

Question B: Should there be legal restrictions on the ability of persons who claim, without sufficient justification, to hold IP rights that have been infringed to bring, or to threaten to bring, legal proceedings based on such claims against their competitors or others?

Report for Belgium

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1. Main types of intellectual property rights and scope of legal protection in Belgium

1.1. National and international framework

Belgium, being a Member State (MS) of the European Union (EU), has implemented into its national legal order the EU directives adopted in view of harmonizing intellectual property law.³ The legislation on intellectual property rights (IPRs) is stipulated in Book XI of the Belgian Code of Economic Law (CEL).

Although Book XI CEL implements the European directives, there may still be some differences compared to substantive law of other EU member states. This is due to the national implementation practices of directives and the room left in the texts of the directives for flexible interpretation. Hereafter only these differences which may have a bearing on the subject matter will, if necessary, be highlighted.

Going into the specific scope of legal IP protection in Belgium, notice should be taken to the field of trademarks and designs. As an alternative to the European Union protection (EU trademark and Community design through the application for registration of such trademarks on the basis of respectively Regulation 2017/1001⁴ or Regulation 6/2002⁵, which have direct effect in all EU Member States) Belgian law has been unified on a sub-European level with that of the neighbouring countries of the Netherlands and Luxembourg, thereby forming the Benelux Union. The act regulating the protection of trademarks and designs in the Benelux Union is the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005 (BCIP). Under the BCIP, trademarks and designs may only be registered, assigned, cancelled or forfeited for the three countries together. As such, a Benelux trademark and Benelux design come into existence. Book XI Title IV limits itself to a reference to the application of the BCIP regarding trademarks and designs.

Tradenames in Belgium do not have the benefit of a unique legally worked out act. This, despite article 8 of the Paris Convention which has been adhered to by Belgium. Protection is awarded for the tradename owner referring to the mentioned article of the Paris Convention and applying article VI.104 CEL, i.e. the prohibition of acts contrary to fair market practices damaging or endangering the professional interest of one of more companies.

Regarding patent protection, Belgium is a signatory of the European Patent Convention (EPC) which provides for protection through a single application and examination procedure for the granting of a bundle of national patents. Moreover, Belgium ratified the Agreement on a Unified Patent Court (UPCA). It also has adopted the Regulation 1257/2012⁶ implementing enhanced cooperation in the area of the creation of unitary patent protection and the

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³ E.g.: Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights. *O.J. L 157/45, 30.04.2004*. Directive 98/44/EC of the European Parliament and the Council of 6 July 1998 on the legal protection of biotechnological inventions. *O.J.E.C. L.213/13, 30/07/1998*.

⁴ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark. *OJ L 154, 16.6.2017, p. 1–99*

⁵ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. *OJ L 3, 5.1.2002, p. 1–24*.

⁶ Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection. *O.J. L 361, 31.12.2012, p. 1–8*.

Regulation 1260/2012⁷ implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangement. The Unified Patent Court will have a local division in Brussels, with French, Dutch, German and English as accepted languages of proceedings.

Further, though possibly superfluous, Belgium is a signatory of several international treaties and conventions⁸ which have an impact on national law and are sometimes directly applicable.

1.2. Peculiarities in Belgian procedural IP law

Before going into the specifics of the potentially unjustified exercise of IP rights, it is important to indicate some specific Belgian procedures regarding IP infringement.

1.2.1. Order to preserve and/or seize evidence ('*saisie description*' and/or '*saisie-contrefaçon*')⁹

Before bringing an action on the merits, IP right holders have the possibility, on the basis of an *ex parte* application, i.e. without summons but with the possibility of *inter partes* review, to request the President of the competent court¹⁰ to order the description and/or seizure of counterfeit matter against the alleged counterfeiter. It would go beyond the scope of the object of this report to go into the specifics of this procedure. Generally speaking, an expert will be appointed and will receive a mission to draft a report regarding the alleged infringement and the counterfeit matter found.

Although safeguards are built in the procedure to protect the rights of the alleged counterfeiter (i.a. confidential information and subsequent use of the report, in conformity with the Enforcement Directive) this action is considered invasive and aggressive as the judge will allow the expert, accompanied by a bailiff, and if necessary a locksmith and/or the police, to enter any premises determined by the President of the competent court, access computer systems, ask questions, take samples, etc.

An order to *preserve evidence* (description) is conditioned on the following two cumulative assessments by the President of the competent court. Firstly, whether the IP right is seemingly valid. Secondly, whether there is an indication of, or a threat of, an infringement of the IP right. An order to *seize evidence* is conditioned on the following three cumulative assessments by the President of the competent court. Firstly, whether the IP right is seemingly valid. Secondly, whether the infringement of the IP right cannot be reasonably argued. Finally, whether the requested seizure is in line with the interests of the parties, including the common interest.

