



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Belgium: Intellectual Property

This country-specific Q&A provides an overview to intellectual property law in Belgium.

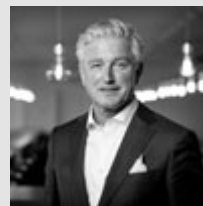
It will cover intellectual property rights, licensing, enforcement, establishing infringement or liability, and challenges to intellectual property.

This Q&A is part of the global guide to Intellectual Property. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/intellectual-property/>



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1. What different types of intellectual property rights exist in this jurisdiction to protect?

The substantive law on intellectual property rights is codified under Book XI of the Belgian Code of Economic Law (CEL). Apart from applicable European rules or international conventions, this section exhaustively covers the different types of intellectual property rights available in the Belgian legal system.

(a) Inventions (e.g. patents, supplementary protection certificates, rights in confidential information and/or know-how);

Inventions can be protected by patents, as well as supplementary protection certificates for pharmaceutical inventions.

To be granted a patent, an invention (either a product or a process), which is presented for registration, must fulfil the following basic requirements: being new, involving an inventive step and being susceptible of industrial application (Art. XI.3 CEL). The subject matter may not be excluded from patentability (Art. XI.4 and XI.5 CEL) and the application must disclose the invention in a sufficiently clear and comprehensive manner (Art. XI.18 CEL).

Supplementary protection certificates (SPCs) are available for medicinal products pursuant to EU Regulation 469/2009/EC and can be applied for with the Belgian Office for Intellectual Property (OPRI) (Art. XI.92 CEL). The certificate confers the same rights and protection as by the basic patent for the medicinal product covered by the market authorization, for a maximum of 5 years.

One may choose not to disclose an invention or know-how, opting for secrecy. Know-how and confidential information are not protected as intellectual property under Belgian law. Confidentiality agreements and the Law on unfair commercial practices protect confidential information and know-how from third parties. Belgian employment law and criminal law also protect the confidential information of employers from abuse and disclosure by employees. In addition, criminal sanctions apply to the disclosure of inventions and trade secrets contrary to the interests of the defence of the territory or the security of the State. The new EU Directive 2016/943 on the protection of undisclosed know-how and business information must be implemented by 9 June 2018 and will institute a new legal framework for the protection against the unlawful acquisition, use and disclosure of trade secrets.

(b) Brands (e.g. trade marks, cause of action in passing off, rights to prevent unfair competition, association marks, certification marks, hallmarks, designations of origin, geographical indications, traditional speciality guarantees);

Signs capable of graphic representation which are used to distinguish the goods or services of one undertaking from those of another and which are not devoid of any distinctive character can be protected by both EU and Benelux trademarks (Art. 2.1 BCIP). The Benelux Convention on Intellectual Property (trademarks and designs) (BCIP) has created a common legal and protective framework for trademarks and designs in Belgium, the Netherlands and Luxembourg. Art. XI.163 CEL therefore provides that the protection of those intellectual property rights is regulated in accordance with the BCIP. The BCIP established the Benelux Office for Intellectual Property (trademarks and designs) (BOIP) and is subject to the interpretation of the Benelux Court of Justice.

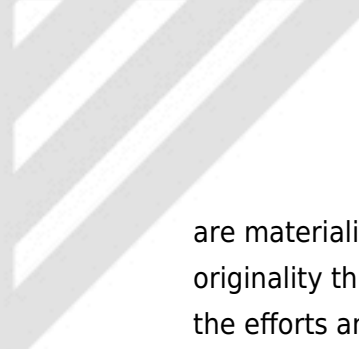
Collective marks can be obtained for signs used to distinguish one or more common characteristics of goods or services originating from different companies using the trademark under the control of the holder, which may not use the mark for its own goods or services (Art. 2.34 BCIP).

Even when no trademark registration exists, an entity may prevent others from using a particular sign in relation to goods or services which may, for example, lead to consumer confusion by presenting a claim for unfair competition or unfair commercial practices (Art. VI.104 CEL).

Designations of origin, geographical indications and traditional speciality guarantees are governed and protected in Belgium by article VI.124 CEL, international treaties (such as the 1883 Paris Convention on Intellectual Property, the 1891 Madrid Agreement on Indications of Source, the 1951 Lisbon Agreement for the Protection of Appellations of Origin and the 1994 TRIPS Agreement) and EU regulations 1151/2012/EU and 664/2014/EU.

(c) Other creations, technology and proprietary interests (e.g. copyright, design rights, semiconductor topography rights, plant varieties, database rights, rights in confidential information and/or know-how).

All works which are original, meaning that they are the product of an intellectual activity and personal expression of the author, are protected by copyright from the moment they



are materialised in a tangible form, without the need to fulfil any formalities. The originality threshold is generally low. Distinct from copyright, neighbouring rights protect the efforts and performances of performers, producers of phonograms and films, and broadcasters (Art. XI.203-219 CEL).

Database rights protect collections of works, data or other independent elements, which are systematically or methodically arranged, and which are individually accessible by electronic or other means (Art. I.13. 6° CEL). Database rights are a sui generis right of the producer of the database for which the acquisition, verification or presentation of its contents indicate that there has been qualitatively and/or quantitatively a substantial investment (Art. XI.306 CEL). The author of a database also benefits from copyright protection, provided that the database is original and is the author's own intellectual creation (Art. XI.186 CEL).

Just like trademarks, design rights are governed by the BCIP. Designs cover the appearance of whole or part of any industrial or handicraft item and can be protected if they are new and have individual character (Art. 3.1 BCIP). Designs can also be protected as community designs for the territory of the EU on the basis of regulation 6/2002/EC. Community designs exist both in registered and unregistered form, the latter benefiting protection from the moment of commercialisation, but with a shorter duration and smaller scope.

The topographies of semiconductors are protected provided that they are the product of their creator's own intellectual effort and are not commonplace in the semiconductor industry (Art. XI.320 CEL). Protection comes into existence from the first moment the topography is fixed or encoded in any way (Art. XI.327 CEL).

Varieties of all botanical genera and species can be the subject of plant variety rights (Art. XI.104 CEL). To be eligible for protection, the variety must be distinct, uniform, stable and new (Art. XI.105 CEL). New plant varieties can also be protected throughout the EU on the basis of a Community plant variety right.

