

Patent Litigation in Belgium

Crowell & Moring Brussels



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1. Competent courts in patent litigation matters

The Brussels Enterprise Court (formerly called the Brussels Commercial Court) has exclusive competence in patent litigation matters. Although there is no official patent chamber within the Brussels Enterprise Court (for convenience hereafter referred to as the “Patent Court”), several judges are known to have a preference for dealing with patent cases and will in principle also handle those cases. Depending on the type of patent proceedings concerned and the desires of the parties, the Patent Court is composed of either one or three judges. Belgian judges in the Patent Court typically have a purely legal, not scientific, background. In patent litigation cases, the Patent Court therefore often relies on a court-appointed expert to provide technical/scientific advice.

2. Proceedings on the merits

Belgian law provides for two types of proceedings on the merits: (i) classic proceedings on the merits and (ii) accelerated proceedings on the merits.

Both types of proceedings are adversarial by nature. Moreover, both types of proceedings can be used in case of IP infringement as well as in case of unfair competition. As such, the patent holder can invoke arguments relating to IP as well as unfair competition in one and the same proceeding.

Classic Proceedings on the merits

Accelerated proceedings on the merits

Nature/scope:

In this type of proceedings, several remedies can be requested. However, before granting these, if any, the Patent Court will examine all arguments made by the alleged infringer. The defendant may raise non-infringement arguments as well as invalidity arguments.

Several remedies are available in such proceedings: a permanent injunction, a recall order, damages, publication of the decision, etc.

It should be noted that Belgian law does not provide for multiple or punitive damages even in cases of willful infringement.

Although accelerated proceedings on the merits are on the merits of the case, the procedure is the same as in **preliminary injunction (PI) proceedings** (see below), but with no need for the urgency requirement to be fulfilled.

Therefore – and at least in theory – the timetable for accelerated proceedings on the merits should be comparable to that of PI proceedings. Accelerated proceedings can result in a permanent injunction, but never in an order to pay damages or any other kind of compensation.

In contrast to PI proceedings, the court must fully examine both non-infringement and invalidity arguments and is entitled to invalidate a patent.

Accelerated proceedings on the merits are the most common proceedings in IP matters, except in patent litigation. Patent owners prefer PI proceedings given the presumption of validity that is given to European patents in such proceedings, and the delay that generally accompanies an application to reverse a successful PI ruling in first instance (see below).

Classic Proceedings on the merits

Accelerated proceedings on the merits

Timing:

Even if both parties proceed expeditiously, proceedings on the merits are likely to take up to 2 years (in first instance proceedings). An appeal can take more than 3 years.

Depending on whether or not both parties proceed expeditiously, accelerated proceedings on the merits may take anywhere between 2 to 8 months, with 6 months being the average. Appeal proceedings usually take 4 to 6 months, but because of a backlog in the 8th Chamber of the Brussels Court of Appeal (which rules on virtually all patent matters), 8 to 10 months is becoming the norm.

Costs:

The total estimate of costs: (i) in first instance: 150,000 EUR in fees; and (ii) in appeal around 100,000 EUR in fees¹.

The total estimate of costs is comparable to that of proceedings on the merits, less 15%. All the arguments are indeed the same, except that there is no debate as to damages.

3. Ex parte relief (counterfeit seizure)

Classic *ex parte* relief can be obtained, but is extremely rare in particular since the Brussels Court of Appeal ruled that if the first instance court is willing to grant fast *ex parte* relief it has to hear and rule on the third party opposition proceedings with the same speed. This is deemed necessary to prevent the targeted party's rights of defense being infringed.

Therefore, when we discuss *ex parte* relief here, we in fact refer to the **pre-trial evidence discovery in IP litigation**.

An important aspect of Belgian patent litigation is the availability of a so-called *saisie-contrefaçon*. A *saisie-contrefaçon* is a type of *ex parte* pre-trial discovery procedure that is specifically tailored to address the infringement of IP rights. This seizure procedure can be used for two purposes: (i) for a descriptive seizure and, ancillary to this, (ii) for an effective seizure.

A counterfeit seizure is only available for the IP holders specifically mentioned in the applicable legislation (such as the holders of patents, design rights, trademarks, copyrights, etc.) and can only be used in case of an alleged infringement of an IP right.

If the case only relates to unfair competition or know-how this procedure is not available.