There is a certain evolution in the case law regarding the first condition to obtain a preliminary injunction or a seizure in matter of counterfeit, i.e. the *prima facie* validity of a title. In 2014, the Belgian Court of Cassation held that all facts and circumstances invoked by the parties and related to the validity of the patent should be taken into account.¹¹

⁷ Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, *O.J. L 361, 31.12.2012, p. 89-92*.

⁸ The following treaties can be mentioned: Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967), the Bern Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), the Agreement on Trade-related aspects of Intellectual Property Rights (TRIPS), the Patent Cooperation Treaty, the Madrid Agreement, and Protocol, concerning the international registration of marks, the Hague Agreement concerning the international registration of industrial designs, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

⁹ Article 1369bis et seq. Judicial Code. For a complete analysis of this procedure, see C. Dekoninck, J. Busse, J. Figys, "Beslag inzake namaak - Een stand van zaken", *C.A.B.G., Larcier* (2017).

¹⁰ The specific competence of a court does not have a direct influence on answering Question B. In general, the commercial courts having a seat in the same territory as one of the courts of appeal of the country, is competent for IP cases, except for patents, European trademarks and Community designs for which the Brussels commercial court has exclusive competence. Decisions of the commercial courts may be appealed before the courts of appeal, and ultimately before the Court of Cassation ('*Cour de cassation/Hof van Cassatie*') which examines issues of law and not issues of fact.

¹¹ C. Cass, 12 Sept. 2014, C.13.0232.N.

Therefore, without having to analyse the substantial validity of a patent, the Presidents of competent courts, nonetheless, have to assess the criterion of validity *in concreto* taking into consideration the assessment of the validity of the IP right situations e.g. when the patent has been declared invalid in first instance and is pending appeal, when opposition is pending before the EPO, or when other national tiers of the patent have been declared invalid by other national courts. Since this decision of 2014, defendants are therefore given more opportunities to argue that a patent is invalid than in the past. The fact that the contestation of the title must be serious gives some room to manoeuvre to judges.

There has also been an evolution in the case law with regards to the second condition, i.e. the requirement of indication of, or threat of, infringement.¹² Right holders must demonstrate that they have concrete indications that infringing activities are on-going or about to happen. These, nonetheless, remain indications as the purpose of the seizure measures (in particular in case of descriptive seizure) is essentially to obtain concrete evidence of a suspected infringement.

The fact that these proceedings are essentially *ex parte* and the fact that the assessment is limited to *prima facie* considerations, together with the invasive effect of the order, results in a procedure that is apt for misuse. The President has an enormous responsibility to balance the rights of the parties and this will only be possible if he has been provided a full disclosure of the underlying facts. In order to restrict potential harmful effects of unjustified *ex parte* measures, the applicant (i.e. the IP right holder) has a duty to fully and frankly disclose relevant information in his possession possibly having a bearing on the assessments of the to be met conditions.¹³ Seizure measures (as well as preliminary injunctions) may be lifted or withdrawn when an applicant fails to do so. Additionally, and in the event of a fault, damages may also be allocated to the party undergoing a wrongfully granted and/or enforced measure.

It should be noted that a potential defendant in *ex parte* proceedings may, pre-emptively, submit a protective letter to a competent court.¹⁴ Through a protective letter, a potential defendant may submit arguments on non-infringement or patent invalidity. There is no regulatory framework regarding these protective letters. Therefore, Belgian courts are under no obligation to open, read or take into account any of the contents of such letter if a right holder initiates *ex parte* proceedings.¹⁵ The actual practice of Belgian courts vis-à-vis such letters, as well as their impact on litigation, is difficult to evaluate as there is no specific framework.

1.2.2. Injunction proceedings *as if in summary proceeding, but on the merits*¹⁶

Book XVII Title I Chapter IV CEL regulates a unique procedure in Belgium regarding injunction orders. This procedure is also referred to in literature as “*cease and desist orders*” and the judge deciding is referred to as the “*cease and desist judge*”.

Besides the common procedure to demand preliminary measures in summary proceedings, where the basic requirement is urgency to prevent serious damage or inconvenience¹⁷, an IP right holder may consider to initiate an

¹² C. Cass, 26 Nov. 2009, C.08.0206.N.

¹³ K. Neefs, “Noot – De informatieplicht bij beslag inzake namaak”, *I.R.D.I.* 2014/4, p. 659.

¹⁴ A. Wehlau, B. Kalbfus, “The conflict between *ex parte* injunctions and the right to be heard: protective letters at European level as a possible solution” *E.I.P.R.*, 34(6), 410-415 (2012). B. de Vuyst, “Verzoek om gehoord te worden bij de behandeling van een eenzijdig verzoekschrift tot beslag inzake namaak door middel van een brief aan de rechtbank (Schutzschrift)”, *I.R.D.I.*, 2010, p. 28.

¹⁵ K. Neefs, “Noot – De informatieplicht bij beslag inzake namaak”, *I.R.D.I.* 2014/4, p. 659.

