar to that of ordinary proceedings on the merits. Interlocutory relief is generally not obtained within less than three months. Interlocutory injunctions may also be directed against intermediaries whose services are used to infringe. They will generally provide for civil penalties (*dwangsom/astreinte*) to be paid to the patentee in case of violation of the injunction by the prima facie infringer. The decision granting the interlocutory injunction may also impose a bond or guarantee upon the patentee to safeguard the infringer for damages incurred if the claim is later found to be ill founded in the proceedings on the merits and the patentee is held liable for that damage.

(5.3.2) *Saisie-Contrefaçon*

70 The burden of proving patent infringement rests on the patentee. Belgian procedural law does not have discovery proceedings as known in most common law countries. Collecting evidence to asses the nature and the extent of an infringement, as well as discovering the source and destination of the infringing goods as well as the turnover and profits the infringer makes by selling them, is often problematic. The Belgian Code of Civil Procedure provides a solution for this evidentiary problem by means of the *beslag inzake namaak/saisie-contrefaçon* or *saisie-description* proceedings (hereinafter '*saisie-contrefaçon*') (Articles 1369*bis* and following of the Code of Civil Procedure). Belgian Intellectual Property law already knew the concept of seizure of infringing goods long before the Enforcement Directive. In fact, as will be explained below, the Belgian *saisie-contrefaçon* proceedings provide for conservatory measures that allow for but also go further than a mere conservatory seizure. Measures of description and information gathering and an interlocutory injunction to prevent their entry into the channels of commerce can also be obtained during these conservatory or interlocutory proceedings. These proceedings are more popular in Belgian litigation practice than the regular interlocutory injunction proceedings described sub Chapter 5.3.1 due to the absence of the urgency requirement.

[34] E.g., in the *Colgate/Unilever* case regarding toothbrushes, the President of the Court of First Instance of Brussels granted a cross-border injunction effective in all countries where the infringed European Patent was granted, Pres. Court of First Instance, Brussels, 14 Sep. 2001, IRDI, 2002, 239, IER, 2002, 34.

71 Before launching proceedings on the merits, the patentee can file an *ex parte* request with the President of the Commercial Court to appoint one or more experts to examine the objects or processes that allegedly infringe the patent.[35] This will allow the patentee to appreciate the strength of his claim in advance of proceedings on the merits, and include in the assessment also information not readily available in the public domain but obtained during the search by the appointed expert. This information can include details about the origin and the actual scope of an infringement, accounting data on sales, and other relevant information found during the *saisie* (Article 1369*bis*/1 §1 of the Code of Civil Procedure). The requirements to obtain the order are similar to those needed to obtain a preliminary or interlocutory injunction but there is no requirement of urgency (Article 1369*bis*/1 §3 of the Code of Civil Procedure). The applicant must show that the patent is prima facie valid and is prima facie infringed. The patent can be a purely Belgian patent, the Belgian part of a European patent or even a foreign patent to the extent that the evidence to be obtained is located in Belgium.[36] The burden of proof for the patentee to demonstrate prima facie validity of a patent is relatively low, especially where (the Belgian part of) a European patent is at stake. As a European patent is granted after a thorough validity examination by the EPO (as opposed to a Belgian patent, which is granted without such an examination), the prima facie validity of such a European patent is difficult to challenge in the framework of a motion for *saisie-contrefaçon*. The burden to prove prima facie infringement is higher, and requires an argument from the patentee why the products or processes in question come within the scope of his patent rights. To obtain a description of the alleged infringement, it can of course not be required from the patentee to furnish watertight evidence of patent infringement, as the proceedings are precisely designed to collect such evidence for the ensuing proceedings on the merits. Prima facie evidence of patent infringement suffices for the purpose of a descriptive *saisie-contrefaçon* application.

72 The descriptive *saisie-contrefaçon* order can, at the request of the patentee and the discretion of the judge, be extended to also contain a preliminary injunction to prohibit the alleged infringer from further distributing the allegedly infringing goods (*verbod tot uit handen geven/defence de se désaissir*, in practice often referred to as a 'real *saisie*'). The patentee may also request that the allegedly infringing documents or objects, and that any revenue rendered by the allegedly infringing products or processes be taken under sequester (Article 1369*bis*/1 §4.1 of the Code of Civil Procedure). The request for injunctive measures can be filed immediately with the request for the descriptive *saisie-contrefaçon* order or later, for example, after the descriptive *saisie* has taken place or even during the subsequent proceedings on the merits.

73 To obtain these more far-reaching injunctive measures there must be prima facie validity of the patent and moreover the infringement may not be subject to a reasonable challenge. As can be expected, the courts will be more cautious when granting these additional measures and assess whether the requested injunctive measures are appropriate. The courts will have to apply a rule of reason approach and determine whether an injunction is justified, taking into account not only the legitimate interests of the parties but also the public interest (Article 1369*bis*/1 §5 of the Code of Civil Procedure). Prior to granting the injunction, the court may decide to first hear the alleged infringer. In that case, however, in order to safeguard the effectiveness of the purely descriptive measures, the applicant will first be given an opportunity to withdraw the application for injunctive relief (Article 1369*bis*/1 §4.2 of the

[35] This fact-finding procedure is also available for holders of other intellectual property rights, such as plant breeder's rights, copyrights and, pursuant to established case law, trademark rights.

[36] Cass. 3 Sep. 1999, *Sanac Variantsystemet*, T.B.H. 2000, 128.