¹ The costs of litigation can vary greatly from case to case, depending on the complexity of the matter, the budget available to the opposing party, the use of experts, etc. Please note that all the amounts mentioned throughout this text are average amounts, based on our most recent experience. They only relate to lawyer fees and do not cover court and other expenses, such as the indemnity to be paid to the prevailing party (which is typically between 12,000 and 24,000 EUR).

A. Descriptive Seizures

Nature/scope

As already mentioned, the *saisie-contrefaçon* can be used to establish and document the existence, extent and/or origin of an infringement of IP rights, including obviously patents. This is known as a descriptive seizure (*saisie-description*). The President of the Patent Court will appoint an independent expert who is authorized to gather any information relating to the alleged infringement. The expert and a witness (and possibly a representative of the plaintiff, such as the plaintiff's lawyer and/or patent attorney) is usually allowed to enter the alleged infringer's premises or any other place where the allegedly infringing products can be found or the allegedly infringing activity takes place.

The expert can take any necessary steps required to draft a report describing the allegedly infringing activity. The descriptive seizure part can therefore be compared to a private version of a "dawn raid" executed by European antitrust authorities.

It is important to understand that the alleged infringer is neither notified of the existence of the patent holder's request for a descriptive seizure, nor of the issuance of a court order authorizing the expert's "dawn raid". We would also like to stress that the expert report will not include any investigation or expert opinion as to the infringing nature of what he or she has described. The information obtained by the expert can be used as evidence in subsequent PI proceedings, or in (accelerated) proceedings on the merits, in Belgium or any other jurisdiction. The seizure can, for instance, be used to analyze the composition of a product and therefore to establish the existence of an infringement, or to determine the extent of the infringement (*e.g.*, the number of infringing products that have been sold).

Following an *ex parte* descriptive seizure request, the President of the Patent Court does not rule on the merits of the case and can only make a *prima facie* (first sight) assessment. To obtain an order for a descriptive seizure it is sufficient that there be a *prima facie* valid and enforceable intellectual property right and that the allegation of infringement is plausible.

Conditions

Presumption of validity

In the context of seizure (and PI) proceedings, Belgian courts assess the parties' rights and claims on a *prima facie* basis. As a result, they have tended to refuse to take patent invalidity arguments into account on the basis that European patents are deemed *prima facie* valid given the substantive examination already carried out by the European Patent Office (EPO). Although this traditional approach has over the last few years received some support in various judgments of the Belgian Supreme Court, a series of judgments in 2014 substantially watered down the presumption of validity.

Prima facie infringement

With regard to the second condition for a descriptive seizure (plausible infringement) the Belgian Supreme Court has confirmed that the applicant for a counterfeit seizure should provide sufficient factual elements which make it plausible that the invoked intellectual property right is infringed. However, mere allegations of infringement are not sufficient. Nor is the fact that the alleged infringer is a competitor enough: the applicant must provide information concerning the alleged infringement. As such, an expert opinion or a decision from another jurisdiction is sufficient.

Case law also stresses the importance of fully informing the court on all elements of the case, including the elements which are not in favor of the applicant (*e.g.*, a negative court decision). All correspondence between parties relating to the alleged infringement should also be disclosed to the court when requesting a counterfeit seizure.

In any event, a seizure measure, if allowed, must be limited to information relating to the Belgian entity where the seizure is executed; the court should hold that the information gathered in Belgium cannot be used abroad. Fishing expeditions (in order to try to obtain confidential information) are prohibited.

B. Effective Seizures

Nature/scope

The President of the Patent Court can also order an effective seizure (*saisie-réelle*) and can thereby prevent or impede the further sale of allegedly infringing goods. However, an effective seizure can be ordered only where it is ancillary to a descriptive seizure. Therefore, providing the patentee with all the information which could be obtained during a descriptive seizure could prevent an effective seizure. It should be noted that seizure measures granted in the context of a counterfeit seizure cannot concern any future products.

Conditions

Prior to granting an order for an effective seizure, the President of the Patent Court must establish whether:

- (i) the patent holder has a *prima facie* valid and enforceable patent (see above);
- (ii) the existence of the infringement cannot be reasonably contested (for example, on the basis of a foreign judgement or an expert report);
- (iii) the interests of the patent holder prevail over those of the alleged infringer and/or the general interest.