¹⁶ For a complete overview regarding the seize and desist procedure, see P. Blomme, “Stakingsvorderingen zoals in kort geding inzake intellectuele eigendom: een stand van zaken”, *C.A.B.G.*, Larcier (2019). A. Puttemans, “L’action en cessation “comme en référé” des atteintes à un droit de propriété intellectuelle”, *Actualités en droits intellectuels – L’intérêt de la comparaison*, Bruxelles, Bruylant, pp. 371-405 (2015).

¹⁷ In Belgian procedural law, such preliminary measures can also be demanded in procedures on the merits during the introductory phase of such proceedings. The urgency requirement is strict but if the IP owner can establish urgency and the legitimacy of his request, injunctions (as preliminary measure) will generally be granted. Being a preliminary measure, the court cannot order measures having a definitive effect on the case.

action on the merits either before the ordinary chamber of the competent court, or before the President of the competent court as if in summary proceedings. The latter procedure is a very common and unique procedural path in Belgium. The standard of proof handled in the procedures on the merits applies. Urgency is not required. The advantage being that proceedings are rather expeditious. The timeframe depends on the case scheme of the relevant court or judge but in theory a case can be decided within a week.

Three drawbacks of these injunction procedures as if in summary proceedings have to be mentioned:

- First, the specific injunction procedure may only be used to obtain an injunction and the publication of the judgement. No damages can be claimed. If the IP owner is granted an injunction, he may opt to initiate an action on the merits before the chamber of the competent court. The judge deciding on the damages is bound by the decision of the injunction judge as he decided on the merits.
- Second, the defendant can introduce a validity defence which will have to be decided by the President, sitting as an injunction judge as in summary proceedings, and not a chamber.¹⁸ This may be, one of, the reasons why the route of the injunction proceedings as in summary proceedings is used more frequently by copyright and trademark owners and not by patent owners. The latter seem to prefer to obtain preliminary orders, in ordinary summary proceedings and not decided on the merits, and initiate proceedings on the merits before the ordinary court.
- Third, no actions for the declaration of non-infringement may be introduced before the President sitting as an injunction judge. An action to obtain a judgment with a finding of non-infringement, or an action seeking invalidity, cannot be brought within the framework of an accelerated injunctive relief procedure. These can, nonetheless, be raised as defences in an action on the merits. As such, an unequal procedural path exists between IP owners who have the possibility to introduce expeditious injunction proceedings (as in summary proceedings) and alleged infringers who are blocked from using this path and, if confronted with an allegedly unlawful IP threat, are obliged to follow the normal (and lengthy) procedural path.

1.3. Main infringing acts

Regarding the main infringing acts we do not believe the Belgian approach differs in great extent to the common infringing acts under foreign EU IP laws. Giving the object of this report, it would go beyond its scope to discuss them in detail. However, the following peculiarities related to the field of patent may be highlighted.

First, we could highlight that, in order to determine patent infringement, Belgian courts proceed on the basis of an essentiality test. They compare the essential features of an invention with those of the allegedly infringing product or process, while leaving minor differences aside.¹⁹

Second, the doctrine of equivalents has been included in Art XI.28(2) CEL. An infringement by equivalents will be found whenever an essential feature of the patented invention is replaced with a technical equivalent and the new invention performs substantially the same technical function, in substantially the same way and with substantially the same results. There will not be an infringement by equivalents when allegedly equivalent means are used, with similar results, but which entail a significant modification of the problem solution or which are not in line with the essential features of the claim.²⁰

Third, article XI.29 CEL provides that right holders may act against direct as well as contributory infringement of product and/or process patents. With regard to process patents, article XI.29§1,b CEL nonetheless stipulates that, for

¹⁸ Article XVII.17 CEL. If the title is invalid or forfeited, the president must order this nullity and the radiation of the registration of the title. If it is not necessary to evaluate the validity of the title, in order to refuse to grant an injunction, the president will not make use of Art XVII.17 CEL.

¹⁹ L. Van Bunnan, "Examen de jurisprudence (2012 à 2017). Brevets d'invention", *R.C.J.B.*, (2018) p. 576.

²⁰ F. Verhoestraete, C. Brion, "Belgium" in M. Sterpi, T. Calame (eds) *Patent Litigation: Jurisdictional Comparisons*, 2nd ed., Thomson Reuters (2011).

an offer for use to qualify as an act of infringement, it is a condition that the offer takes place in Belgium, but also that the subsequent use of such process, be intended to take place on the territory of Belgium. In 2017, the Belgian Constitutional Court held that, a difference in treatment between a process claim and a product claim (for which there is no restriction that the subsequent use be in Belgium), was objectively justified and did not constitute a violation of article 10 and 11 of the Belgian Constitution.²¹

Finally, multiple parties can be held jointly liable for IP infringement if it is proven that they collaborated or concerted with each other, namely, if they were aware of each other's activities and knowingly proceeded to pursue their activities. It should be noted that the fact that a party acted in good faith (i.e. was unaware of the infringing nature of its activities) is irrelevant under Belgian law to establish the existence of infringement and ensuing liability.