Code of Civil Procedure). Nonetheless, depending on the circumstances of the case, Belgian judges have been found willing to grant injunctive relief within the framework of *saisie-contrefaçon* proceedings even when a patent was still under opposition in Munich or had even been revoked by a non-final Opposition Division decision.[37]

74 The expert's mission during a descriptive *saisie-contrefaçon* is to give a complete description of the nature and characteristics of the allegedly infringing products or processes, as well as of any other documents or objects that are relevant to establish the extent of the infringement, always within the scope of the mission given to the expert in the *saisie-contrefaçon* order. The main purpose is to allow the patentee to gather necessary data to take an informed decision on whether or not to initiate patent infringement proceedings on the merits. The expert has no authority to assess whether or not any patent infringement has taken place. Such assessment can only be made in the ensuing proceedings on the merits.

75 Much like a 'dawn raid' in EU competition law, the *saisie-contrefaçon* is conceived as an unannounced visit to the alleged infringer, so that he will not have the chance to conceal or tamper with any evidence of the alleged patent infringement. Therefore, an application for *saisie-contrefaçon* is filed ex parte. On the day of the first visit to the alleged infringer's domicile or place or residence, a bailiff shall accompany the court-appointed expert. The expert may not start his work at the alleged infringer's domicile or place or residence before the bailiff has formally served the order upon the alleged infringer. Service of the order starts the one-month period in which the alleged infringer has the opportunity to file an opposition against the *saisie-contrefaçon* order before the judge who issued it (Articles 1031–1034 Code of Civil Procedure). An opposition, if any, shall however not suspend the enforcement of the measures that are ordered.

76 A representative of the patentee (e.g., outside counsel, patent agent or employee) can be present during the expert's fact-finding mission but only when formally and explicitly authorized by the court in the *saisie-contrefaçon* order (Article 1369*bis*/4 of the Code of Civil Procedure). The court must formally justify why such presence is being authorized and may impose specific measures to safeguard confidential data.

77 The expert is formally entrusted with the task to describe the alleged infringement, as explained above, but he/she must also ensure that the legitimate interests of the alleged infringer are safeguarded, in particular in relation to confidentiality (Article 1369*bis*/6 of the Code of Civil Procedure). A bailiff remains present during the expert's operations to record them in an official statement (*proces-verbaal van vaststellingen/procès-verbal de constatations*). Any reservations or remarks of the alleged infringer or the patentee's representative are recorded in the statement.

78 When the expert is finished with his examination and description of the allegedly infringing products or processes, he/she files his/her report with the court within the term imposed by the court, with copies for the patentee, the alleged infringer and any third party at whose domicile or place of residence the description occurred (Article 1369*bis*/7 §1 of the Code of Civil Procedure). Unless a longer term has been granted based on specific grounds, that term shall not exceed two months from the formal notification of the order. The report should be dealt with on a confidential basis and may only be used by the patentee or his/her assignee within the framework of subsequent court proceedings, interlocutory or on the merits, before competent Belgian or foreign courts (Article 1369*bis*/7 §2 of the Code of Civil Procedure). By way of exception, the court may allow other persons to have

[37] Court of Appeal Antwerp, 25 Jun. 1990, Ing. Cons. 1993, 203; Court of Appeal Ghent, 9 Jun. 1983, Pas. , 1993, II, 115; Pres. Court of First Instance, Brussels, 14 Sep. 2001, IRDI, 2002, 239, IER, 2002, 34.

access to the report when allowing the description but that must then be authorized explicitly in the order (Article 1369*bis*/1 §3.2 of the Code of Civil Procedure).

79 The patentee must then commence patent infringement proceedings on the merits within the deadline specified by the President authorizing the *saisie*. In the absence of any deadline specified by the President, the patentee must commence proceedings on the merits within twenty working days or thirty-one calendar days, whichever is the longer term, after receipt of the expert's final report by registered mail (Article 1369*bis*/9 of the Code of Civil Procedure). Proceedings on the merits may also be launched before the competent courts outside of Belgium. Failure to start proceedings on the merits shall result in the forfeiture of the court order granting the measures and the applicant shall then also no longer be allowed to use the expert's report, which can also not be rendered public by the patentee (Article 1369*bis*/8 of the Code of Civil Procedure).

80 The absence of advance warning contributes greatly to the effectiveness of the measure. At the same time however, the absence of advance warning entails a danger of abuse. It is therefore recommended that the patentee exercise his/her rights under a *saisie-contrefaçon* order with appropriate caution. The more stringent requirements that apply for a request for a real *saisie* – as opposed to mere descriptive measures – are also intended to avoid any abuse. The court may also order additional measures to safeguard confidential data (Article 1369*bis*/1 §3 of the Code of Civil Procedure), or make any order dependent upon a deposit to be made by the patentee (Article 1369*bis*/3 §1 of the Code of Civil Procedure). Such a deposit is intended to safeguard the falsely accused defendant against damage arising from the *saisie-contrefaçon*. However, under the current case law of the Belgian Supreme Court, if the Court holds in the proceedings on the merits that no patent infringement was committed, the patentee is not automatically liable for the damage caused to the alleged infringer by the *saisie-contrefaçon*.[38] Only in the event of an abusive application by the patentee for a *saisie-contrefaçon* (e.g., in which the patentee concealed important information regarding the possible invalidity of the patent or any precedent from other jurisdictions that found against patent infringement), or an abusive exercise of the *saisie-contrefaçon* order by the patentee (e.g., use of confidential information unlawfully obtained during the expert's operations), will the patentee be held liable for the damage caused to the accused yet innocent infringer during the *saisie-contrefaçon*. This case law predates the recent statutory changes regarding *saisie-contrefaçon* and is now subject to certain criticism in the legal doctrine.[39] The new Article 1369*bis*/3 §2 of the Code of Civil Procedure states that the court may award appropriate damages to the alleged infringer if the *saisie-contrefaçon* measures are lifted. It is as yet unclear under which conditions such damages may be awarded and whether this new statutory provision has changed the Balta case law of the Belgian Supreme Court.

