

Enforcing patents in the Netherlands

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

A holder of a European patent designating the Netherlands can start a court action against unauthorised making, using or selling of the patented product in the Netherlands. Also transit of goods through the Netherlands can be prohibited based on patent infringement.

On 29th April 2006, the EC Enforcement Directive 2004/48/EC should have come into force, but implementation is still pending. As well as changing Article 70 of the Dutch Patents Act of 1995, relating to enforcement, and introducing changes to other intellectual property laws, implementation of the directive will see the Code of Civil Procedure (CVP), which gives the basic framework of enforcement of IP rights, modified as follows:

- To accommodate Article 6 of the directive regarding evidence, a new Article 1019a of the CVP has been drawn up specifying that evidence other than written documents can be ordered to be produced. Violation of confidentiality may be a ground for refusal of the provision.
- Article 7 of the directive on measures for producing evidence is implemented through new Articles 1019b-1019d CVP. The new articles provide for physical seizure of the infringing goods, but also for a descriptive seizure or the taking of samples of infringing goods or documents and tools relating to such goods. This may be ordered in *ex parte* proceedings.
- Article 9 of the directive relating to provisional and precautionary measures

is implemented in new Article 1019e CVP providing for an *ex parte* injunction where there is a chance of irreparable damage to the plaintiff.

- Article 14, relating to legal costs, is implemented in new Article 1019h CVP, which states that the unsuccessful party in a case must bear the other party's reasonable and proportionate costs, instead of the fixed rates formerly prevailing. This may increase the risk for smaller companies exerting their Dutch patent rights against larger companies that are able to afford extensive legal assistance in IP proceedings.
- Article 260 of the old CVP, implementing Article 50 under 6 of the TRIPs agreement, is changed to new Article 1019i CPV although its content remains unchanged. For provisional measures to remain effective, proceedings on the merit should be commenced at the latest within 31 days.

Contributory infringement can be acted against for goods relating to an essential element of the invention, provided that they are both intended and suitable for an infringing use within the Netherlands.

In court proceedings not only injunctions, but also lost profits and damages can be claimed, the latter after the alleged infringer knew or had "reasonable grounds to know" about the infringing nature of its acts (cf Article 45 TRIPs), or in any case after 30 days from the date on which the infringing party is put on notice of the infringing nature of its acts. Serving a writ in which the infringing act is clearly set out serves as a trigger for the 30-day notice period.

Disputes can be adjudicated in summary preliminary injunction proceedings, which may be concluded within the timeframe of two months, or in proceedings on the merits with an accelerated regime, resulting in a verdict in a period just short of a year.

Parties can also agree on alternative dispute resolution to resolve their disputes, such as arbitration under the Rules of the Netherlands Arbitration Institute.

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

Patent cases are dealt with exclusively by an expert court (the district court) of first instance and in appeal (the court of appeals) residing in The Hague.

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

Witnesses are not cross-examined at trial. A court can order a hearing of witnesses at the request of one of the parties or in an interlocutory decision. The court will mainly rely on written evidence.

There are no restrictions on the use of evidence from experts, although certain pieces of information during trial may be labelled confidential and may be accessible only to an independent expert and not directly to the parties.

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

Infringement and invalidity are dealt with in the same proceedings. The level of proof for infringement is a level of beyond reasonable doubt. For invalidity, lack of novelty or lack of inventive step can be based on public prior use, supported by witness statements in the form of written declarations. Parties to the proceedings or employees of parties to the proceedings may also serve as witnesses.

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

Pre-trial discovery is not available. In case of alleged infringement of a process claim, Dutch law provides for a reversal of the burden of proof (to the defendant) where: (1) the product directly resulting from the patented process is a novel product; or (2) the plaintiff has made a credible case of infringement and cannot submit more evidence.

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

In infringement actions the doctrine of equivalents is applied in the sense of the tripartite test of essentially the same means

for performing essentially the same function in essentially the same way, or the insubstantial differences test (in chemical cases). In crowded prior art fields, the courts will adhere to a more literal claim interpretation.

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

Enforcement of biotech patents and of computer and software-related patents is well provided for. These generally complex cases are often less suitable for dealing with in summary proceedings and may be allowed only in proceedings on the merits.

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

High court decisions are authoritative and are followed by the lower courts.

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

The Dutch courts do take into account verdicts of foreign courts that have dealt with the equivalent patent, but will form their own opinion based on all facts. Dutch cross-border injunctions based on the spider-in-the-web doctrine may be affected by the recent ECJ decision in *Roche v Primus* that this Dutch cross-border practice is in contravention of the Brussels Convention.

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

There are very few options open for the plaintiff or defendant to delay proceedings in the accelerated proceedings (which are almost always used). At the start of the proceedings a time schedule is set for submission of briefs and documents with no extensions.

11. How available are preliminary injunctions and how do you get them?

A preliminary injunction is easily available and the required urgency is almost always presumed.

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

Disputes can be adjudicated in summary preliminary injunction proceedings, which may be concluded within the timeframe of

two months or, in proceedings on the merit with an accelerated regime, resulting in a verdict in a period just short of a year.

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

Appeals may be filed from decisions of the district court at first instance to the Court of Appeals and from there to the Supreme Court. The latter proceedings can be based only on procedural violations or violation of the law; no factual re-assessment of the case is undertaken. The appeal process before the Court of Appeals and before the Supreme Court may take about one and a half years.

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

In first instance, costs of litigation may amount to between Euros 30,000 and Euros 100,000.

15. Who can represent parties in court?

The parties are represented by a lawyer, mostly in combination with a patent attorney who has a right to plead, which is often used to elucidate the technical side of the case. Detention by the customs authorities of goods suspected of infringing an intellectual property right under Council Regulation EC 1383/2003 can be requested in an administrative procedure before the customs authorities without legal representation being required. Within 10 days of a seizure, a period that is extendable by 10 days, legal proceedings requiring representation by a lawyer need to be commenced.

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

The injunction is the most popular remedy for infringement. Damages may be awarded and submission of sales figures may be ordered for calculating lost profits. Punitive damages are not available.

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

Alternatives to litigation are mediation or arbitration.

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

When litigating a Dutch patent (either EP/NL or a Dutch national registration patent which has been granted without substantive examination), the patent may be partially invalidated in view of lack of novelty or inventive step. In the 1996 case of *Spiro Research v Flamco*, the High Court ruled that in case of invalidity a new and valid claim may be formulated only when it is clear to the skilled person where the scope of protection shall lie and that a more limited patent is obtained which is not different from the invalidated patent. This differs from the interpretation the European Patent Office gives under Article 123 (2) EPC relating to amendments of a patent application not being allowable in case of extension of subject matter. In *Parteurosa v Fokker*, the Dutch Court of Appeal in early 2005 ruled that in the absence of validity of the main claim no partial validity was allowed as to the remaining sub-claims. This is at variance with the *Spiro Flamco* doctrine. The same ruling may be expected in cases of a voluntary restriction of a Dutch patent by the patentee filing new claims.

19. Has your jurisdiction signed up to either the London Protocol or the European Patent Litigation Agreement? If not, how likely is it that it will do so?

The Netherlands has signed up to both the London Protocol and the Litigation Agreement. The state law changing article 52.1 of the Dutch Patents Act of 1995 was published on 17th January 2006. This now states that European patents designating the Netherlands must be translated into Dutch or English. Where an English translation is submitted, the claims need to be translated into the Dutch language.