Confidential information and know-how (See point a) above).

**What is the duration of each of these intellectual property rights?
What procedures exist to extend the life of registered rights in
appropriate circumstances?**

(a) Inventions

Patents	A patent is valid for 20 years from the date of filing of the application, subject to the payment of the annual renewal fees (Art. XI.47 CEL).
Supplementary protection certificates	The maximum duration of SPCs is 5 years . It is valid after the expiration of the patent for a period of time equal to the period of time between the date on which the patent request was filed and the date of the first market authorisation in the Community, reduced by a period of 5 years. It may be extended with an additional 6 months for medicines for paediatric use.
Know-how and confidential information	Know-how and information may remain confidential as long as they are kept secret.

(b) Brands

Trademarks and collective marks	Trademarks and collective marks are registered for a period of 10 years with effect from the date of filing. The registration may be renewed indefinitely for subsequent periods of 10 years (Art. 2.9 BCIP).
Designations of origin, geographical indications and traditional speciality guarantees	Designations of origin, geographical indications and traditional speciality guarantees are not subject to a specific period of validity. Geographical indications protected as collective marks are protected for renewable periods of 10 years (<i>supra</i>).

(c) Other creations, technology and proprietary interests

Copyright	The duration of copyright protection lasts for 70 years following the death of the last surviving author (counting from the 1 st of January following the year of his death) (Art. XI. 166 CEL).
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Neighbouring rights	<p>The neighbouring rights of performers expire 50 years following the date of performance, first publication or first communication to the public. If the performance is recorded on a phonogram, the neighbouring rights of the performer expire 70 years following the date of its first publication or communication to the public (Art. XI.208 CEL).</p> <p>The neighbouring rights of producers of phonograms and films expire 50 years following the first recording. In case of a legitimate publication or communication to the public of phonograms, the rights of producers only expire 70 years following the first legitimate publication or communication to the public (Art. XI.209 CEL).</p> <p>The neighbouring rights of broadcasters expire 50 years following the date of the first broadcast (Art. XI.215 CEL).</p> <p>The duration is always calculated from the 1st of January of the year following the fact that creates the right.</p>
Database rights	<p>Database rights expire 15 years following the 1st of January following the year of completion of the production of the database or its first provision to the public (Art. XI.309 CEL).</p>
Design rights	<p>Benelux designs and registered Community designs shall be registered for a period of 5 years with effect from the date of filing. The registration may be renewed for four successive periods of five years up to a maximum of 25 years (Art. 3.14 BCIP and Art. 12 Regulation 6/2002/EC).</p> <p>Unregistered Community designs are protected for a period of 3 years from the date on which the design was first made available to the public within the territory of the European Union (Art. 11 Regulation 6/2002/EC).</p>
Topographies of semiconductors	<p>Topographies of semiconductors are protected for a period of 10 years from the end of the calendar year in which the topography is first commercially exploited anywhere in the world. The right expires after 15 years from its first fixing or encoding if the topography has not been commercially exploited anywhere in the world (Art. XI.327 CEL).</p>
Plant variety rights	<p>The protection of Belgian plant variety right certificates lasts for 25 years following the year of the grant of the right. For vines, trees and potatoes, the plant variety protection lasts for 30 years following the year of the grant of the right (Art. XI.120 CEL).</p>

3. Who is the first owner of each of these intellectual property rights and is this different for rights created in the course of employment or under a commission?

(a) Inventions

Generally the first owner of a patent is **the inventor** or his successor in title (Art. XI.9 CEL). There are no statutory provisions in Belgium governing the ownership of patents for inventions made by employees. This can be freely negotiated in the employment contract. When no provisions have been made in the contract, the court must evaluate whether the invention constitutes a service invention, dependent invention or free invention. Free inventions are made independently from the employment context and belong to the inventor. Service inventions are made as a result of the assignment of the employee in the normal performance of his employment contract and belong to the employer. Dependent inventions are not made in performance of the employment contract, but do relate, in some way or another, to the employer or his activity. For these inventions there is no consensus and ownership is determined on a case by case basis.

(b) Brands

Trademarks and collective marks The first owner of the trademark registration is the first **applicant** (Art. 2.8 BCIP).

(c) Other creations, technology and proprietary interests

Copyright The **natural person who has created the work** is considered to be the initial owner of the copyright. There is a presumption in favour of the person whose name or initials are mentioned on the work (Art. XI.170 CEL). When the work is anonymous, the publisher is presumed to be the author in respect of third parties. In case of works created in an employment context, the employee remains the author of the work, unless the rights are specifically transferred to the employer by contract. The same goes for commissioned works (Art. XI.167 §3 CEL). The situation is different for software made in the context of an employment agreement. Here, only the employer is considered to be the owner of the proprietary rights of the software, unless specifically specified otherwise by contract (Art. XI.296 CEL).

Neighbouring rights The first owners of the neighbouring rights are the **performer, producer of phonograms or films, or broadcaster**, each in respect of their own specific right.

Database rights The **producer** of the database is considered to be the first owner of the *sui generis* database rights (Art. XI.306 CEL).

Design rights

The first owner is the **applicant** for the design registration. Normally, this will be the **designer**. However, in the event that the applicant and designer are different persons, the actual designer may claim the right to the Benelux application or registration within a period of 5 years following publication of the registration of filing (Art. 3.7 BCIP). The ownership of designs developed by an employee in the execution of his duties shall belong to the employer, unless otherwise agreed (Art. 3.8 §1 BCIP). For designs created on commission, the commissioning party shall, unless specified otherwise, be deemed to be the designer, provided that the commission was given with a view to commercial or industrial use of the product in which the design is incorporated (Art. 3.8 §2 BCIP).

Topographies of semiconductors

The right to the topography of semiconductors belongs to **the creator** of the topography (Art. XI.319 CEL). When created by an employee in the performance of his employment agreement, the employer is presumed to be the creator, unless specified otherwise. When created on commission, the commissioning party is presumed to be the creator, unless specified otherwise (Art. XI.322 CEL).