(5.3.3) Conservatory Attachment of Bank Account of Infringer

81 When the patentee can demonstrate urgent circumstances likely to endanger the recovery of damages, the President of the Commercial Court may also order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets (Article 584.4 sub 5 of the Code of Civil

[38] Cass., 11 Mar. 2005, *Balta Industries v. Roger Vanden Berghe*, <www.cass.be>; AM 2005, 396, observations F. de Visscher; Bull. B.M.M. 2006, 88; IR DI. 2005, 238; Ing.-Cons. 2005, 154; J.L.M.B. 2005, 1313 at <www.jlmbi.larcier.be>.

[39] See in particular F. de Visscher in AM 2005, 396.

Procedure). To obtain a conservatory attachment or blocking of the bank accounts, the applicant must meet the general urgency requirement for interlocutory measures and demonstrate that the measure is urgent to ensure that damages can be recovered. In addition, there must be prima facie proof of validity of the patent and the infringement may not be subject to a reasonable challenge.

(5.4) PROCEEDINGS

(5.4.1) Pre-trial Proceedings

82 With the exception of the *saisie-contrefaçon* proceedings discussed in paragraphs 70 and following, Belgian procedural law does not have any other pre-trial proceedings.

(5.4.2) Ordinary Proceedings on the Merits

(5.4.2.1.) General Rules

83 The following general principles will apply to the various types of patent proceedings described in this section:

(1) The action is brought by service of a writ upon the defendant by a bailiff (Article 702 of the Code of Civil Procedure). Alternatively, a joint statement of voluntary appearance can be filed with the court by both parties, which avoids the cost of service of a writ and the need to observe deadlines regarding notice requirements (Article 706 of the Code of Civil Procedure). In both cases, the court registrar sets the date for the introductory hearing.

(2) The introductory hearing takes place at least eight calendar days after service of the writ when the defendant is domiciled or has its registered office in Belgium, or when the writ can be served at a branch office in Belgium of a company that has its registered office abroad (Article 707 of the Code of Civil Procedure). The introductory hearing must take place at least twenty-three calendar days after service of the writ for a company domiciled or with its registered office in neighbouring countries including the United Kingdom (Article 55, 1° of the Code of Civil Procedure), at least thirty-eight calendar days after service of the writ for a company domiciled or with its registered office elsewhere in Europe (Article 55, 2° of the Code of Civil Procedure) and at least eighty-eight calendar days after service of the writ for a company domiciled or with its registered office elsewhere in the world (Article 55, 3° of the Code of Civil Procedure). The purpose of these notice requirements is to give the defendant time to instruct local counsel and prepare for the introductory hearing. The notice period may be shortened by the President of the Court upon request of the plaintiff in matters of urgency (Article 708 of the Code of Civil Procedure).

(3) If the defendant is present or represented by counsel at the introductory hearing, the parties will agree on a calendar to exchange trial briefs and request the court to acknowledge this calendar (Article 747 of the Code of Civil Procedure). There is no restriction on the number of trial briefs each party may file. The case will then be postponed in order to allow the parties to develop their arguments through the exchange of trial briefs. When the parties cannot reach agreement, they will submit their observations to the Court and the Court will then decide on the calendar and date for oral argument, no later than six weeks after the introductory

hearing. Non-observance of the calendar agreed between the parties or the calendar set by the Court will result in the inadmissibility of the trial brief.

(4) Upon request of either of the parties, the court may issue preliminary rulings at the introductory hearing or shortly thereafter (Article 19 of the Code of Civil Procedure). Procedural incidents in relation to admissibility or jurisdiction may be settled in advance (Article 735 of the Code of Civil Procedure) or certain investigations may be ordered and an expert can be appointed. The court may also issue conservatory measures that the parties are to comply with pending the proceedings.

(5) If the defendant is not present or represented at the introductory hearing, the plaintiff may request the Court to render a judgment by default (Articles 802 and following of the Code of Civil Procedure).

(6) The evidence relied upon by each party is communicated to the other party together with each trial brief. The evidence is filed with the Court at least fifteen days before the hearing (Article 756 of the Code of Civil Procedure). There is no discovery in Belgium. But as explained in Chapter 5.3.2, the *saisie-contrefaçon* proceedings allow for an efficient alternative to discover and obtain evidence in relation to an alleged infringement.

(7) The examination of witnesses is very rare in Belgium. A judge will take a deposition from the witness and there is no right to cross-examine the witness (Articles 915 and following of the Code of Civil Procedure). Although both parties' counsel shall be present, they are not allowed to question the witness themselves, but they may request the judge to direct certain questions to them (Article 938 of the Code of Civil Procedure).

(8) In patent cases, it is customary for the Court to appoint an independent expert witness (either ex officio or at the request of the parties), to give an opinion regarding specific technical issues (Articles 962 and following of the Code of Civil Procedure). Although the expert's findings are not binding for the Court, the courts do tend to follow the expert's conclusions. The courts are more reluctant to rely on the findings of party-appointed experts, whose objectivity and independence may be challenged.