1.4. Who may bring an action²²

Multiple actions are at the disposal of right holders as well as other entitled persons. In particular, articles XVII.14 to 21 CEL envisage specific actions in case of infringement of IPRs. IP infringement actions are, in general, subject to a five-year statute of limitations period.²³ The period starts running from the moment the right holder becomes aware of acts of infringement and of the identity of the alleged infringer.

With regard to who may bring an action, a difference should be made between the ordinary civil procedure for infringement and the procedure before the seize and desist judge. Additionally, some distinctions should be made between different IPRs.

1.4.1. Ordinary civil procedure

For patents²⁴ and SPCs, the claim for infringement can be introduced by the patentee, the usufructuary of the patent, or the compulsory or exclusive licensee. The exclusive licensee can introduce an action if the patent holder has failed to do so after having been advised of the intentions of the exclusive licensee and unless the licence agreement provides differently. The holder of a compulsory license, that has been registered, is entitled to bring infringement proceedings if the patent holder does not file proceedings after having been requested to do so. The non-exclusive licensee does not have a separate right to introduce a claim for infringement but can join a procedure to request separate damages. However, the patentee is allowed to grant a separate right to the non-exclusive licensee in the license agreement. The same rules apply for Plant Variety Rights.²⁵

With regard to Benelux Trademarks and Designs²⁶, only the trademark owner has the right to introduce a claim for infringement. Neither the exclusive neither the non-exclusive licensee has a right to introduce a claim for infringement. The licensee can join a procedure introduced by the trademark owner to demand his damages or can introduce a separate claim for damages if he obtained the permission by the trademark owner.

1.4.2. Injunction proceedings *as if in summary proceedings*

With regard to copyright, neighbouring rights and software, every interested party has the right to introduce these procedure.²⁷ This term has been broadly interpreted by jurisprudence in the sense that not only the copyright owner or

²¹ C. Const., 28 Sept. 2017, 105/2017.

²² M.-C. Janssens, "Wie kan de vordering(en) tot handhaving van intellectuele rechten instellen?" in F. Brison (ed.) *Sancties en procedures in intellectuele rechten*, Brussel, De Boeck (2008) p. 58.

²³ Article 2262bis Civil Code.

²⁴ Article XI.60 CEL.

²⁵ Article XI.155 CEL.

²⁶ Article XI.163 CEL juncto Article 2.20.1 BCIP.

²⁷ Article XVII.19 §2, 1 CEL.

a licensee can initiate proceedings but every party who can prove an acquired, immediate and personal interest in the sense of the Judicial Code.²⁸ Collective rights management companies, or professional groups may also introduce these proceedings.

As for other IPRs, the person who can introduce a claim for infringement based on the relevant IP law can introduce a seize and desist order before the seize and desist judge. Under patent law, this means that non-exclusive licensees cannot introduce such proceedings. Under trademark law, as the seize and desist judge is not competent to judge on damage claims, the licensee cannot introduce a seize and desist order before this judge.

2. Restrictions on the ability of IP right holders to bring (or threaten to bring) legal proceedings

An IP right is a property right. Every property right is vested with the possibility to make claims regarding alleged infringers of such right. The outset is that the claimant, in pre-litigation or during litigation, claims to be the owner, or beneficiary, of such a right.

Next to investigating restrictions and remedies available under different branches of law (e.g. IP law, competition law, consumer law etc.) which could limit the ability of IP right holders to bring legal proceedings (or threaten to do so) we believe it is important to make a distinction between different situations where an abuse of the exercise of an IP right or prerogative should be considered. Each situation may request a separate approach. In particular, we suggest making the following distinction:

- i. Pre-litigation: The IP owner makes a threat towards an alleged infringer or a third party (e.g. a client of the alleged infringer).
- ii. The litigation as such: The IP owner initiates a specific procedure.
- iii. Procedural strategy during (pending) litigation: The IP owner uses a specific procedural strategy.

2.1. General restriction: Unfair competition, the prohibition of abuse of rights and the role of competition law

Before elaborating on the different phases of litigation identified hereabove, the two most common legal tools at the disposal of recipients of unjustified threats or debtors of unjustified actions need to be presented, i.e. the law against unfair competition and the general principle of the prohibition of abuse of rights. Additionally, and under particular circumstances, the rules of competition law may also limit the exercise of the right to initiate an infringement action or other IP-related procedures.

2.1.1. Unfair competition

Regarding the law against unfair competition, article VI.104 CEL²⁹ provides that acts contrary to fair market practices damaging or endangering the professional interest of one or more companies, are prohibited. There is no defined list of acts which fall within the scope of this provision. Judges, therefore, benefit from a certain margin of appreciation in order to determine which acts may be considered contrary to *honest practices in industrial or commercial matters*. Acts of unfair competition must be determined objectively in light of the economic context in which they occur. They

²⁸ Article 17 and 19 Judicial Code.