The President will consider the balance of interests of the parties and has wider discretion than in a descriptive seizure. A decision may even take into account the interests of third parties, such as (in pharmaceutical patent cases) those of patients or of the Belgian social security system – which arguably profits from having access to generic/biosimilar alternatives to expensive pharmaceutical substances.

C. Procedural rules/protective letters

A *saisie-contrefaçon* can be obtained *ex parte* within a few days. However, to maintain the evidential value of the expert report, proceedings on the merits (in Belgium or in another jurisdiction) must be brought within a month after the filing of the expert report.

On the other hand, the alleged infringer is entitled to initiate **adversarial opposition proceedings** to withdraw the *saisie-contrefaçon* within one month before the same judge.

Timing:

Opposition proceedings against a *saisie-contrefaçon* usually take 2 to 6 months. If an effective seizure has taken place, the alleged infringer will be obliged to develop a substantial non-infringement defense (similar to what has to be established in proceedings on the merits) as invalidity arguments are often to no avail. Decisions following opposition proceedings can be appealed. Such appeal proceedings usually take 4 to 6 months.

Costs:

The cost of drafting a *saisie* request is on average 10,000 EUR. The total cost of opposition proceedings is on average around 45,000 EUR, but can amount to 100,000 EUR or more depending on the complexity of the case and the sensitivity of the information that was seized. On appeal the fees for third party opposition proceedings typically range from 30,000 EUR to 65,000 EUR.

Finally, it should be noted that **protective letters** can be filed. These letters are sent to the judges that are most likely to rule on a request for *saisie-contrefaçon* that is expected to be filed by the patentee in the weeks to come. In the letters, the likely target of such a *saisie* explains to the judge why no *saisie* should be granted and requests to be heard before the judge in the event that the written explanation is not enough to refute the *saisie*.

Although there is no legal basis for protective letters in Belgium, the courts do accept such letters. However, it remains unclear how much weight is given to these letters. Based on recent experience, it seems that some judges certainly take such letters into account prior to deciding on a request for a counterfeit seizure. The preparation of a protective letter also gives a defendant a good basis for its defensive arguments in third party opposition or other proceedings against the patentee.

Filing a protective letter is therefore recommended in order to limit the risks of an *ex parte* decision granting a counterfeit seizure.

Costs:

Costs for drafting and filing a protective letter generally amount to 10,000 EUR per protective letter (depending on the availability of a master document or trial briefs from parallel foreign court proceedings and the necessary amendments in view of BE specifics). Note that the letters have to be translated into both Dutch and French to achieve maximum cover.

4. Preliminary injunction proceedings

Preliminary injunction (PI) proceedings are adversarial interim relief proceedings before the President of the Patent Court (in essence the same judge as the one ruling on the *saisie-contrefaçon*, but who acts here in a different capacity). In PI proceedings the patent holder can apply for interim relief pending the outcome of the ‘accelerated’ or the ‘classic’ proceedings on the merits.

Essentially, the President of the Patent Court will examine three questions:

Urgency: Is the matter urgent?

PI proceedings are only available when there is “urgency”, *i.e.*, when the plaintiff has reasons to fear imminent damage, and when initiating mere proceedings on the merits would not lead to a timely decision to prevent such imminent damage.

Belgian courts tend to presume urgency in cases involving intellectual property infringement.

However, the alleged infringer can argue that the urgency requirement is not fulfilled if the urgency is created by the plaintiff – for instance as a result of waiting too long before initiating proceedings.

Prima facie assessment: Does the claimant have prima facie valid claims or rights?

In PI proceedings, the President of the Patent Court is not expected to make a full legal analysis of the parties’ (patent) rights. Rather, a *prima facie* analysis of the patent invoked and the alleged infringement is sufficient.

Depending on the type of rights invoked, this analysis will be more or less detailed. European patents are in principle deemed to be valid. However, as mentioned above, recent case law from the Belgian Supreme Court relating to European patents has introduced a stricter assessment of the *prima facie validity* of European patents, stressing that all relevant circumstances, including any decisions of other European jurisdictions, should be taken into account. Nevertheless, courts (in particular the Brussels Court of Appeal) are very reluctant to decide that a European patent is not *prima facie* valid.