Plant variety rights

The first owner of the plant variety right is the **person who has cultivated the plant variety, or who has discovered or developed it**, or his successor in title. When a new variety has been cultivated, discovered or developed by an employee in performance of his employment contract, the right belongs to the employer, unless otherwise agreed (Art. XI.111 CEL).

4. Which of the intellectual property rights described in questions 1-3 are registered?

The registered intellectual property rights are: patents, SPC's, trademarks and collective marks, designations of origin, geographical indications and traditional speciality guarantees, Benelux and registered Community designs, and plant variety rights.

5. Who can apply for registration of these intellectual property rights and, briefly, what is the procedure for registration?

Both natural persons and legal entities can apply for patents, trademarks, collective marks, designs, and plant variety right certificates. Applicants may be represented by a qualified representative.

An SPC may only be applied for by the holder of the basic patent protecting the product concerned, or his successor in title.

As designations of origin, geographical indications and traditional speciality guarantees represent a collective interest, only a national group of producers or processors of the product concerned may file an application. Applications are filed either with the Flemish Ministry of Agriculture and Fishing or with the Directorate-General Agriculture of the Walloon Region.

Applications for patents, SPCs, Benelux trademarks and collective marks, Benelux designs, and plant variety right certificates may be filed with OPRI. For Benelux trademarks and designs, OPRI will forward the Benelux application to the BOIP. Benelux trademark or design applications may also be filed directly with the BOIP, which is responsible for their registration. OPRI itself registers Belgian patents, SPCs and plant variety right certificates.

Applicants also have the choice to file their trademark or design application with the European Intellectual Property Office (EUIPO) in order to obtain protection in the EU. To obtain registration in the EU for a Community plant variety right, applicants must direct their application to the Community Plant Variety Office (CPVO). Patent applications can also be filed with the European Patent Office (EPO) to obtain registration in several or all European countries which are member to the European Patent Convention. Finally, applications may also be filed on an international basis, pursuant to the relevant international filing system, with the World Intellectual Property Organisation (WIPO).

6. How long does the registration procedure usually take?

Registration of a Belgian national patent is usually obtained within 18 months. The registration of a European patent takes three to five years on average.

Registration of a standard application for a Benelux trademark takes approximately 3 months, absent opposition proceedings. An applicant may also opt for an accelerated procedure, which allows for registration of the trademark within a couple of days. In the event of an accelerated procedure, the assessment on absolute grounds and possible opposition will take place after the registration, which means that the registration may be cancelled on those grounds shortly after the registration.

EU trademark applications are normally published 8 to 11 weeks after payment. Absent opposition proceedings, registration takes place 3 months following the publication of

the trademark application.

Registration of a Benelux design right takes approximately 4 months. EU design applications are registered immediately upon examination of the formal requirements, which usually happens at the day of the application.

A plant variety right is usually registered within 2 to 3 years.

7. Do third parties have the right to take part in or comment on the registration process?

Unlike the European registration procedure before the EPO, Belgian patent law provides no option for third parties to file observations during the registration procedure. Publication of the Belgian patent application only serves consultation purposes. In both registration procedures there is no possibility for oppositions or protests prior to the granting of the patent. However, when a European patent is granted by the EPO, any person may file an opposition against the patent within 9 months of the publication of the mention that the patent has been granted to annul the patent grant.

The EU trademark registration procedure allows third parties to file written observations after the publication of the application. This possibility is not prescribed by the BCIP for Benelux trademark applications. Both the Benelux and EU trademark registration procedure do, however, provide the possibility for third parties to submit a pre-grant opposition.

During the registration procedure for designations of origin, geographical indications and traditional speciality guarantees, any natural or legal person with a legitimate interest has the possibility to file a statement of objections against the registration.

For all other registered intellectual property rights (SPCs, designs and plant variety rights) there is no possibility for third parties to comment or intervene in the registration procedure.

8. What (if any) steps can the applicant take if registration is refused?

When confronted with a refusal during the registration procedure, an applicant will receive a notification of the intention to refuse the registration wholly or partially. Depending on the ground for refusal, the applicant will be given the opportunity to respond and amend his application. For patents, these amendments generally consist of the reduction of the scope of the claims. For trademarks, the amendments can both pertain to the sign itself and to the classes of goods and/or services for which registration is pursued.

Failure to resolve the objections to the registration results in complete or partial refusal of the registration. An applicant may lodge an appeal against such decision with the competent body.

9. What are the current application and renewal fees for each of these intellectual property rights?

(a) Inventions

Patents	Application fee: €50 Search fee: €300 Yearly renewal fee (starting from year 3): €40 (3) - €55 (4) - €75 (5) - €95 (6) - €110 (7) - €135 (8) - €165 (9) - €185 (10) - €215 (11) - €240 (12) - €275 (13) - €320 (14) - €360 (15) - €400 (16) - €450 (17) - €500 (18) - €555 (19) - €600 (20)
Supplementary protection certificates	Application fee: €200 Yearly renewal fee: €650 (1) - €700 (2) - €750 (3) - €800 (4) - €850 (5)

(b) Brands

Trademarks (Benelux)	Application fee (1-3 classes): €240 (digital) - €276 (paper) Fee for each additional class: €37 (digital) - €42 (paper) Search fee (1-3 classes): €150 Fee for each additional class: €20 Renewal fee (every 10 years) (1-3 classes): €260 Fee for each additional class: €46
Collective marks (Benelux)	Application fee (1-3 classes): €373 (digital) - €428 (paper) Fee for each additional class: €37 (digital) - €42 (paper) Renewal fee (every 10 years) (1-3 classes): €474 Fee for each additional class: €46

(c) Other creations, technology and proprietary interests

Application fee (1 design): €108 (digital) - €124 (paper)
Fee 2nd - 10th design (per design): €54 (digital) - €62 (paper)
Fee 11th - 20th design (per design): €27 (digital) - €31 (paper)
Fee 21st - 50th design (per design): €22 (digital) - €25 (paper)

Design rights (Benelux) Renewal fee (every 5 years) (1 design): €95
Fee 2nd - 10th design (per design): €48
Fee 11th - 20th design (per design): €24
Fee 21st - 50th design (per design): €20

