

Bird & Bird

# Belgium

Patent Litigation Q&A

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# Belgium – Patent Litigation

## Where can patent infringement actions be started? Is there a choice of venue?

Patent infringement proceedings may be brought in the Brussels Enterprise Courts (French or Dutch speaking). There is no choice of venue.

## Are the judges' specialists? Do they have technical backgrounds?

Within the Brussels Enterprise Court and Appeal Court, there are specific chambers which deal with intellectual property (including patent) matters. The Court is either composed of a single judge or a panel of three judges.

With such centralisation comes an increasing level of specialism, but our judges usually do not have a technical scientific background.

## How long does it take from starting proceedings to trial?

There are different types of patent proceedings in Belgium with varying timelines;

- *Ex parte* preliminary relief: this takes a matter of days
- *Inter partes* preliminary injunctions: +/- 3 months
- Proceedings on the merits:
  - Cease and desist actions: 4-12 months
  - Actions also claiming damages: 12-15 months

## Can a party be compelled to disclose documents before or during the proceedings?

There is no discovery or disclosure obligation before or after commencing proceedings. Both parties are required to prove the allegations that they put forward and the burden of proof ultimately rests with the claimant.

However, Belgian law does allow the courts to compel a party to disclose relevant documents or materials under article 877 of the Judicial Code where a party makes a substantiated request.

## How are arguments and evidence presented at the trial?

Parties exchange written briefs and supporting exhibits in successive rounds before an oral hearing is held where the parties are then able to verbally present their case. Witness hearings are possible but rare.

## How long does the trial generally last and how long is it before a judgment is made available? Are judgments publicly available?

Oral hearings are short. Usually there are one or two days of hearings (of 180 minutes per hearing).

In principle, judgments on the merits of the case are to be rendered within one month's time, but in practice, courts tend to postpone this term at least once before rendering their judgment. In principle, judgments should be made available but in practice this proves more difficult as there is no electronic database.

## Can a defence of patent invalidity be raised? Are infringement and validity issues heard together?

Invalidity is a common defence in patent cases.

Questions of validity and infringement are handled by the same Court in the same proceedings and are usually resolved within one judgment.

## Are infringement proceedings stayed pending resolution of validity in the national patent office (or, if relevant, the EPO) or another court?

The fact that opposition proceedings before the EPO are pending, or that invalidity proceedings are pending before another court, forms no bar to raising an invalidity defence before the Brussels Enterprise court. No opposition can be raised before the Belgian patent office.

When there are EPO opposition proceedings (relating to the same patent) pending, there is no obligation for the Belgian to suspend the national proceedings. The Belgian courts have a margin of appreciation, taking into account all circumstances, including the status of the pending EPO proceedings.

In principle, in Europe, claims regarding the validity of a national branch of a patent are a matter of exclusive jurisdiction for the courts in the country where the patent has been applied for. When such claims are pending before a different court nonetheless, it is up to the later seized court that has jurisdiction to rule on whether it will stay the proceedings for reason of *lis pendens*.

## Are preliminary injunctions available? If they are, can they be obtained *ex parte*? Is a bond necessary? Can a potential defendant file protective letters?

Preliminary injunctions are available and they are regularly granted.

They can be obtained *ex parte* but only in cases of extreme necessity (urgency).

A bond may be imposed by the court, but that is not mandatory.

The Brussels Enterprise Court allows for protective letters to be filed. The legal basis is in the section relating to *ex parte* seizures.

## Are final injunctions available as of right? Is a bond necessary?

Final injunctions are available as of right. Whilst there are a few exceptions, the general rule is that once the courts have found an infringement of a valid patent, they must issue an injunction.

First instance judgments are immediately enforceable, even if an appeal is lodged. A bond is not necessary.

## What other remedies are usually ordered if a patentee is successful?

Available remedies include orders of recall, destruction, confiscation of infringing goods (and items used in their production) and publication of (a summary of) the judgment.

In practice, recall and publication orders occur more frequently than any others.

## Would the tribunal consider granting cross-border relief?

Cross-border relief would be considered if the factual circumstances allow for it.

## Is there a right of appeal from a first instance judgment? How long between judgment at first instance and hearing the appeal?

A judgment may be appealed to the Appeals Court, located in Brussels. An appeal hearing will usually be scheduled within 15-24 months of lodging the appeal. The appeal deadline starts running from the date of service of the first instance judgment.

## Is an appeal by way of a review or a rehearing? Can new evidence be adduced on appeal?

Appeals are *de novo* proceedings: all aspects of the first instance judgment (de facto and de iure) can be contested in appeal proceedings and new arguments and new evidence may be adduced if supported by the original writ of summons.

## What is the cost of a typical infringement action to first instance judgment? If the issues of invalidity and infringement are bifurcated, what is the cost of the invalidity action? Can the winner's costs be recovered from the losing party? How much is the cost of an appeal?

The procedural costs, including court costs and costs for service of a writ of summons and judgment through a bailiff, are limited with typical a maximum of €1,000. The attorney's fees depend on the complexity of the case (number of patents; facts of the matter; subject-matter of the case, etc.). Appeal costs amount to a few hundred euros.

Court costs are reimbursed by the losing party. Lawyers fees can also be recovered from the losing party, but this is capped at a relatively low fee. Costs for technical assistance may be reimbursed as well.

*Note: The information in this document relates to litigation through the national jurisdiction and not the UPC.*

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