

Enforcing patents in Belgium

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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?

There are basically three possible courses of action which are open to a patentee seeking to enforce its rights in Belgium.

The most obvious option is to start proceedings on the merits in order to obtain an injunction and the grant of damages, and any other form of relief available under the Belgian Patent Act of 28th March 1984.

However, proceedings on the merits are often preceded by a so-called descriptive attachment proceeding (*saisie description*), which is a specific *ex parte* procedure aimed at establishing the existence and/or the extent of the infringement, and possibly securing the seizure of any infringing materials.

In urgent matters, the patentee can initiate summary proceedings aimed at the immediate cessation of the patent infringement.

Patent proceedings can be preceded by the sending of a notice letter to the alleged infringer, although this is not required and also is not advisable if *ex parte* proceedings are envisaged.

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

Belgium does not (yet) have specialist patent courts. Judges as a rule also have no technical background, although they can seek the assistance of court-appointed judicial experts.

The Belgian Patent Act of 28th March 1984 provides that only the courts of first instance of Brussels, Antwerp, Ghent, Liège and Mons have jurisdiction in patent

matters, which arise under their respective territorial jurisdiction. However, it appears from the latest legislative proposals tabled within the framework of the transposition of the IP Enforcement Directive 2004/48/EC that the Brussels Court of Commerce will be designated as solely competent to deal with patent litigation.

At present, most patent cases are litigated in Brussels and Antwerp.

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?

Belgian civil proceedings are mainly based on written evidence which must be exchanged between the parties together with their written submissions.

Any witness examination must be requested and authorised by the court. We have knowledge of only one recent patent case where a witness examination was ordered. In any case, proof by witnesses can be authorised only in view of proving certain facts or highlighting certain factual or technical issues.

Furthermore, Belgian judicial law does not provide for the possibility of cross-examining witnesses at trial. Questions are directed only by the court (possibly at the request of either party).

On the other hand, parties in patent litigation usually submit written affidavits or declarations from patent attorneys in order to strengthen their case. There are no limitations on the use of such written documents.

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

When an infringement action is brought against an alleged infringer, the latter has the right to invoke the possible invalidity of the patent at stake and to file a counterclaim based on one of the grounds of

nullification provided for by the Patent Act. In such cases, both infringement and invalidity will be dealt with simultaneously.

Where the alleged infringer brings separate invalidity proceedings, it can be expected that such proceedings will also be joined to the main infringement proceedings on the basis that they could otherwise lead to contradictory decisions.

In such proceedings both parties are allowed to use all available means of evidence, provided it is in written form or can otherwise be filed with the court. As will be further described below, the descriptive attachment proceedings allow for a very efficient means for the patentee to establish the proof of an infringement.

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

Belgian judicial law does not recognise any discovery proceedings within the usual meaning of the term. But Article 877 of the Belgian Judicial Code allows a judge to order a party to the suit or a third party to submit a document (or a copy thereof) which contains the evidence of a relevant fact when there are important specific and concurring presumptions that such party possesses this document.

Where insufficient evidence of the existence and/or scope of the infringement is available, a patentee can, before starting any contradictory proceedings, establish the infringement by requesting on an *ex parte* basis the granting of a descriptive attachment (*saisie description*) from the judge. In order to obtain this, the existence of a *prima facie* valid patent must be established (the production of a copy of the patent is normally sufficient) and *prima facie* evidence of infringement must be provided. The request is aimed at the appointment of an expert who is empowered to enter the premises of the alleged infringer or any location where relevant evidence can be found. The judge may also authorise the patentee to be represented during the description operations by its lawyers or other representatives.

The patentee may further request the judge to provide for any adequate accompanying measures, such as allowing the expert to enter the premises as many times as necessary for the carrying out of his task, to obtain access to computers, files, etc. The expert will be required to describe the allegedly infringing processes or products or any materials involved therein,

but may not judge the alleged infringement as such.

In addition to descriptive measures, the judge can also order the person against whom the descriptive measure is sought not to dispose of the infringing goods upon forfeiture of a financial penalty. The judge can further appoint a custodian to seize the infringing goods or revenues derived from infringing activities. Obtaining such measures, however, usually requires the patentee to demonstrate that the requested relief is reasonably justified under the circumstances, having regard to the various interests at stake.

In many cases, the judge will also request that a guarantee be posted before the *saisie description* can be carried out.

Upon granting of the authorisation, the expert will visit the alleged infringer's premises together with a bailiff who will serve the judge's decision. Once he has gathered the required evidence, the expert will draft a sworn report containing a detailed and objective description of the alleged infringements, and will subsequently file this report with the court of first instance and send a copy to the parties. The patentee must initiate proceedings before the competent court of first instance within 30 days of the date of this filing. If this does not happen the report becomes devoid of any legal value.