Application fee (depending on variant class): €150 (A) - €150 (B) - €150 (C)
Variety search fee: €445 (A) - €345 (B) - €250 (C)
Yearly renewal fee:
Plant variety rights (1) €75 (A-B-C)
(2) (A) €150 (B) €125 (C) €100
(3) (A) €225 (B) €175 (C) €125
(4) (A) €295 (B) €225 (C) €150
(5-30) (A) €370 (B) €275 (C) €175

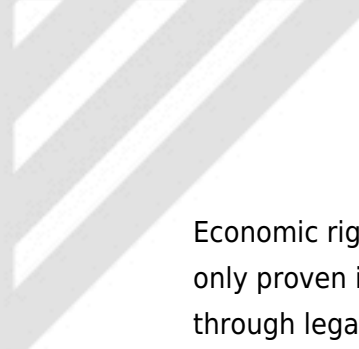
10. What are the consequences of a failure to pay any renewal fees and what (if any) steps can be taken to remedy a failure to pay renewal fees?

When a holder of a registered intellectual property right fails to pay the renewal fees, the right lapses. Renewal fees must be paid during the six months preceding expiry of the registration. When no renewal fees were paid on the expiry date, the holder of the registered intellectual property right can still benefit from a grace period of six months following the expiry date, subject to the payment of an additional fee.

11. What are the requirements to assign ownership of each of the intellectual property rights described in questions 1-3?

Patents, SPC's and plant variety rights can be validly assigned in writing to one or more assignees.

The assignment of trademarks and designs must be in writing and must cover the entire territory of the trademark or design. A trademark may be transferred for all or some of the goods or services for which it was filed or registered.



Economic rights of copyrights may be assigned by consent. The assignment is generally only proven in writing. However, the assignment of economic rights can also be proven through legal presumptions in favour of the employer or the instructing party, e.g., copyrights which are also protected by design rights or copyright protected software.

Database rights, semiconductor topography rights and rights in confidential information may be assigned by consent. Nevertheless, a written agreement is highly recommended nonetheless.

The economic rights of databases, which are made in the non-cultural sector by employees in the performance of their tasks, are presumed to be transferred to their employer, absent any agreement to the contrary. A similar presumption applies to semiconductor topography rights which are created in the performance of the employee's task.

12. Is there a requirement to register an assignment of any of these intellectual property rights and, if so, what is the consequence of failing to register?

The assignment of patents and plant variety rights must be notified with OPRI for registration together with proof of the assignment. Enforcement of rights against third parties is subject to the registration of the assignment.

The assignment of trademarks and designs shall have effects vis-à-vis third parties only after registration. The transfer of an EU trademark is also enforceable against third parties if it is part of transfer of an entire undertaking or any other universal succession. (Art. 23 EUTM Regulation) The Benelux Convention for Intellectual Property contains no such provision.

As there are no public register for copyrights, databases, or semiconductor topographies, there is no requirement to register the assignment of these rights. Evidently, the same applies to trade secrets.

13. What are the requirements to licence a third party to use each of the

intellectual property rights described in questions 1-3?

Apart from designations of origins and geographic indications, all rights described in section A can be licensed. The license agreement of patents, plant variety rights, and/or their applications must be in writing. For copyrights, absent legal presumptions, the license agreement must be proven in writing. There are no formal requirements for the licensing of any of the other intellectual property rights.

14. Is there a requirement to register a licence of any of these intellectual property rights and, if so, what is the consequence of failing to register?

The licence agreement for a patent, patent application, SPC, plant variety right or plant variety right application must be registered with OPRI. However, there is no statutory penalty for the failure to register the licence other than the fact that failure to register makes the license unenforceable to third parties having no knowledge of the license agreement.

Only registered licenses of a trade mark or design are enforceable against third parties. However, the license of an EU trademark will generate effects towards the person who acquires the entire of the undertaking.

Licences of other IP rights require no registration.

15. Are exclusive and non-exclusive licensees given different rights in respect of the enforcement of the licensed IP, and if so, how do those rights differ?

Absent an agreement to the contrary, mandatory and exclusive licensees of a patent or plant variety right may initiate counterfeit proceedings if the patent or plant variety holder has been put on notice of the infringement, but fails to take action. A non-exclusive licensee may only intervene in counterfeit proceedings initiated by the patent or plant variety holder.

For the other IP rights, no distinction is made in the protection of exclusive and non-exclusive licensees. The possibility to take legal action will depend on the licensing

agreement.

16. Are there criminal sanctions for infringement of any intellectual property rights, and if so, what are they and how are they invoked?

Infringements are sanctioned by the Criminal Code and Book XV of the Code of Economic Law which provides for six levels of sanctions. Most are of a financial nature going from €EUR26 to €5,000 at the first level to €500 to €100,000 and/or an imprisonment of 1 to 5 years for knowingly infringing IP rights. These are historical amounts and must currently be multiplied by 6 in order to reflect the current level of sanctions.

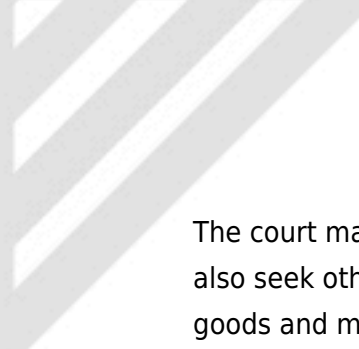
Criminal proceedings are initiated at the initiative of an interested party claiming compensation for damages suffered, or by the public prosecutor.

Criminal proceedings suspend civil proceedings – apart from requests for injunctive relief – and are conducted under the control of the public prosecutor. In practice, that is why they are initiated only by the claimant who has no information on the identity of the infringer or in the context of a larger criminal investigation.

The criminal courts may also impose a variety of other sanctions which can also be ordered by civil courts, such as seizure or forfeiture and destruction of the infringing goods (whoever is the owner), total or partial closure of the establishment operated by the convicted person and temporary or permanent disqualification of the infringer from commercial activities.

17. What other enforcement options are available in your jurisdiction for each of the intellectual property rights described in questions 1-3? For example, civil court proceedings, intellectual property office proceedings, administrative proceedings, alternative dispute resolution.