(9) Oral arguments are public. The hearing normally takes 1 to 4 hours depending on the complexity of the case. More time can be requested from the Court in exceptionally difficult cases. Counsel for the plaintiff is invited to argue his case first, followed by counsel for the defendant. Each counsel may reply afterwards, but such replies are normally brief. Counsel is not allowed to bring up evidence or arguments that were not raised in the written trial briefs exchanged prior to the hearing.

(10) The case is then taken into consideration. Judgment is not given at the end of the hearing but is usually issued between one and four months later. It may take the Court longer to reach a decision in highly technical patent cases.

(5.4.2.2) Infringement Action

84 The following persons have standing to bring an action for patent infringement:

(1) The patent owner or usufructuary of the patent (Article 52 §2, section 1 of the 1984 Act). If the patent is co-owned by several joint proprietors, the contractual arrangements between them shall determine whether or not they are all to be joined as a party to the proceedings. In the absence of a contract between the co-owners of the patent, infringement proceedings require the agreement of all co-owners. If no agreement can be reached between all the co-owners, each owner

can obtain authorization to commence infringement proceedings from the Court (Article 43 §2 of the 1984 Act).

(2) The beneficiary of a compulsory license. The compulsory licensee must first request the patent owner or usufructuary to commence infringement proceedings. If the patent owner or usufructuary does not commence proceedings as a result of such request, the compulsory licensee has standing to do so (Article 52 §2, section 2 of the 1984 Act).

(3) The exclusive licensee, unless standing to commence patent infringement proceedings has been excluded in the license agreement. The exclusive licensee must first request the patent owner or usufructuary to commence infringement proceedings. If the patent owner or usufructuary does not commence proceedings as a result of such request, the exclusive licensee has standing to do so (Article 52 §2, section 3 of the 1984 Act).

Any licensee may intervene in a patent infringement action commenced by the patent owner or usufructuary to claim damages (Article 52 §2, section 4 of the 1984 Act).[40]

85 A patent infringement action can only be filed from the day the patent has been made available to the public and only for acts of infringement committed as from that date (Article 52 §3 of the 1984 Act)[41].

86 Under Belgian law, an infringement action shall be time-barred after five years (Article 54 of the 1984 Act). Any act of infringement (manufacturing, offer for sale, sale, commercialization) will be considered separately in order to determine whether the action is timely.

(5.4.2.3) Declaratory Action of Non-Infringement

87 Under the following conditions, a party who could be accused of committing patent infringement may commence an action before the Belgian courts to obtain a declaration of non-infringement (Article 18 §2 of the Belgian Code of Civil Procedure). The potential infringer must demonstrate the existence of a right that is subject to a serious threat. A mere theoretical possibility that the patentee might commence patent infringement proceedings is usually not sufficient to demonstrate a serious threat to the potential infringer's rights. Such possibility may have become likely, for example, because the patentee has sent the potential infringer a cease-and-desist letter, or because the patentee has commenced patent infringement proceedings in another jurisdiction or otherwise given the impression that he/she intends to enforce his/her patent rights. In practice, however, courts will rather easily accept that there is a potential threat, certainly when the defendant patentee does not immediately acknowledge that there is no infringement.

88 A few years ago, Belgium had a reputation of a highly sought-after jurisdiction for cross-border non-infringement actions, known as 'Belgian torpedoes'. Patent infringers who

[40] Pursuant to Art. 45 §1 of the 1984 Act, license agreements are null and void unless they have been executed in writing. They have effect vis-à-vis third parties only if they have been registered with the Belgian Patent Office (Art. 45 §5 of the 1984 Act). There is some case law to the effect that an unregistered licensee has no standing to commence *saisie-contrefaçon* proceedings or an infringement action, see e.g., Court of First Instance Liège, 25 Feb. 2008, IRDI, 2008, 181.

[41] The 1984 Act also allows the patentee to seek a reasonable compensation from a third party who has applied the invention before the actual grant of the patent but after the publication of the application, or after the third party was provided with a certified copy of said application. A requirement is that the actions by the third party qualify as an infringement under the patent as granted (Art. 29 of the 1984 Act).

anticipated an infringement action to be launched by the patentee would quickly file a cross-border non-infringement action against the patentee in the notoriously slow courts of Belgium. The patentee, who then started cross-border infringement proceedings in another Member State of the European Union, saw his proceedings stayed under the rules of *lis pendens* and related actions (Articles 27 and 28 of Regulation 44/2001) until the Belgian court reached a decision in the declaratory action of non-infringement. The slow Belgian court would thereby – unwittingly – block any efficient enforcement of the patent by its – by assumption – more efficient counterpart abroad. Belgian courts have in recent decisions effectively countered clear attempts to misuse the Belgian court system and refused to uphold cross-border jurisdiction over foreign parties in the absence of a sufficient link with the Belgian territory.[42] The Belgian torpedo now appears to be a thing of the past.

(5.4.2.4) Revocation and Invalidity Actions

89 A Belgian patent or the Belgian part of a European Patent can be revoked by the Belgian courts on any of the following grounds (Article 49 §1 of the 1984 Act):

(1) The invention is not patentable because it lacks novelty or inventive step, because it cannot be the object of industrial application or because it is excluded from patent protection in Article 3 or 4 of the 1984 Act.
(2) The patent does not disclose the invention clearly and completely enough for it to be performed by a person skilled in the relevant art.
(3) The claims have been extended beyond what was disclosed in the original patent application, that is, there was an impermissible addition of new matter.
(4) The patent holder is not the inventor or his/her beneficiary.

90 The Court may declare the patent null and void in its entirety, or limit the nullity to a part thereof (Article 49 §2 of the 1984 Act). Any nullity decision must be registered with the Belgian Patent Office (Article 51 §1 of the 1984 Act).