Courts tend to be more “flexible” when it concerns the *prima facie* infringement of a patent. Hence, the importance of non-infringement arguments.

Balance of convenience: Does the interest of the claimant outweigh the other interests at stake?

As well as making a *prima facie* assessment of the patent holder’s rights and of the alleged infringement, the President of the Patent Court will also analyze the interests at stake, *i.e.*, the interests of both the patent holder and the alleged infringer, as well as those of third parties and the general public.

This analysis of the interests at stake will be all the more important if there is uncertainty as to *prima facie* validity and infringement. In this regard, it is generally accepted that the more far-reaching the claimed measures are (*e.g.*, an injunction or a recall), the more clearly the rights of the parties need to be vested (although this principle is often overlooked in IP cases).

Timing:

Depending on whether both parties proceed expeditiously or not, PI proceedings may take anywhere between 1 to 6 months in first instance. Preparing for trial in appeal on average takes 4 to 6 months depending on the flexibility of the parties. The main reason for delays is the lack of hearing dates with sufficient time for the parties to argue complex patent cases. The more pleading time that is requested, the longer parties have to wait. It is not exceptional for the parties to be ready to argue at an oral hearing after 6 months and then still have to wait several months before they can appear before the Brussels Court of Appeal.

Costs:

Costs might on average be estimated at 75,000 EUR (excluding court fees in case of a defeat) in first instance and between 50,000 and 75,000 EUR (excluding court fees in case of a defeat) in appeal.

Firm Overview

Crowell & Moring LLP is an international law firm with offices in Washington D.C., New York, Los Angeles, San Francisco, Orange County, London and Brussels.

Crowell & Moring's Brussels office brings together 30 lawyers operating across a number of practice areas and jurisdictions. It is a strong domestic and European practice offering pragmatic, commercial solutions to the challenges facing a range of clients, from local SMEs to large multinational corporations. We favor a personalized approach and we take the time to get to know our clients, the sectors they operate in, and their needs. Our services are customized and goal-oriented. We are a close-knit team—our associates collaborate closely with more experienced team members, which allows our clients cost-effective and easy access to our entire team's knowledge and experience.

Our Brussels lawyers offer litigation and arbitration services, a corporate and transactional practice, and counseling and regulatory advice. We deliver consistent, high-quality results on time and within budget.

Our main practice areas are: Antitrust/Competition, Corporate, Commercial, Employment, Intellectual Property, International Trade, Litigation, Privacy & Cybersecurity, Regulatory, and Technology, Media & Telecommunications. We represent many of the world's leading multinational companies as well as local SMEs in diverse industries, with particular experience in the following areas: pharmaceuticals & life sciences; health care; technology, media & telecommunications; financial & insurance services; retail & consumer products; automotive; and betting & gambling.

Our lawyers work in Dutch, French, English, Russian, Italian, and Spanish.

Crowell & Moring Patent Litigation Team

Patent litigation is a core strength at Crowell & Moring. Our Belgian patent practice is widely recognized as one of the very best. We handle patent litigation and transactions for clients from many different industries, including chemicals, electronics, life sciences, medical devices, industrial machinery, packaging, textiles, food and feed.



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Kristof Roox serves as co-managing partner of the firm's Brussels office. He focuses on intellectual property (IP) litigation in a variety of technological and commercial fields, with a particular focus on complex patent litigation in the pharmaceutical and life sciences sector. He has been involved in a number of cases concerning parallel litigation in several jurisdictions and European cross-border issues. He also advises on many aspects of intellectual property portfolio management, including licensing, protection of trade and domain names, trade secrets, combating counterfeiting and piracy, broadcasting and cable retransmission, technology transfer and strategic IP planning. He has extensive experience in a wide variety of media law issues.



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Counsel **Jurgen Figys** focuses on IP and life sciences. Jurgen is one of only a few lawyers in Belgium who is also trained as a biomedical scientist. His ability to combine this scientific and legal knowledge gives him a considerable advantage. Jurgen predominantly works with clients in the pharmaceutical and biotechnology industry, with particular experience in patent litigation. He has particular experience in patent litigation with regard to invalidity, third-party opposition proceedings against counterfeit seizure, and preliminary injunction proceedings. His pre-contentious experience includes freedom-to-operate patent analysis and drafting protective letters. Jurgen is also involved in a number of trademark cases, such as parallel import litigation.