In civil court proceedings, a claimant will traditionally seek temporary and final measures to stop infringement and claim damages. In the framework of that proceeding, a claimant may seek the production of evidence showing the amplitude of the infringement with a view to obtaining appropriate compensation for damages suffered.



The court may order a defendant to contribute actively to the disclosure. A claimant may also seek other measures like seizure or forfeiture and destruction of the infringing goods and material used to manufacture them, total or partial closure of the establishment operated by the infringer, and temporary or permanent disqualification of the infringer from commercial activities.

A claimant may wish to freeze all evidence regarding the infringement first. He may request injunctive relief in summary proceedings or initiate proceedings on the merits to seek compensation for damages in addition to a cease and desist order.

A claimant may seek the invalidity of a patent or a trademark or the revocation of a trademark or designs.

Parties to a contract may call upon an arbitrator to decide on a dispute related to an intellectual property. Arbitrators have full jurisdiction in copyright disputes as well as in patent disputes, although they cannot decide in cases involving mandatory licenses. Arbitrators cannot declare a trademark, design or model invalid but they may hear arguments related thereto. Arbitrators may decide upon all other disputes related to the object, price and modalities of an agreement on intellectual property rights.

There is no specific administrative proceeding but an interested party may organise border measures through contacts with the customs authorities.

An alternative dispute resolution very similar to ICANN's UDRP system was introduced to handle domain name disputes in the .be domain. The system is frequently used and involves a reimbursement program of successful claimants as well as an appeal system.

18. What is the length and cost of such procedures?

First instance proceedings on the merits before civil and commercial courts last between 6 and 12 months. Appeal proceedings on the merits may last 12 months or longer.

Injunction proceedings last 2 to 4 months in first instance as well as in appeal.

The duration of arbitration proceedings very much depends on the nature and

complexity of the case. The local arbitration centre tends to incite the arbitrators to conduct the arbitration with respect for the applicable rules and time frame.

Domain name ADR proceedings usually last no longer than 75 days.

Costs of proceedings before civil and commercial courts include the bailiff's cost for serving the writ and enrolling the case with the court's docket. The losing party will be ordered to pay the winning party's legal fees through the payment of a flat-rate amount fixed in a Royal Decree. These amounts are generally considered to be unrealistically low (see Q. 32).

19. Where court action is available, please provide details of which court(s) have jurisdiction, how to start proceedings, the basics of the procedure, the time to trial, the format of the trial, the time to judgment and award of relief and whether any appeal is available.

Small claims are handled by the justice of the peace court. Other claims are initiated before the civil court, if the defendant is not a merchant, or before the commercial court. Courts are located in the districts of Antwerp, Ghent, Brussels, Mons and Liège.

All patent, EU trademark and EU design disputes are exclusively initiated before the commercial court of Brussels.

In opposition cases related to Benelux trademarks, a party may appeal the decisions of the BOIP the Brussels Court of Appeal, the The Hague Gerechtshof, or the Luxembourg Court of Appeal.

Appeals against the decisions of the EUIPO related to EU trademarks, are brought before the Board of Appeals of the EUIPO and thereafter before the General Court and the ultimately before the Court of Justice of the European Union.

A bailiff initiates proceedings by issuing the writ of summons to the defendant and enrolling the case on the court's docket.

During a first procedural hearing, the pre-trial judge takes note of the agenda for filing submissions as agreed by the parties and confirms this agreement in a procedural order.

In this procedural order or in a second subsequent procedural order, parties are informed of the hearing at which they may present their case. They must file their exhibits and an inventory at the latest fifteen days before the hearing or before any other day set by the order.

Judgements must be rendered within a month following the hearing. In complex cases, this deadline is rarely met. If parties do not receive a decision at the latest six months following the hearing, they may file a request with the president of the court with a view to having the judge replaced. This is rarely done as it would require parties to organise another hearing.

Appeals against the judgement of a lower court must be filed within 1 month from the notification of the decision. Foreign companies are granted an additional fifteen to eighty days, depending on their location.

20. How does the court acquire any necessary information (fact or technical) and in what circumstances does it do so?

(a) Is there a technical judge, a judge with technical experience, a court appointed expert, an expert agreed by the parties, and/or parties' expert witness evidence?

There is no technical judge in the Belgian judicial system, although IP litigation is handled by specialised courts with exclusive jurisdiction.

Should the technicality of the issue(s) require so, the court can decide to appoint an expert upon the request of a party or at its own initiative. The court will define the scope and timing of the expert mission. Parties may nominate possible experts and even agree on one single expert, but the court will ultimately appoint the expert at its discretion. The court is not bound by an expert's views. Experts may be invited by the court to attempt helping the parties to reach a settlement.

Parties are free to produce reports prepared with their own party appointed expert.

Expert witnessing is rare in intellectual property matters. Courts tend to invite expert witnessing only if a case requires additional information or the confirmation of essential elements of fact.

(b) What mechanisms are available for compelling the obtaining and protecting of evidence? Is disclosure or discovery available?

Both the claimant and the defendant must cooperate in the production of evidence and courts may order injunctions to that effect and order financial penalties to compel parties to cooperate.

However, there is no mandatory obligation for a party to disclose information that may jeopardize its own position.

The Belgian Judicial Code does not provide for an Anglo-Saxon system of discovery.

21. How is information and evidence submitted to the court scrutinised? For example, is cross-examination available and if so, how frequently is it employed in practice?

Courts freely assess evidence submitted by parties. Written documents – especially if agreed or approved by both parties – will be given more weight than oral declarations.

In their submissions, parties must discuss the evidence they submitted.

The Belgian Judicial Code does not provide for a system of examination or cross-examination of parties and their witnesses, although a judge may order a call for witnesses but that is extremely rarely done.

22. What customs procedures are available to stop the import and/or export of infringing goods?

Pursuant to EU regulation 608/2013/EU, the Belgian customs authorities may, at their own initiative or at the request of the right holder, detain goods at the border suspected of infringing intellectual property rights. Right holders or other entitled persons (such as licensees) may file a customs application with the Belgian customs authorities in order to

prevent the importation of infringing goods in the Belgian territory. The customs authorities are authorised to act when counterfeit or pirated goods are being imported, exported or re-exported on the Belgian territory.