91 In principle, nullity has a retroactive effect dating back to the date of filing of the patent application (Article 50 §1 of the 1984 Act). The patent is deemed to have never existed. There are cases in which the retroactive effect of the nullity decision is tempered (Article 50 §2 of the 1984 Act). The nullity decision shall not affect court decisions in patent infringement proceedings that have become final and have been enforced before the nullity of the patent was pronounced. The nullity decision shall also not affect contracts that have been performed prior to the nullity decision. However, the parties to such patent infringement proceedings and the parties to such contracts can claim damages from the patentee who committed a tort or who acted in bad faith, or who enjoyed unjust enrichment.

(5.4.2.5) Revindication Action

92 The inventor or his/her assignee is entitled to the patent. There is a presumption that the person or entity that files the patent application is the inventor or his/her assignee (Article 8 of the 1984 Act). The Belgian Patent Office does not verify whether this is actually the case, with the result that sometimes the patent is awarded to a person or entity that is not legally entitled to it.

[42] Brussels Court of Appeal, 20 Feb. 2001, IRDI, 2001,168, Observations CATTOOR S., IER, 2001, 111, Observations R. de Ranitz; Brussels Court of First Instance, 19 Jan. 2001, IRDI, 2002, 304; Brussels Court of First Instance, 12 May 2000, BIE, 2000, 210, IRDI, 2002, 351, IER, 2000, 227.

93 Belgian law aims to remedy this situation by providing for a revindication action, allowing a person or entity to claim that it is the lawful owner of the patent and to have it transferred – in part or in full (Article 9 § 2 of the 1984 Act) – to its name.

94 A revindication action is only admissible when (Article 9 § 1 of the 1984 Act):

(1) the patent was granted for an invention that was taken from the inventor or his/her assignee; or
(2) the patent application infringes a statutory or contractual obligation, for example, the patentee is an employee who filed a patent application in violation of an assignment clause in his/her employment agreement, or the patentee filed a patent application in violation of a confidentiality clause.

95 A revindication action is only admissible in the two situations mentioned above. In other situations where the patentee is accused of not being the rightful owner of the patent, the plaintiff cannot commence a revindication action, but he may be successful in an action for damages.

96 The plaintiff is not required to show that the patentee acted in bad faith upon filing the patent application. A revindication action must be launched no more than two years after the grant of the patent, unless the patentee knew at the time the patent was granted that he was not entitled to it (Article 9 §3 of the 1984 Act). The fact that a revindication action has been initiated is registered with the Belgian Patent Office, as is any judgment or other termination of the proceedings (Article 9 §4 of the 1984 Act).

(5.4.2.6) Accelerated Cease-and-Desist Proceedings

97 The new Article 96 of the Unfair Trade Practices and Consumer Protection Act of 14 July 1991 (UTPCP) which entered into force on 1 November 2007, allows the President of the Commercial Court to establish in accelerated proceedings the existence of a patent infringement and to issue a cease-and-desist order against the infringer. Contrary to preliminary injunction proceedings, the accelerated cease-and-desist proceedings are proceedings on the merits. They are conducted with the same speed as preliminary injunction proceedings (with an order typically issued within three months), although the plaintiff is not required to prove urgency. The President will proceed to a full and complete assessment of the validity[43] and infringement issues, but he has no power within the framework of these proceedings to asses or award damages. He may only issue a cease-and-desist order, under penalty of a fine, and a publication measure may also be granted.[44] Cease-and-desist orders may be granted not only against the infringer, but also against intermediaries who are not themselves committing any infringement.

98 As is the case for the regular preliminary injunction proceedings, accelerated cease-and-desist proceedings shall be conduced in accordance with the general principles applicable to all proceedings that are set out in Chapter 5.4.2.1 above, with a few modifications in light of the accelerated character of the proceedings. For example, the time periods to be observed when serving the writ, the calendar to exchange briefs, and the deliberation time for the President will be much shorter.

[43] I.e., to the extent that the invalidity of the patent is raised as a defence by the alleged infringer, see President Commercial Court Brussels, 6 Oct. 2008 and 19 May 2008, *Sprl Maxcard Company/Sprl Mastercard Europe*, unpublished but available through <www.darts-ip.com>.

[44] The possibility of accelerated cease-and-desist proceedings was already accepted by case law and was recently acknowledged by the legislator upon implementation of the Enforcement Directive.

(5.4.3) Preliminary Injunction Proceedings[45]

99 As already mentioned above, preliminary or conservatory proceedings shall be conducted in accordance with the general principles applicable to all proceedings in as far compatible with the urgency of the matter and a *prima facie* assessment of the claims. Hence, the terms to be observed when serving the writ, the calendar to exchange briefs, and the deliberation time for the court will be much shorter. Also, experts are unlikely to be appointed in preliminary proceedings, as the action will be assessed on a *prima facie* basis.

100 Preliminary injunction proceedings are not the common way to conduct patent litigation in Belgium. The reason is not only the availability of *saisie-contrefaçon* proceedings, allowing under certain circumstances for a real *saisie*,[46] but also the availability of accelerated cease-and-desist proceedings pursuant to Article 96 UTPCP.[47]

(5.4.4) Suspension of Proceedings

101 Belgian courts may suspend infringement proceedings if the alleged infringer challenges the validity of the patent and the validity of the patent is also at stake in opposition proceedings before the EPO. Belgian courts generally prefer to wait until the EPO has reached a decision in the opposition proceedings.