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

In the absence of a literal infringement of the patent, it is possible for the patentee to invoke the doctrine of equivalents.

Although there is only very limited case law available, it appears that the function-plus-result approach will probably be applied, ie, that a certain means will be considered to be equivalent to the infringement if it realises the same technical function in the same way and with a similar result.

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?

One should take into account that technically complex patents such as pharmaceutical patents will as a rule be more difficult to enforce than those patents which can be understood by a layman. A particular effort should therefore be made to translate any technical issues into plain language. In complex matters, the Belgian courts will try to compensate for their lack of technical

expertise by appointing a judicial expert.

In addition, biotechnological patents could give rise to further difficulties in view of the limitations imposed by the Belgian Patent Act. Although the Patent Act has been amended in order to transpose the provisions of the European Biotechnology Directive 98/44/EC, the legislator has added some further limitations including, in particular, a newly worded research exemption which will be discussed below.

For software-related inventions, there is no case law available from which to draw any relevant conclusion as to their enforcement in Belgium.

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?

Belgian courts are not bound in any way whatsoever by the opinions and decisions of any other (Belgian or foreign) courts that have dealt with similar cases, even if they concern parallel national patents to the patent at stake.

That said, Belgian judges will usually take into account the decisions reached in parallel cases by the more specialised courts of other European countries such as Germany and the Netherlands or, in exceptional circumstances, even the US courts.

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

Belgian judges are willing to consider the reasoning given by foreign courts, particularly in parallel patent cases; although they will not necessarily agree with the reasoning.

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

The possibilities of delaying a case which are open to a defendant will vary depending upon the particular circumstances of each case and the strategy and tactics adopted by the defendant.

Classical means of defence include the contestation of the available evidence of infringement (including starting opposition proceedings against the *saisie description* which the patentee may have obtained, in order to delay the infringement proceedings) or the filing of a counterclaim for the nullification of the patent.

Many defendants also try to exploit the possibilities available under Belgian judicial

law to create obstacles and/or postpone the case. This includes, in particular, the failure to file submissions or to agree on a timetable for the filing of submissions. The plaintiff can, however, counter this by requesting the court to determine a procedural calendar.

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

It is possible to request the president of the court of first instance to impose a preliminary injunction on a patent infringer within the framework of summary proceedings, pending the outcome of the proceedings on the merits.

In order to succeed, the patentee must meet two conditions:

- It must demonstrate the so-called appearance of rights, ie, that the acts for which a preliminary injunction is sought *prima facie* infringe on its patent. Within this context, the president will, as a rule, assume that the European patent invoked is valid (*foi est due au titre*), having already been the object of an examination by the European Patent Office, unless the defendant can demonstrate that this patent is *prima facie* invalid and should therefore be disregarded.
- The patentee must also demonstrate that its claim is urgent, ie, that it will suffer serious harm or prejudice in the absence of a preliminary injunction and that the proceedings on the merits will not allow it to obtain the necessary relief in a timely fashion. Accordingly, if the urgency has been caused by the patentee's negligence or inaction, its claim will be rejected for lack of urgency.

A decision on whether or not to grant a preliminary injunction will usually be handed down within a couple of weeks or months at the most. It is possible to request preliminary measures on an *ex parte* basis, but only in cases of absolute necessity, ie, if an immediate decision is required in order to safeguard the plaintiff's interests.

Summary proceedings sometimes give rise to the balancing of the parties' interests, particularly if the case is not clear-cut.

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

The length of proceedings on the merits depends mainly on the court in question, the complexity of the case and the diligence of the parties.

While there are certain exceptions (such as the proceedings before the French-language Court of First Instance of Brussels, which suffers backlogs of up to three years or more), one can say that it is possible to obtain a judgment in a standard patent case within one or two years. Where the court decides on the appointment of a judicial expert, further delays must be anticipated, as the expert will have to hear the parties, investigate the issues and draft a report which will then be debated before the court.

Considering that the furtherance of the proceedings mainly depends on the parties themselves – the court being mainly reactive to their initiatives – the plaintiff can expedite the case to some extent by acting proactively and diligently in setting deadlines for the exchange of submissions and exhibits, and fixing a hearing date.

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?

The defeated party can appeal any (even interlocutory) judgment before the territorially competent court of appeal (at Brussels, Antwerp, Ghent, Mons or Liège). Where this happens, the whole case is devolved to the court of appeal, which will review it and decide on the claims (raised in appeal or possibly also in counter-appeal).