²⁹ Article IV.104 CEL: “*Is prohibited, any act contrary to honest commercial practices by which a company harm or may harm the professional interests of one or multiple other companies*” (Free translation).

do not require a subjective fault.³⁰ The essential principle is that, each party acts with prudence with regard to the others' freedoms to conduct a business. The violation of this duty of prudence must be assessed in light of the conduct that a normally prudent and diligent person would have adopted in the same conditions.

2.1.2. The general principle of the prohibition of abuse of rights

In Belgium, the principle of the prohibition of abuse of rights constitutes a jurisprudential construction built upon different provisions.³¹ The most common legal basis is article 1382 Civil Code which provides that "Any act which cause damage to another obliges him by whose fault it occurred to repair the damage" (Free translation). This provision is applicable in non-contractual (tortious) matters and provides for a regime of liability with fault. It requires the fulfilment of three conditions in order for a right holder to be held liable for his actions:

- First, it is necessary to prove that the right holder is at fault.
- Second, the victim of this fault must demonstrate that he/she suffered a harm.
- Finally, the fault must be at the origin of the harm suffered (i.e. the causal link). Belgian courts have developed a set of criteria in order to assess if a right has been exercised abusively and therefore demonstrate that a right holder is at fault. They also have adopted a mixed test of abuse, including subjective and objective elements.

Under Belgian case law³² an abuse is present if the limits of the normal exercise of a subjective right by a careful and cautious person placed in the same circumstances are manifestly exceeded (i.e. the generic criterion).³³ The reference to the word manifestly is particularly important under Belgian case law. It limits the discretionary power of judges who are bound by a principle of reservation (or the so-called '*marginale toetsing/contrôle marginal*'). To assist the judge in the determination of what constitutes a manifestly unreasonable exercise of a right, a non-exhaustive and alternative list of specific criteria has been developed³⁴:

- A first criterion relates to the subjective intentions of a right holder. Abuse will be considered to take place when the aim of the right holder is to harm third parties (i.e. the intention to harm criterion).
- A second criterion is the proportionality criterion. There will be an abuse when, facing a choice between different ways of exercising his right, a right holder chooses the one which provides him with a disproportionate benefit compared to the disadvantage inflicted on the other party. In such cases, judges operate a balance of interests, between, the advantages offered to the right holder in exercising his rights, on the one hand, and the damages they may be sustained by third parties, on the other.
- A third criterion relates to the interest of the right holder. Abuse will take place when a right holder exercises his right without legitimate or reasonable interest.

³⁰ T. Léonard, "Pour une théorie de l'acte de concurrence illicite affranchie des articles 1382 et 1383 du code civil", *T.B.H.* 2010/7, p. 574.

³¹ Article 1382 Civil Code: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*". Article 1383 Civil Code: "*Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence*". Article 1134(3) Civil Code: "*Les conventions légalement formées [] doivent être exécutées de bonne foi*".

³² Belgian courts have expressly recognised that the theory of the prohibition of abuse of rights is a general principle of law. See notably Cass. 06 Jan. 2011, *Pas.* 2011, I, p. 44. Cass. 22 Sept. 2008, *Pas.* 2008, p. 1999. Cass. 24 Sept. 1992, *Pas.* 1992, I, p. 1049. Cass. 19 Oct. 1989, *Pas.* 1990, I, p. 392. Cass. 05 Mars 1984, *Pas.* 1984, I, p. 768.

³³ Cass., 10 Sept. 1971, *Pas.*, 1972, I, p. 28. T. Léonard, *Conflits entre droits subjectifs, libertés civiles et intérêts légitimes: un modèle de résolution basé sur l'opposabilité et la responsabilité civile*, Bruxelles Larcier (2005). S. Stijns, "Abus, mais de quel(s) droit(s)?", *J.T.*, n 5533, 33-44 (1990). P. Bazier, "Abus de droit, rechtsverwerking et sanctions de l'abus de droit", *T.B.B.R.*, 2012/8, 393-403 (2012). J. Van Zuylen, "Fautes, bonne foi et abus de droit: Convergences et Divergences", *Annales de Droit de Louvain*, Vol. 71, No. 3 (2011).

³⁴ S. Stijns and I. Samoy, "la confiance légitime en droit des obligations" in S. Stijns and P. Wery (eds) *De bronnen van niet-contractuele verbintenissen – Les sources d'obligations extra-contractuelle*, Bruges, Die Keure (2007) p. 59. A. Lenaerts, *Fraus Omnia Corruptit in het Privaatrecht*, Die Keure, Brugge (2013).

- A fourth criterion relates to the different ways of exercising a right. An abuse will occur when, amongst the options which are equally beneficial to the right holder, he chooses the option which is the most disadvantageous to third parties or disregards the general interest. Finally, there will be an abuse whenever the exercise of a right goes against the purpose of this right (i.e. the right-function criterion). According to this criterion, it cannot be accepted that a right is exercised for a purpose other than the one which animated the legislature. Under the right-function criterion, the notion of abuse is intrinsically linked to the idea of the existence of a social function of subjective rights.³⁵

In 2018, a new draft legislation³⁶ has been approved by the Belgian ministerial cabinet and envisages the codification of the prohibition of abuse of rights in the law of obligations. The proposed article 7 of the new book 5 of the Civil Code essentially codifies what had been developed in the case law and reiterates that an abuse is present if the limits of the normal exercise of a subjective right by a careful and cautious person placed in the same circumstances are manifestly exceeded.