102 However, in the Senseo case discussed in paragraph 40 above, the alleged infringers had initially chosen not to challenge the validity of the patent in the course of the infringement proceedings, but to file a separate (national) nullity action against the Belgian part of the European patent, in addition to the opposition proceedings pending before the EPO. The Court of Appeal denied the request of the alleged infringers to suspend the infringement proceedings in light of the pending nullity and opposition proceedings. The Court of Appeal held that it was the alleged infringers' own decision not to challenge the validity of the European patent in the framework of the infringement proceedings, and to file separate opposition and national nullity proceedings. The Court of Appeal held that there was no reason to suspend the infringement proceedings, and the European patent was deemed to be valid for the purpose of the infringement question. In the same case, the court seized to handle the validity of the patent in parallel but separate proceedings also chose to proceed with a national assessment and not to await the outcome of the proceedings conducted before the Technical Board of Appeal of the EPO in Munich in relation to the European patent in dispute.

(5.4.5) Appeal

103 Any judgment of the Commercial Court and the President of said court may be appealed before the Court of Appeal of the district where the Commercial Court is located. There are five Courts of Appeal: one in Antwerp (with Dutch-speaking chambers), one in Brussels (with Dutch- and French-speaking chambers), one in Ghent (with Dutch-speaking chambers), one in Liège (with French-speaking chambers) and one in Mons (with French-speaking chambers).

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[45] See also Ch. 5.3.1 above.
[46] See para. 72 and following.
[47] See Ch. 5.4.2.6 Accelerated Cease- and -Desist Proceedings.

104 The motion to appeal, which sets forth the appellant's grievances, must be filed within one month after formal service of the decision in first instance (Article 1051 of the Code of Civil Procedure).[48]

The Court of Appeal hears the case de novo, both on questions of fact and matters of law.

105 Generally, the enforcement of first instance decisions will be stayed during the proceedings in appeal, unless the Court of First Instance explicitly states in its judgment that enforcement is allowed pending the appeal. However, preliminary injunctions, decisions rendered in saisie-contrefaçon proceedings and accelerated cease-and-desist orders are enforceable notwithstanding the appeal, albeit at the risk of the party enforcing the decision.

(5.4.6) Supreme Court

106 In Belgium, proceedings before the Supreme Court are limited to cases where there is a violation of a legal provision (e.g., a legal provision was wrongly interpreted) or of procedural rules (e.g., failure to observe due process or to motivate a decision). The Supreme Court will not address the merits of a case and will only look into the purely legal questions. If a decision is found to have violated the law, the case and the parties will be referred to another Appellate Court and the matter will have to be tried again de novo.

(5.5) EVIDENCE

107 Each party has the burden of proof for the facts it alleges. Aside from the *saisie-contrefaçon* proceedings discussed in Chapter 5.3.2 above, there are no discovery proceedings in Belgium. As a rule, each party produces only the documents necessary to support its own allegations, and may choose not to produce certain documents. However, the Court may order a party or even a third party to produce a document, if serious, precise and concurring presumptions exist that the party concerned is in possession of a document that will prove a fact relevant to the case (Articles 877 and following of the Code of Civil Procedure).

[48] The term is extended if the plaintiff is not domiciled in Belgium.

(6) REMEDIES[49]

108 As was already mentioned in the introduction, Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights (the 'Enforcement Directive') was implemented in 2007 by Acts of 9 May and 10 May 2007. Belgian patentees will therefore be assured the protection as provided in the Directive. The following remedies are available to the plaintiff in case of patent infringement (Articles 52 and 53 of the 1984 Act).

(6.1) DAMAGES

109 The principle of indemnification in general Belgian tort law is that the party who committed the tort must reimburse the whole damage. That includes profits lost and losses incurred. At the same time, the party who committed the tort must reimburse nothing more than the damage, so that the indemnification does not enrich the victim of the tort. The same principle is applicable in intellectual property cases. When there are insufficient elements available to determine exactly the damage inflicted, courts will often determine the amount of indemnification *ex aequo et bono* (Article 52 §5 of the 1984 Act), but will then still make reference to the actual damage sustained by the owner of the intellectual property right.[50] Some courts consider that such a limitation of the amount of damages actually encourages infringement, as the infringer is generally ordered by the courts to pay no more than he would have had to pay if he had not infringed the intellectual property right in question and had, for example, obtained a license. Therefore, some courts have awarded an indemnity that exceeds the damage sustained by the patentee in order to discourage infringement of intellectual property rights.[51] This approach is quite controversial and seems no longer compatible with the Enforcement Directive.

110 Damages in patent cases are determined either on the basis of the patentee's lost profits (if he/she commercializes the invention) or on the basis of a reasonable royalty (if he/she does not commercialize the invention, but could have granted licenses). If damages are determined on the basis of lost profits, only the net profits are taken into account, that is, gross profits minus normal costs of production, sales and advertising. However, when the amount of infringing products sold is only marginal compared to the sales by the patentee, so that the patentee without any additional costs could have realized the sale of such an amount, the gross lost profits may be taken into account. Determining lost profits or a reasonable royalty almost always entails an accounting exercise and in most cases, unless when an amicable settlement can be reached, an accounting expert will be appointed by the court.

111 The patentee can also claim compensation for the loss sustained resulting from damage to goodwill or the reputation of the product.[52] The courts generally award a lump-sum amount *ex aequo et bono* to cover such loss.

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[49] In what follows, only civil remedies will be discussed. As stated above, the Act of 15 May 2007, which implements European Customs Regulation 1383/2003 and also introduces criminal sanctions for patent violations, is outside the scope of this contribution.

[50] I.e., by means of a lump sum amount determined in the judge's discretion on the basis of equitable consideration.

