



IP enforcement in Belgium, the Netherlands and Luxembourg

A comparison



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Speakers

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Topics

- Part 1: Harmonisation process
- Part 2: Pre-procedural
- Part 3: Preliminary relief proceedings
- Part 4: Main proceedings on the merits
- Questions?

A close-up photograph of a computer keyboard. The central focus is a blue key with the word "Trademark" in white, followed by a registered trademark symbol (®). Surrounding this key are several other keys: a key with a closing curly brace and a closing square bracket, a key with a vertical line and a dash, a key with an upward-pointing arrow, and a key with a white triangle pointing up.

Part 1: Harmonisation

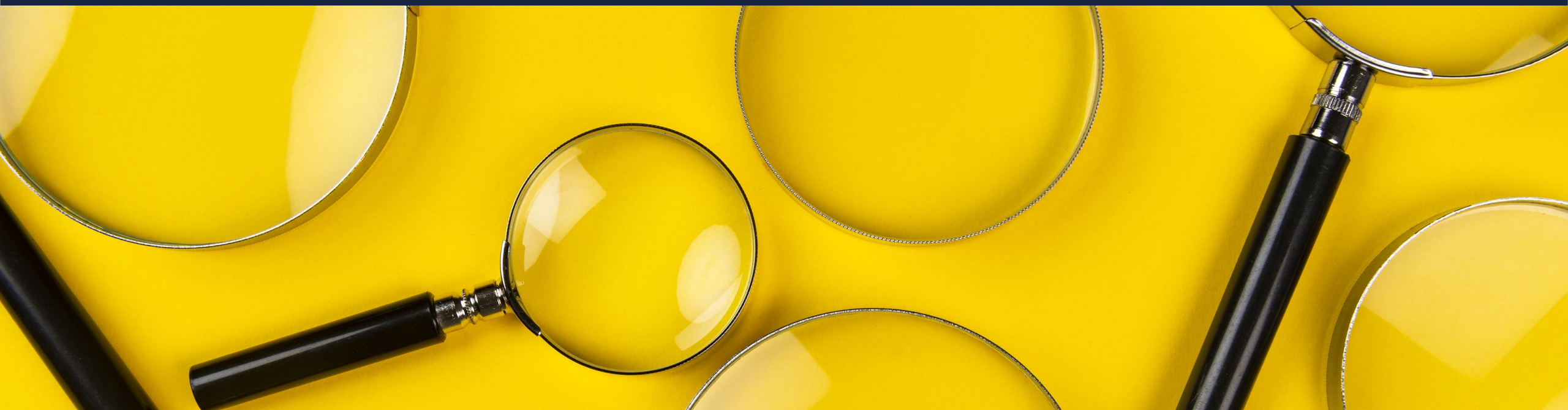


Harmonisation

- **Paris** treaty and **Berne** Convention
→ no material minimum requirements re IPR enforcement
- 1994: WTO Trade-Related Aspects of Intellectual Property (**TRIPs**)
→ Part III Enforcement of IPR
- 2004: **Enforcement Directive** 2004/48 of 29 April 2004
- 2017: **Commission**: comprehensive package on IPR enforcement



Part 2: Pre-procedural





Belgium



Netherlands



Luxembourg

Ex parte seizures, saisie-contrefaçon and other protective measures

- Saisie-contrefaçon (IP ss):
 - Ex parte request
 - Appointment of expert
 - Measures: descriptive and/or protective
- Conditions:
 1. Prima facie valid IPR
 2. Prima facie IP infringement
 3. (Reasonably justified)
- Timelines: 2 + 1 month(s)

Summary proceedings (e.g. trade secrets)

- Urgency + absolute necessity
- Decision does not bind judge on the merits

- Evidentiary
 - For any subject matter
 - Four strict criteria
- Surrender of goods (for destruction)
- Sampling
- Description
 - Prima facie IP infringement
- Ex parte injunction
- Court to set date for initiating main proceedings

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 - Ex parte request
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Belgium



Netherlands



Luxembourg

Duty of loyalty

- Enhanced duty of loyalty, obligation to provide complete, correct and objective information

- General obligation to provide the relevant facts fully and truthfully (art. 21 DCCP)

- Enhanced duty of loyalty, obligation to provide complete and sincere information

Liability

- Objective liability (Art. 1369bis/3, §2, 1369ter, §3 and 1398 J.C.)
- Unless circumstances changed, then subjective liability (Art. 1382 old CC)

- Vicarious liability for damages suffered if measures are (in hindsight) unlawful
- Risicoaansprakelijkheid*

- Tortious liability for damages suffered if measures are (in hindsight) unlawful (art. 1382 Civil Code)

Protective letters

- Yes
 - But not regulated and very rare use by the courts

- No
 - Abolished for soft-IP matters in august 2017

- No

Part 3: Preliminary relief proceedings





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What can be obtained?