Customs authorities can take provisional and preventive measures by suspending the release or detaining the goods suspected of infringing an intellectual property right. Afterwards, the right holder has the possibility to inspect and sample the goods in order to confirm the infringement. The right holder is then required to initiate proceedings to determine whether an intellectual property right has been infringed within 10 working days, or three working days in the case of perishable goods. If the Belgian customs authorities are not duly informed of the initiation of such proceedings within these periods, the goods shall be released. There is also a simplified procedure for the destruction of the detained goods if the holder of the goods has agreed with their destruction, or fails to notify his opposition within a period of 10 working days, or three working days in the case of perishable goods.

23. Are any non-court enforcement options or dispute resolution mechanisms mandatory in respect of intellectual property disputes in any circumstances? If so, please provide details.

Except in the case of ex parte proceedings which have an inherent surprise effect, a claimant is expected to send a cease and desist letter meant to resolve the dispute amicably prior to initiating court proceedings. Although such attempt to resolve disputes amicably is mandatory, in practice it shows to be impracticable and courts spent little to no attention to it.

Courts may suggest to the parties to initiate a conciliation or mediation proceeding. However, knowing that the success of such proceeding depends upon parties' cooperation and ultimate consent to an agreement, it is rarely suggested.

Courts will decline jurisdiction if parties have entered into a valid arbitration agreement to resolve a contractual dispute. Ultimately, the court will reappear in the process as an arbitral award will require exequatur. All requests for exequatur are handled by the court of first instance of Brussels.



What options are available to settle intellectual property disputes in

24.

your jurisdiction?

At any time before or during court proceedings, parties may agree to a settlement.

To be effective, a settlement is in writing and expressly mentions that parties agree that the agreement is final and binding.

25. **What is required to establish infringement of each of the intellectual property rights described in questions 1-3? What evidence is necessary in this context?**

In civil infringement cases, the holder of the intellectual property right may provide any means of proof accepted under common rules on evidence of civil or commercial law. Evidence is freely evaluated by the competent judge, who will decide based on a balance of probabilities. The burden of proof rests on the party alleging the infringement. Evidence is gathered on the basis of expert reports, witness statements, license agreements, (counterfeit) seizures with bailiff reports, detainment of goods by customs authorities, etc.

For Belgian patents, any violation of the rights of the patent owner constitutes an infringement. The fact that the infringing party acted in good faith does not exclude infringement. The patent holder must establish that the infringing party, without his consent, has manufactured, offered for sale, put into circulation, used, imported or kept in stock the invention to which the patent relates. If the invention is a process, the right holder must establish that the infringing party has applied the patented process and/or has obtained, offered for sale, put into circulation, used, imported or kept in stock a product which is a direct result of that process (Art. XI.29 CEL). There is also a possibility for indirect infringement, where a third party has supplied, in bad faith, a person, other than those entitled to use the invention, with means constituting an essential component of the patented invention.

Know-how and confidential information are protected by general law and require the establishment of contractual liability or tort.

For trademarks and collective marks, a person will infringe the rights of the right holder

if he uses in the course of trade, without the owner's consent, a sign:

- that is identical to the trademark for goods or services that are identical to those for which the trademark is registered;
- in respect of which, because it is identical or similar to the trademark and the goods or services covered by the trademark and the sign are identical or similar, there exists on the part of the public a likelihood of confusion that includes the likelihood of association with the trademark;
- which is identical or similar to the trademark for goods or services which are not similar to those for which the trademark is registered, where the trademark enjoys a reputation in the Benelux territory, where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark (Art. 2.20 BCIP).

Also, in the Benelux, a sign may not be used for purposes other than those of distinguishing the goods or services, where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark. The sign must not be used in the course of trade to take unfair advantage or to be detrimental. The infringement can result from use of the sign in books, news articles, media, or as a trade name.

For designations of origin and geographical indications, infringement requires:

- any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including when those products are used as an ingredient;
- any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as 'style', 'type', 'method', 'as produced in', 'imitation' or similar, including when those products are used as an ingredient;
- any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its

origin;

- any other practice liable to mislead the consumer as to the true origin of the product (Art. 13 Reg. 1151/2012/EU).

Copyright infringement takes place if a person, without the owner's or his successor in title's consent, has reproduced, adapted, translated, rented, lent or distributed whole or part of the protected work. Using a work contrary to its intended purpose may also constitute infringement. A person may not communicate a protected work to the public without the author's consent. An author can also take action against acts which threaten the integrity of his work (Art. XI.165 CEL). Infringement is established from the moment one or more of the original elements of a prior work are reproduced in a newer work, without there being a need for a risk of confusion.

Holders of database rights must show that a person has extracted and/or re-utilised either the entire database or a quantitative or qualitative substantial part of the contents of the database without their consent. Also, the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database constitutes infringement if this is contrary to the normal exploitation of that database or if this unjustifiably prejudices the legitimate interests of the producer of the database (Art. XI.307 CEL).

Design rights are infringed when a person uses a product in which the design is incorporated or on which the design is applied, which has an identical appearance to the design as filed, or which does not produce a different overall impression on an informed user, taking into consideration the designer's degree of freedom in developing the design. The use of this product covers, in particular, the making, offering, putting on the market, sale, delivery, hire, importing, exporting, exhibiting, or using or stocking for one of those purposes (Art. 3.16 BCIP).

The holders of rights to the topography of semiconductors may act against any reproduction or commercial exploitation of the protected subject matter (Art. XI.319 CEL).

Holders of plant variety rights must establish that the infringing party, without their consent, has produced or expanded, conditioned for propagation, offered for sale, sold or

otherwise commercialised, imported, exported or stored for any of the aforementioned purposes variety components, harvesting material or products directly obtained from this material (Art. XI.113 CEL).

26. **What defences to infringement are available?**

A defendant has several general substantive and procedural defences at his disposal, as well as defences specific to the different intellectual property rights. Procedural defences include objections for lack of jurisdiction or competence, or inadmissibility.