Notice should be taken that, article VI.104 CEL is considered a finetuning of the general principle of abuse of rights as stipulated under article 1382 Civil Code. Therefore, in practice, arguments of abuse and arguments of unfair competition may overlap. Belgian courts generally address both arguments under the same overall headings of “abusive practices”.³⁷ However, some distinctions should be made between the two provisions regarding their conditions of application as well as the remedies they provide.³⁸ These differences will be highlighted in the following sections.

The principle of the prohibition of abuse of rights is not only applicable to the exercise of substantive rights, but also to the exercise of procedural rights. The exercise of the right of access to justice, the right of defence, the right to sue, the right to appeal³⁹, the right to request protective measures, or the right to enforce judicial decisions⁴⁰, are not abusive *per se*. Nonetheless, procedural tools (including remedies) are powerful means and must be handled with care and in good faith. Litigants must avoid unnecessary expenses and must act in a diligent way, notably by taking into

³⁵ P. Van Ommeslaghe, “Abus de droit, fraude aux droits des tiers et fraude à la loi (note sous Cass., 10 Sept. 1971)”, *R.C.J.B.*, 303 (1976).

³⁶ New draft legislation approved on 30 March 2018, by the ministerial cabinet and prepared by a Commission for the reform of the law of obligations instituted on the 30 September 2017 on the creation of a Civil Code. “LIVRE 5. LES OBLIGATIONS Titre 1^{er}: Dispositions introductives. Art. 5.7. Prohibition de l’abus de droit § 1^{er}. Nul ne peut abuser de son droit. § 2. Commet un abus de droit celui qui l’exerce d’une manière qui dépasse manifestement les limites de l’exercice normal de ce droit par une personne prudente et raisonnable placée dans les mêmes circonstances. § 3. La sanction d’un tel abus consiste en la réduction du droit à son usage normal, sans préjudice de la réparation du dommage que l’abus a causé”. See also, article 5.76 of the draft legislation for the application of good faith and the prohibition of abuse of rights in contracts. Available at: https://justice.belgium.be/sites/default/files/voorontwerp_van_wet_verbintenenrecht.pdf. Last accessed: 15 March 2019.

³⁷ E.g.: CA Bruxelles (9^e ch.) 08 Juin 2007, *Alnaco S.A. c. [M. de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, pp. 673-696. The Brussels Court of Appeal compensated an alleged infringer for the abusive exercise of its rights by a patent holder not only because of its bad faith, and the denigration campaign it undertook, but also because of the threats and pressures it inflicted on the alleged infringer and its resellers. In parallel to the infringement action, the patent holder reached out to resellers and potential clients of the alleged infringer, affirming patent infringement, spreading rumours and threatening these third parties with potential complicity in patent infringement. These actions led to a significant drop in the alleged infringer’s sales although the lawsuit was only in an initial phase. The court held that the right holder was liable for the abusive exercise of his rights, in light of its bad faith, recklessness, malice and relentlessness in pursuing such conduct.

³⁸ T. Léonard, “Pour une théorie de l’acte de concurrence illicite affranchie des articles 1382 et 1383 du code civil”, *T.B.H.* 2010/7, p. 563.

³⁹ CA Bruxelles (9^e ch.) 08 Juin 2007, *Alnaco S.A. c. [Sir de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, pp. 673-696. A reasonable and prudent litigant must evaluate properly its chances of success before appealing a decision. Rushing to an appeal procedure without actually properly evaluating the circumstances of the case or in order to unduly prolong a dispute can turn into an abuse.

⁴⁰ In 2014, the Brussels Court of Appeal (confirmed by the Belgian Court of Cassation) held that it was not abusive for a patent holder, who had been successful in his infringement action, to delay a request for the payment of penalties for infringement for a couple of months as long as the legal timeframe envisaged by the law was respected (article 1385octies Judicial Code). In the case at hand, this delay did not lead to an abusive increase in the sum to be paid by the infringer and the court rejected the claim of abuse. CA Brussels (9e ch.) 30 Jan. 2014, *D.A.O.R.*, 2014/110, p. 257. C. Cass., 19 Fév. 2016, *Ing. Cons.*, 2016/2, p. 363.

consideration the legitimate procedural interests of the other parties involved⁴¹ as well as the interests of the court itself⁴². Like any other rights, procedural rights are not absolute and can be the object of legitimate limitations.⁴³ Therefore, when litigants institute legal procedures – or persevere in a legal action – with the sole purpose of harming the defendant, in a disproportionate manner or with a particular objective not intended by the legislator, it can become abusive.⁴⁴