- Provisional and conservatory measures
 - Prevention of any infringement of IP rights
 - Prohibition of any further existing infringements + commercialization ban
 - Seizure of suspected counterfeit goods and bank accounts
 - Penalties
- Decision does not bind judge on the merits

- Condemnatory judgment
- Provisional measures
- Even with (practically) irreversible consequences!
- Subject to penalties
- Not suitable for damages

- Provisional and conservatory measures
- Prevention of any infringement of IP rights
- Prohibition of any further existing infringements
- Seizure of suspected counterfeit goods
- Penalties
- Decision does not bind judge on the merits

Requirements

- Inter partes
- Urgency
- Prima facie valid IPR

- Inter partes
- Urgency
- Suitable for preliminary review
- Court to set date for main proceedings

- Inter partes or ex partes
- Urgency (implicit)
- Existence of an IP right
- The seizure aims to protect the said IP right
- The existence of the infringement may not be “reasonably disputed”

Part 4: Main proceedings





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Main proceedings

Two types of proceedings on the merits (!)

1. Specific fast-track injunction procedure ("as in summary proceedings")
 - President of enterprise court
 - Valid IP right
 - All injunctive remedies (+ penalties), incl. preliminary measures (19.3)
 - No damages
 - Timeline: a few weeks/months
2. Standard procedure on the merits
 - Anything can be claimed, incl. preliminary measures (19.3)
 - Damages
 - Timeline: 12-20 months

- Everything can be obtained
- Extensive assessment of the facts and merits
- Provisional measures pending the proceedings
- 12 – 24 months

Two types of proceedings on the merits (!)

1. Specific fast-track injunction procedure ("as in summary proceedings")
 - President of district court
 - Valid IP right
 - Injunctive remedies preventing infringement (+ penalties)
 - No damages
 - Timeline: a few weeks/months
2. Standard procedure on the merits
 - Anything can be claimed
 - Damages
 - Timeline: 12-20 months



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Director's liability

- Specific liability regime
 - 'Manifest' policy error (Art. 2:56 CCA)
 - Relief possible
 - Liability caps
 - Rare case law (illegal software)

- Director's liability
 - Injunction and damages
 - High threshold; serious personal reproach

- Potential director's liability
- Very rare

Provisional enforceability

- Default rule: provisionally enforceable
- Unless expressly reasonably argued why not
- Except for opposition
- Risk with executing party

- Judgment can be determined provisionally enforceable upon request

- Provisionally enforceable
- Financial guarantees



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Damage assessment

In standard procedure on the merits

- Restitutio in integrum: *damnum emergens + lucrum cessans + moral prejudice*
- Bad faith? + transfer of net profits
- Ex aequo et bono (per infringing copy or general lump sum)

- Ex aequo et bono
- Lump sum
- Surrender net profits instead of damages (only with bad faith)
- Referral to damage assessment proceedings

- In standard proceedings on the merits
- The victim must evaluate the damage, or ;
- Lump-sum payment

Cautio iudicatum solvi (security)

- Must be provided by foreign plaintiffs upon request if:
- The foreign entity does not have assets in BE upon which damages and costs may be recovered, and
- No treaty/convention for the enforcement of BE judgments in the country of domicile
- 2018: "Unconstitutional", but...

- Must be provided by foreign plaintiffs upon request if:
 - There is no treaty with NL for enforcement or security;
 - No assets in the Netherlands upon which procedural costs may be recovered

- Must be provided by foreign plaintiffs upon request if:
 - They are not in an EU Member State; or
 - They are not in a Council of Europe Member State; or
 - They are not in a State with which Luxembourg has a bilateral convention



Belgium

- Legal costs, incl. lawyers' fees, expert fees, bailiff's fees, court fees
- *Rechtsplegingsvergoeding - Indemnité de procédure*:
- Fixed rates based on claimed amount
 - EUR 225 – EUR 22,500
 - EUR 1,800 if non-monetisable
 - Deviations possible depending on financial capacity, complexity, unreasonable character... (up to min and max amounts)



Netherlands

- Proceskostenveroordeling*
- General scale of costs for “very simple” cases
 - Indicative rates for “simple”, “normal” and “complex” cases
 - Court fees, legal / expert fees and bailiffs' fees

Preliminary relief proceedings

- EUR 6,000 – EUR 25,000

Main proceedings

- EUR 8,000 – EUR 40,000



Luxembourg

- Legal costs, incl. expert fees, and bailiffs' fees
- No Court fees
- *Indemnité de procédure* (lump sum left to the discretion of the court) – no fixed rates
- Lawyers' fees (based on tortious rules – rarely granted)

Procedural costs

Questions?



Thank you!

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