The most common substantive defences are arguments of non-infringement, where, for example, the defendant proves that the right holder has consented with his activity or that the activity does not fall within the scope of protection of the intellectual property right. Also, a defending party will often file counterclaims, for example, to obtain the forfeiture of the intellectual property right, abuse of rights, the lack of standing of the claimant, exhaustion of the intellectual property rights in the EU, or most importantly, the invalidity of the right. There is also an option to obtain a declaration of non-infringement pre-emptively before Belgian courts.

Defences specific to the different intellectual property rights generally concern actions which fall under the provided exceptions to the rights.

For patents, this includes: (a) acts done privately and for non-commercial purposes; (b) acts done for experimental purposes relating to the subject matter of the patented invention; (c) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared; and other acts concerning ships, aircraft and vehicles in transit (Art. XI.34 CEL). Genuine prior use or possession of the patented invention may also be used as a defence (Art. XI.36 CEL).

For trademarks, defences include the use by a third party in the course of trade of: (a) its name and address; (b) indications concerning the kind, quality, quantity, intended purpose, value, geographical origin or time of production of the goods or rendering of the service or other characteristics of the goods or services; (c) the trademark, where it is necessary to indicate the intended purpose of a product or service, in particular as an accessory or spare part; provided that such use is made in accordance with honest

practices in industrial or commercial matters (Art. 2.23 BCIP). In addition, a defendant may prove the existence of a prior right to a similar sign. Proving the acquiescence of the holder of a prior trademark in the use of the sign is also a valid defence, if the prior trademark holder was aware of the use for a period of five years (art. 2.24 BCIP). A defendant may also invoke the revocation of the trademark as a result of it not being genuinely used for a continuous period of five years, or when it has become generic because of acts or inactivity of the holder (Art. 2.26 BCIP).

For designs, this includes: (a) acts done privately and for non-commercial purposes; (b) acts done for experimental purposes; (c) acts of reproduction for the purpose of making citations or of teaching, provided that such acts are compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design, and that mention is made of the source; (d) use of the design which is part of a complex product for the purposes of repair of that complex product in order to restore to its initial appearance (Art. 3.19 BCIP). There is also a defence of prior use of products that are identical in appearance to the design filed or that do not produce a different overall impression on an informed user (Art. 3.20 BCIP).

With regard to copyright, there is a long list of exceptions provided in Art. XI.190 CEL. These fair use defences include: free private performance or reproduction (private copy); parody and criticism of the work; the right to quote for the purposes of criticism, controversy, education or science; use of the work to report on current events, use as anthologies for educational purposes; use in temporary and technical acts of reproduction, use as occasional background information; etc. (Art. XI.190 CEL).

27. Who can challenge each of the intellectual property rights described in questions 1-3?

Any interested party may challenge the validity of the intellectual property rights described in section A. The validity of Benelux trademarks and designs may also be challenged by the Public Prosecutor.

28. When may a challenge to these intellectual property rights be made (e.g. during any registration process or at any time during the subsistence of the right)?

Most national or regional intellectual property rights cannot be challenged during the registration process. Benelux trademarks may be opposed within a two-month period following the publication of the application. EU trademarks may be opposed within a three-month period following the publication of the application.

Plant variety rights may be opposed until the registration date. Opposition against the name of a plant variety must be filed within a three-month period following the publication of the proposed name.

29. Briefly, what is the forum and the procedure for challenging each of these intellectual property rights and what are the grounds for a finding of invalidity of each of these intellectual property rights?

The existence of a copyright, database protection, semiconductor topography rights or the validity of a national patent, plant variety right, or a Benelux trademark or design can be challenged either by an independent action or through a counterclaim before the competent jurisdiction. No specific proceedings are available for invalidating copyrights, database protection or semiconductor topography rights; these rights are most commonly challenged by means of counterclaim.

Patents

The validity of patents may be challenged before the Brussels commercial court, or, subject to an arbitration agreement, before an arbitration panel.

The lack of novelty and the lack of inventive step are commonly invoked grounds for a finding of invalidity of a patent. Patents can also be annulled if (i) their subject-matter was non-patentable (e.g., discoveries, scientific theories, mathematical methods, plant or animal varieties, exploitation contrary to public order), (ii) the disclosure of the invention is insufficiently clear or incomplete, (iii) their subject-matter extends either beyond the content of the patent application as filed or, if the patent was granted on a divisional application, beyond the content of the original application as filed, and (iv) the holder of the patent was not entitled to the patent for lack of being the inventor or his assignee.

Trademarks

An opposition against a Benelux trademark must be filed with the BOIP. Any natural or

legal person with trademark rights in the Benelux may file opposition against a more recent trademark on the following grounds:

- The applied-for trademark is identical to the opponent's earlier trademark, and is filed for the same goods or services;
- The applied-for trademark is identical or similar to the opponent's earlier trademark for the same or similar goods or services, and there exists a likelihood of confusion on the part of the public; or
- The newer trademark can cause confusion with the opponent's well-known trademark within the meaning of Art. 6b of the Paris Convention.

Before arguments are exchanged between the opponent and the trademark applicant, the BOIP will perform an admissibility check of the opposition and there will be a two-month cooling-off period to allow parties to self-resolve the conflict among themselves. If no settlement is reached, the opponent must submit arguments within two months following the cooling-off period. The trademark applicant then has two months to respond and/or to request proof of use. If the latter request is made, the opponent must submit proof of use within two months, after which the trademark applicant has two months to submit a final response. The BOIP may request additional arguments before taking a decision. The decision of the BOIP is open for appeal with the Brussels Court of Appeal, the The Hague Gerechtshof, or the Luxembourg Court of Appeal.

After the registration of the mark, any interested party may request the revocation or invalidation of the Benelux trademark with the national courts (the commercial court located in the district of Brussels, Antwerp, Ghent, Liège or Mons).

Grounds for revocation include (i) the lack of genuine use on Benelux territory of the mark within a continuous period of five years in connection with the goods or services for which it is registered, and (ii) the trademark becoming the common name in the trade for a product or service in respect of which it is registered in consequence of acts or inactivity of the holder. Grounds for invalidation include (i) the lack of distinctive character of the trademark and grounds similar to the grounds for a trademark opposition, (ii) the registration in bad faith, and (iii) the likelihood of confusion with a well-known trademark.

Depending on the ground invoked, a 3 or 5 year time limit may apply to submit a request

for invalidation.