[51] See and compare judgment rendered in the context of copyrights: Court of Appeal of Brussels 29 Mar. 1991, R.W. 1991–1992, 814.

[52] Court of First Instance of Brussels, 30 Dec. 1993, Ing. Cons. 1994, 88.

112 The 1984 Act, as amended in 2007, also provides for the possibility that as an alternative for compensation, the court can order that the infringing goods and/or the materials and instruments principally used in the creation or manufacture of those goods be assigned to the patentee. When the value of those goods exceeds the actual damage, the patentee may be ordered to reimburse the difference (Article 52 §5).

113 Where the infringement is found to have been committed in bad faith, the courts may (but are not required to) follow an alternative approach to calculating damages. Bad faith requires proof that the infringer knew that the patent existed, that it was in all likelihood valid and that the infringement was not reasonably challengeable. In that case, as an alternative to the usual way to calculate the lost profits and the damage inflicted upon the patentee, the court may order the infringer to reimburse all profits made by the infringement to the patentee (Article 52 §5.3).

114 Also in case of bad faith – and only then – the court may order that the infringer transfer to the patentee all infringing goods and/or the materials and instruments principally used for the creation or manufacture of those goods to the extent that they are still in the infringer's possession. If the value of such goods, materials and/or instruments exceeds the actual damage suffered by the patentee, the court sets the amount to be reimbursed by the patentee to the infringer (Article 52 §5.2 of the 1984 Act, as amended in 2007).

(6.2) AN INJUNCTION TO CEASE THE INFRINGEMENT

115 When infringement has been established, the court will issue an injunction enjoining the infringer from committing the infringement. In accordance with the Enforcement Directive, such injunction can also be ordered against intermediaries or any person or entity whose services are used to infringe an intellectual property right (Article 53 §1 of the 1984 Act). Whether or not the court has a margin of discretion when issuing a final injunction, and should weigh the interests of the parties and the public at large, is debated. The majority of the legal doctrine is of the opinion that an injunction can only be refused when there is a clear abuse of rights by the patentee.

(6.3) CORRECTIVE MEASURES: RECALL, DESTRUCTION AND ORDER TO PROVIDE INFORMATION

116 With regard to goods that are found to infringe an intellectual property right, the court may also order that these be recalled or destroyed, or otherwise removed from the market. The same measures can also be ordered with regard to materials and instruments principally used in the creation or manufacture of those goods (Article 53 §2 of the 1984 Act). As provided by the Directive, these measures will be at the expense of the infringer, unless particular reasons exist for deciding otherwise. The court may also order the infringer or a third party (who has the infringing goods in his possession on a commercial scale, or uses or provides services related to the infringing activity on a commercial scale) to provide information as to the origin and distribution channels of the infringing goods (Article 53 §3 of the 1984 Act). In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

(6.4) PUBLICATION

117 A judgment that upholds infringement may also allow for publication, in whole or in part, in newspapers or in any other appropriate way, at the expense of the infringer (Article 53 §4 of the 1984 Act). Publication on websites or by way of mandatory mailings, under penalty of a fine, is often ordered by Belgian courts and is considered an effective remedy to put an end to the infringement.

(6.5) LEGAL COSTS

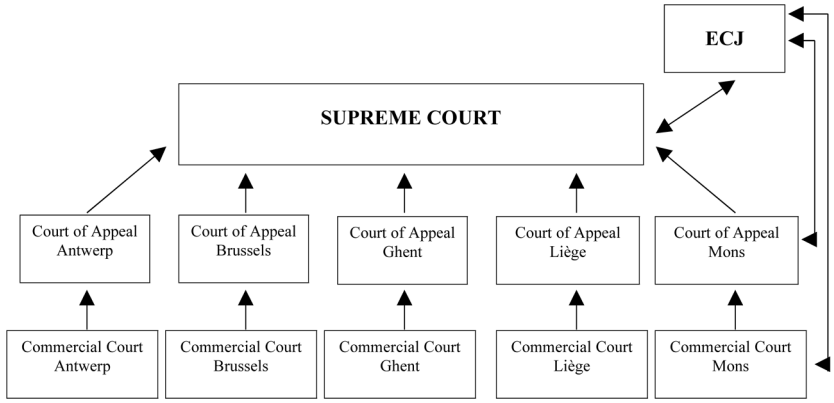
118 The losing party shall be ordered to pay the costs of the bailiff and a court-appointed expert, as well as a limited lump-sum procedural indemnity that is determined by statute. This amount is usually not sufficient to cover all actual fees incurred.

(7) CONCLUSION

119 In the past, Belgium may not have had the reputation of being the most effective pro-patentee jurisdiction. This is mainly due to the infamous 'Belgian Torpedo' which was successfully deployed before Belgian courts in the 1990s. That time has now long gone, and Belgian's negative reputation is no longer warranted. Belgian courts have in recent years proven to react appropriately in cases where international jurisdiction was alleged on shaky grounds. Belgian courts are known to be practical in their approach and will generally adopt relatively pro-patentee positions. Decisions on validity by the EPO and other foreign Patent Offices will be respected and the patent will be construed in favour of the patentee. Recent practice has also seen very speedy proceedings on the merits, thereby dispelling the myth that patent proceedings in Belgium are unreasonable lengthy. Fairly complex patent cases have been decided with a final judgment on the merits rendered on appeal within two years after the case was initiated. The availability of the saisie-contrefaçon and the newly created accelerated cease-and-desist proceedings further add to the appeal of the Belgian court system when there is an urgent need to collect evidence on a presumed infringement, or when the issue of infringement requires a quick resolution.