Proceedings before the court of appeal usually take longer than those at first instance and one should count on a timeframe of about two to three years before a decision is taken on the merits (or sometimes less, depending upon the court involved). Appeals against decisions by the president of the court of first instance in summary proceedings take much less time and are normally dealt with in one year or less, depending upon the circumstances.

The judgment of the court of appeal can be appealed to the Supreme Court (*Court de Cassation*). However, the Supreme Court will not review the facts, but only the legal issues. Such procedures can take two years or more.

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

It is very difficult to give an assessment of the cost of patent litigation in Belgium, as the cost of litigation (and patent litigation in particular) will vary to a great extent depending upon the type of the proceedings and the complexity of the case, in addition to some other elements such as the rates applied by the legal counsel

involved, whether or not the court appoints a judicial expert, etc. Any estimate will therefore have to be considered as very approximate, as one usually knows where this kind of undertaking starts but cannot predict how and where it will end.

Based on prior experience, we would say that a case on the merits involving a not too complex patent dispute will cost between Euros 50,000 and Euros 100,000, up to the point where a first instance judgment is rendered (this amount would cover the drafting of summons and arguments, as well as the appearances in court, the preparation of the case, correspondence and follow-up, etc). One should also take into account that the assistance of a specialised patent attorney is required in most cases to help prepare the briefs. The cost of the proceedings can further increase if the court renders only an interlocutory judgment, eg, if a judicial expert is appointed and the proceedings are lengthened as a result.

In addition, one needs to take into account the possibility that certain submissions and exhibits will have to be translated (for the benefit of the client or sometimes at the request of the judge).

Finally, note that (some of the) legal costs could possibly be recovered from the defendant if one can convince the court that such costs are part of the damage incurred by the plaintiff as a result of the patent infringement.

15. Who can represent parties in court? Is specialist representation required?

Litigating parties must be represented by one or more attorneys at law. It is possible for a party to represent itself, but this is almost never done in patent cases and could prove dangerous in view of the complexities of Belgian judicial and substantive laws.

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

Article 27 of the Belgian Patent Act allows the patentee to prevent any unauthorised third party from: (1) producing, offering, marketing, using or importing or storing with a view to the aforementioned the patented subject matter; (2) in the case of a patented process, applying or offering this process for use in Belgium; and (3) producing, offering, marketing, using or importing or storing with a view to the aforementioned any material directly resulting from a patented process.

In addition, the Patent Act also sanctions

indirect patent infringements, ie, where the defendant knowingly or negligently offers or supplies means relating to an essential feature of the patented invention.

Any such injunction is normally imposed under forfeiture of substantial fines in case of continued infringement and can possibly be combined with publicity measures at the cost of the infringing party.

In addition, the patentee (and any registered licensee) is entitled to seek damages (to be increased with interest at the legal rate of 7%) in order to compensate for the prejudice resulting from the infringement. The same principles apply here as in tort cases, the aggrieved party being entitled to the full reparation of its prejudice caused by the infringement. One should, however, take into account that the Belgian courts have a rather conservative approach in the assessment of damages, eg, taking as a basis the level of royalties usually claimed by the patentee.

Within this context, it is out of the question that punitive damages can be granted, although the amount and level of damages granted seems to be growing.

Finally, if the bad faith of the defendant is established, the court can order the confiscation of the infringing products and the means specifically intended for their manufacture.

It is noteworthy that the experimental use exception has been fundamentally modified following the review of the Belgian Patent Act with regard to the transposition of the Biotechnology Directive. Whereas under the old law, the rights conferred by a patent did not extend to experiments relating to the subject matter of the patented invention, this exception now applies to acts which are performed on and/or with the subject matter of the patented invention, for scientific purposes.

The Belgian legislator has thus completely abandoned the distinction between experiments on the patented subject matter and experiments with the patented subject matter, and provides for the exemption of both types of experiment. As a result, it has become much more difficult to enforce patent rights relating to so-called research tools.

Furthermore, one should take into account that the Belgian Patent Act and the relevant procedural rules will be further amended at the occasion of the transposition of the IP Enforcement Directive. The main anticipated new features are the centralisation of patent cases at the level of the Brussels Court of Commerce and the possibility of obtaining final injunctions on the merits on an expedited basis.

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

Alternatives to litigation are either arbitration or mediation, but these require the agreement and cooperation of the infringing party and might therefore not always be of relevance.

18. 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?

Belgium has not yet signed or ratified the London Protocol and has not yet expressed its support for the European Patent Litigation Agreement. Although one can expect that such will eventually happen, it is impossible to make any prediction on the timing thereof. Also, it remains to be seen whether the dispensation of translations provided by the London Protocol will cause any problems at the political level.

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