Procedural abuses may refer to “*frivolous and/or reckless*” litigation. Frivolous and reckless litigation means irresponsible or thoughtless litigation, or situations where a litigant institutes legal proceeding without worrying about the consequences or the risks involved for himself or incurred to third parties.⁴⁵ It can also be considered reckless for a litigant to introduce a claim which manifestly lacks ground.⁴⁶ An action is considered vexatious when a litigant uses the procedure to intentionally or maliciously hinder or harm third parties.⁴⁷

According to Belgian case law, procedural abuse is entirely modelled on the general principle of the prohibition of abuse. Therefore, it is only the acts which manifestly go beyond the margin of manoeuvre allocated to any person that procedural abuses will be sanctioned. The generic and the specific criteria previously developed have to be assessed in the same manner in order to establish a procedural abuse.⁴⁸ Three specific criteria are commonly relied upon, i.e. the exclusive intention to harm, the right function and the proportionality (vis-à-vis the opponent or the judicial system itself).⁴⁹

There will be a procedural abuse if a court is of the opinion that a party litigates in a manner that clearly goes beyond the limits of the normal exercise of his right by a cautious and careful litigant.⁵⁰ It is worth noting that prior to 2003, the intention to harm criterion played a predominant role in the evaluation of abuse in the course of litigation. However, in a landmark decision regarding procedural abuses, the Belgian Court of Cassation clarified that this criterion was not unique and that manifest excesses in the exercise of a right can turn a procedure into vexatious litigation.⁵¹

⁴¹ P. Knaepen, “La loyauté procédurale, un principe en plein essor (Note sous Justice de paix d’Ixelles, 25 Février 2014)”, *J.L.M.B.*, 2014/31, pp. 1496-1500. M. Storme, “L’obligation de procéder de manière diligente et raisonnable: une obligation indépendante du fond de l’affaire (note sous Bruxelles, 25 janvier 1990)”, *J.L.M.B.*, 458 (1991).

⁴² B. Vanlerberghe, “Rechtsmisbruik in het procesrecht” in J. Rozie, S. Rutten and A. Van Oevelen (eds) *Rechtsmisbruik*, Intersentia (2015) p. 123.

⁴³ G. Eloy, “La procédure téméraire et vexatoire”, in *X., Droit judiciaire. Commentaire pratique*, 1.5-1-1.5-34 (2015) p. 9. M. Taruffo, *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness*, Kluwer Law International (1999).

⁴⁴ M. Storme, “Over het tergend geding voor een roekloze vriendschap. Beschouwingen m.b.t. het procesrechtsmisbruik”, in *Liber Amicorum Jan Ronse*, Bruxelles, Story-Scientia, 1986, pp. 67 et s., as cited in T. Malengreau, “La loyauté procédurale dans la mise en état des causes civiles”, *Annales de Droit de Louvain*, vol. 75, n. 1 (2015) p. 76. They refer to using procedural rules without reasonable interest, for a different purpose than the one envisaged in procedural laws, and/or in a manner which contradicts the processual economy.

⁴⁵ B. Vanlerberghe, “Rechtsmisbruik in het procesrecht” in J. Rozie, S. Rutten and A. Van Oevelen (eds) *Rechtsmisbruik*, Intersentia (2015).

⁴⁶ G. Eloy, “La procédure téméraire et vexatoire”, in *X., Droit judiciaire. Commentaire pratique*, 1.5-1-1.5-34 (2015) p. 24. T. Comm. Mons, 28 Juin 2012, *Prefarails SA & Feronia SA c. CDM SA & ALM Industry* (A/10/01456). The court found manifestly abusive to drag in the procedure a defendant when the patent holders had frivolous grievance and very little chance of success (pp. 14-15).

⁴⁷ B. Vanlerberghe, “Rechtsmisbruik in het procesrecht” in J. Rozie, S. Rutten and A. Van Oevelen (eds) *Rechtsmisbruik*, Intersentia (2015) p. 126. To maliciously sustain a claim that has no reasonable chance of success or to maliciously holding back evidence.

⁴⁸ B. Vanlerberghe, “Rechtsmisbruik in het procesrecht” in J. Rozie, S. Rutten and A. Van Oevelen (eds) *Rechtsmisbruik*, Intersentia (2015) p. 120, 126. J-F. van Drooghenbroeck, “L’abus procédural: Une étape décisive (note sous Cass., 31 Oct. 2003)”, *J.T.*, 2004/07, 135-136. P. Taelman, “Abuse of procedural rights: Regional report for Belgium – The Netherlands” in M. Taruffo (ed.) *Abuse of Procedural Rights: Comparative Standards of Procedural Fairness*, Kluwer Law International (1999) p. 125.

⁴⁹ M. Stassin, “L’amende civile”, *J.T.* n. 6679, 2017, p. 166.

⁵⁰ See e.g.: Cass., 31 Oct. 2003, *J.T.*, 2004, p. 134. Cass., 12 Mai 2005, C.04.0275.F. Cass., 28 Sept. 2011, P.11.0711.F. Cass., 16 Mars 2012, C.08.0323.F-C.09.0590.F.