(8) TABLES

Court Structure for Patent Litigation in Belgium



Preliminary Injunction Proceedings: First Instance and Appeal

Introduction	Counterclaim	Oral Hearing	Judgment
Send draft writ of summons and copy of patent to bailiff.	Plaintiff should first provide exhibits.	Oral hearing takes place generally between 4 and 12 weeks from introduction. Term may be longer on appeal.	Single judge renders judgment, on average within 2 weeks of oral hearing.
Parties will agree on or judge will set calendar to exchange submissions.	Defendant will submit evidence when filing first submissions.	Each party will have 45 to 60 minutes to present case but special arrangements on duration of oral arguments can be made at introductory hearing.	On appeal single or three judges will render judgment on average within one to three months.
Judge will also decide on hearing date (usually between 4 and 12 weeks from introduction, but shorter term may be possible).	Parties can add further evidence when filing further submissions in accordance with calendar.		
Urgency is a prerequisite.	Submissions are always to be exchanged in accordance with calendar set at introductory hearing.		
	Defendant may raise prima facie invalidity and file counterclaim for urgent measures.		

Accelerated Cease-and-Desist Proceedings: First Instance and Appeal

Introduction	Defence/ Counterclaim	Oral Hearing	Judgment/ Appeal
Send draft writ of summons and copy of patent to bailiff.	Plaintiff should first provide exhibits.	Oral hearing takes place generally between 3 to 6 months from introduction. Term may be longer on appeal.	Single judge renders judgment, on average within 1 month of oral hearing.
Parties will agree on or judge will set calendar to exchange submissions.	Defendant will submit evidence when filing first submissions.	Each party will have 45 to 60 minutes to present case but special arrangements on duration of oral arguments can be made with Judge at introductory hearing.	On appeal single or three judges will render judgment on average within 1 to 3 months.
Judge will also decide on hearing date at the introductory hearing (usually between 3 and 6 months from introduction, but shorter or longer term may be possible).	Parties can add further evidence when filing further submissions in accordance with calendar.		
Urgency is no prerequisite. But no damages can be awarded.	Submissions are always to be exchanged in accordance with calendar set at introductory hearing.		
	Defendant may raise all defences on the merits and also file counterclaim that patent is null and void.		

Normal Proceedings on the Merits: First Instance and Appeal

Introduction	Defence/ Counterclaim	Oral Hearing	Judgment/ Appeal
Send draft writ of summons and copy of patent to bailiff.	Plaintiff should first provide exhibits.	Oral hearing will generally take place between 9 to 12 months from introduction.	Case will in principle be decided within 1 to 3 months after hearing.
Parties will agree on or judge will set calendar to exchange submissions.	Defendant will submit evidence when filing first submissions.	In general, each party will have 60 to 90 minutes to present case but special arrangements on duration of oral arguments can be made at introductory hearing.	
Judge will acknowledge or decide calendar and also decide on date for hearing within six weeks from the introduction.	Parties can add further evidence when filing further submissions in accordance with calendar.		
	Submissions are always to be exchanged in accordance with calendar set at introductory hearing.		
	Defendant may raise all defences on the merits and also file counterclaim that patent is null and void.		

Relationship Between Infringement and Validity

Heard Together?	Difference between Belgian and European Patent?	National Invalidity Proceedings while EPO Opposition Is Pending
Can be heard together in one action. However, separate actions are also possible.	In theory none, but European Patent shall benefit from substantial examination by EPO.	This is possible. However, the Court may (depending on the specific circumstances of the case) stay the proceedings awaiting the outcome of the opposition proceedings.
Preliminary injunction proceedings: judge will decide whether there is a serious, non-negligible chance that the patent will be revoked in opposition proceedings or invalidated in invalidity proceedings.		

Role of Experts

Party Experts	Experts Appointed by Court	Expert Opinion of (European) Patent Office
It is very common for each of the parties to submit expert evidence by means of a report by an independent patent agent or an internal or external expert.	Belgian courts will generally appoint an expert. Such expert will have to report on all questions submitted by the Court that may relate to both validity and infringement.	Although a very uncommon occurrence in patent proceedings, the Court may in theory request the EPO to render an opinion.
Further expert evidence may be submitted in appeal (as appeal is de novo).	The parties may agree on the expert to be appointed or suggest an expert to the Court.	
	Expert proceedings are *inter partes*.	
	After the expert has submitted his/her report, the parties will in principle have the right to give their comments on such report.	

Duration of Preliminary Injunction Proceedings

First Instance	Appeal	Appeal to Supreme Court
Case may be heard on same day or within days (which is rather exceptional), but in general within 4–12 weeks. Judgment is normally rendered within 14 days of date of oral hearing.	6–9 months	9 to 12 months

Duration of Accelerated Cease-and-Desist Proceedings

First Instance	Appeal	Appeal to Supreme Court
Case may be heard in general within 3–6 months. Judgment is normally rendered within one month.	6–9 months	9 to 12 months

Duration of Normal Proceedings (Infringement and/or Invalidity)

First Instance	Appeal	Appeal to Supreme Court
In normal proceedings: 12–18 months.	12–18 months	18–24 months

Costs of Infringement and Invalidity Proceedings[53]

Preliminary Injunction	Accelerated Cease-and-Desist Proceedings	Normal Proceedings (Infringement and Invalidity)	Appeal
50,000–150,000	50,000–175,000	50,000–250,000	50,000–150,000

[53] All in Euro; Estimates only as costs will depend on the complexity of the patent and the number of invalidity and/or infringement arguments to be discussed.