The validity of an EU mark can be challenged in a counterclaim before the Brussels commercial court.

Designs

An invalidity action against a Benelux design can be brought before the national courts (i.e. one of the commercial courts in the district of Brussels, Antwerp, Ghent, Liège or Mons).

A Benelux design can be declared invalid if (i) it is not new or if it lacks individual character, (ii) its features of appearance are solely dictated by its technical function, (iii) there is a conflict with an earlier design, (iv) it uses older trademarks or an item which is protected by copyright without authorization, (v) it makes improper use of arms, flags and other emblems, abbreviations and names of states or international organisations, (vi) it contravenes public policy and accepted principles of morality, or (vii) the application insufficiently reveals the features of the design.

The validity of a Community design can be challenged before EUIPO or in a counterclaim before the Brussels commercial court. The grounds for invalidating a Community design are similar to the ones applicable to Benelux designs.

Plant Varieties

Opposition against a plant variety right or against the proposed name of a new plant variety must be filed with OPRI.

Once granted, plant variety rights can be invalidated if the variety is not distinguishable, homogenous, invariable or new or if the plant variety right was not allocated to the breeder of its assignee. They can be challenged before one of the commercial courts located in the district of Brussels, Antwerp, Ghent, Liège or Mons.

30. **Are there any other methods to remove or limit the effect of any of the intellectual property rights described in questions 1-3, for example,**

declaratory relief or licences of right?

Protective letter (Schutzschrift)

When a party suspects that a counterfeit seizure is imminent, it may request to be heard by the competent judge by means of a protective letter (Schutzschrift). Such letter aims at preventing ex parte counterfeit seizures or to limit its effects. It is common practice to send such a letter under sealed envelope with a request to be opened if and when an IP rights holder files a request for counterfeit seizure.

Declaratory relief

Courts have a general discretion to grant declaratory relief when they consider it appropriate to do so. A declaration of non-infringement may be requested by any interested party by means of a claim or counterclaim in proceedings inter partes.

Licenses of right

Public authorities may grant mandatory licenses on patents for reasons of (i) lack of or insufficient commercialisation within three years following the grant of the patent (or within four years following the patent application, if the patent was granted within a year), (ii) significant economic value of a more recent patent or plant variety, (iii) the existence of a compulsory license on a plant variety right which is needed to commercialise a biotechnological patent. With respect to healthcare products, mandatory licenses may also be granted for public health reasons. With respect to semiconductor technology, a compulsory license under (i) and (ii) may only be granted after a competent court has determined that such license is aimed at avoiding anti-competitive behaviour. A mandatory license may be limited in time or cover only part of the invention.

Public authorities may also grant mandatory licenses on plant variety rights for reasons of (i) public interest, (ii) allowing a patent holder of a biotechnological invention, which represents significant technical progress of substantial commercial value, to commercialize its invention, (iii) the existence of a mandatory license on a patent which is needed to commercialize the plant variety right.

Prior use

In respect of patents, a party in good faith who used or possessed the invention before the patent's priority date may continue to commercialise the invention in its personal

capacity.

In respect of trademarks, prior use of the sign as a commercial name in a particular geographical location may allow a party to continue that use without the possibility to extend its use to other locations.

31. What remedies (both interim and final) are available for infringement of each of the intellectual property rights described in questions 1-3?

The most common forms of interim relief and measures that an IP right holder may seek from the court are:

- Counterfeit seizure: when indications of an infringement or an imminent infringement exist, the holder of a prima facie valid IP right may request in ex parte proceedings the appointment of an expert to describe the alleged counterfeit and investigate its extent. If the IP infringement cannot be reasonably disputed, the judge in ex parte proceedings may, upon request and after having balanced all relevant interests, order conservative measures, which may include the seizure and withdrawal of litigious goods from distribution channels;
- Investigative or conservative measures: IP right holders can also request investigative and/or conservative measures in proceedings inter partes. They may do so at any stage of the proceedings by means of a preliminary injunction, and request for penalties in case of non-compliance with the interim order;
- Declaratory relief: IP right holders may request a declaration of validity of their IP right and a declaration that their IP right has been infringed. Such a declaration may be ordered in conjunction with injunctive relief or when awarding damages;
- Injunctive relief, prohibiting further infringing activity by the infringer for the duration of the right;
- Damages, as compensation for the losses caused by the infringement and for lost profits;
- Destruction of infringing goods, at the expense of the infringer;
- Withdrawal of the infringing products from distribution channels;
- Order for publication: the court may order a party to publicise the outcome of a case, at their own cost, in one or more journals.

32. What are the costs of enforcement proceedings and is any kind of costs recovery available for successful parties? Is there a procedural mechanism enabling or requiring security for costs?

Judgments must first be served by a bailiff on the party against whom enforcement is sought. The costs are dependent on the length of the judgment, and usually vary between €200 to €400. If a judgment is not complied with voluntarily, the creditor may proceed to the seizure of assets. These will be sold and the proceeds will ultimately be handed over to the creditor. Should the creditor face opposition by the debtor, additional court proceedings will generate new costs.

A losing party must bear the costs of proceedings and pay the legal fees of the winning party. The latter are limited to a flat-rate amount fixed in a Royal Decree. The flat-rate amounts are generally considered to be unrealistically low. Following the CJEU's decision in the *United Video Properties / Telenet* case (28 July 2016, C-57/15) in which it confirmed that the losing party should pay reasonable and proportionate legal fees as required by Art. 14 of IP Enforcement Directive 2004/48, on May 8, 2017 the Antwerp Court of Appeal issued the most recent Belgian decision on this subject. The Antwerp Court of Appeal ordered the losing party to reimburse expert costs, but refrained from ordering the payment of legal fees exceeding the maximum amount provided for by law. The court decided that it is not allowed to rule *contra legem*. The court refused to apply what is generally considered to be the core of Art. 14 of the IP Enforcement Directive, i.e. the prevailing party should be reimbursed a reasonable and equitable part of its lawyers' fees.

Except in the case a bilateral agreement provides for an exemption, a defendant may ask the court to order a foreign national plaintiff or intervening party to pay a guarantee as security for the defendant's costs and possible damages (*caution judicatum solvi*).