⁵¹ Cass., 31 Oct. 2003, *J.T.*, 2004, p. 134: “Une procédure peut revêtir un caractère vexatoire non seulement lorsqu’une partie est animée de l’intention de nuire à une autre mais aussi lorsqu’elle exerce son droit d’agir en justice d’une manière qui excède manifestement les limites de l’exercice normal de ce droit par une personne prudente et diligente”.

Mis en forme : Français (France)

Similar to the overlap between arguments based on unfair competition and those relying on the prohibition of abuse of rights, arguments of procedural abuse have also been considered jointly with arguments on abuse of (substantive) rights. A distinction nonetheless resides in the type of sanction for such abuse.

2.1.3. The role of competition law

IPRs must be obtained, exploited and enforced in conformity with the rules of competition law. Belgian case law is, nonetheless, fairly scarce on the effects of articles IV.1 and IV.2 CEL (i.e. the equivalents of articles 101 and 102 TFEU) on IP enforcement proceedings.⁵² The case law of the Court of Justice of the European Union (CJEU) on abuse of dominant position and the exercise of procedural or substantive rights (including IPRs) is nonetheless applicable in Belgium.⁵³ We point here, in particular to the *ITT Promedia*⁵⁴ and *Huawei v. ZTE*⁵⁵ decisions.

For example, in 2010, the Brussels' Commercial Court⁵⁶ held that “two actions brought by a company in a dominant position against a single permit authorizing the construction of a project of a competitor constitute an abuse of a dominant position, where the first action was dismissed for lack of interest in bringing proceedings, where the applicant has abandoned two out of three original grievances in the second action, and where the applicant withdrew her second action the day after having filed for a new permit” (Free translation). The dismissal for lack of interest of the first action and the abandonment of original grievances in the second action were considered sufficient to meet the first criterion of *ITT Promedia*, i.e. the action could not reasonably be considered an attempt to establish the rights of an undertaking but could only serve to harass the opposite party. The particular timing of the withdrawal of the second action was considered sufficient to meet the second criterion of *ITT Promedia*, i.e. the procedural actions were part of a broader plan whose goal was to eliminate (or delay) effective competition.

Similar to the overlap between arguments based on unfair competition and those relying on the prohibition of abuse of rights, arguments of anticompetitive abuse have also been considered jointly with arguments on abuse of procedural rights.

2.2. Pre-litigation

Before engaging in litigation, IP right holders may inform alleged infringers as well as third parties (e.g. customers of the alleged infringer or public officials) of the existence of their rights and their claims of infringement. They must, nonetheless, be careful when providing such information to third parties and must avoid entering into a denigration campaign (or disparagement). An act of communication may be considered excessive or abusive when delivered with a clear intention to harm suppliers or customers of alleged infringers, or in instances where an immoderate notice may negatively affect a commercial relationship between alleged infringers and third parties. On the other hand, the issuance of a reasonably worded warning letter will be considered permissible.⁵⁷

⁵² X. Taton et al., “Chronique de jurisprudence (2004-2010). 1ere partie – Overzicht van rechtspraak (2004-2010). 1st deel. Les actions civiles pour infraction au droit de la concurrence – Private handhaving van het mededingingsrecht”, *T.B.H./R.D.C.*, 2013/1, p. 5. X. Taton et al., “Les actions civiles pour infraction au droit de la concurrence – Chronique de jurisprudence (2004-2010). 2eme partie. Private handhaving van het mededingingsrecht Overzicht van rechtspraak (2004-2010). 2^{de} deel”, *T.B.H./R.D.C.*, 2014/3, p. 199. P. De Jong, O. Vrins and C. Ronse, “Evoluties in het octrooirecht. Overzicht van rechtspraak 2003-2006”, *R.D.C./T.B.H.* 2007/5, Mai/Mei 2007, pp. 423-480. P. de Jong, K. Neefs, C. Ronse, “Evoluties in het octrooirecht – Overzicht van rechtspraak 2011-2013”, *R.D.C./T.B.H.*, 2014/5, pp. 409-461.

⁵³ L. Van Bunnem, “Examen de jurisprudence (2012 à 2017). Brevets d’invention”, *R.C.J.B.*, (2018) p. 576.

⁵⁴ Judgment of 17 July 1998, *ITT Promedia NV v. Commission of the European Communities*, T-111/96, EU:T:1998:183.

⁵⁵ Judgment of 16 July 2015, *Huawei Technologies Co. Ltd. v. ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477.

⁵⁶ T. Comm. Bruxelles, 17 Juin 2010, *T.B.H./R.D.C.*, 2013/1, pp. 39-47.

⁵⁷ F. Verhoestraete, C. Brion, “Belgium” in M. Sterpi, T. Calame (eds) *Patent Litigation: Jurisdictional Comparisons*, 2nd ed., Thomson Reuters (2011) p. 79.

In Belgium no specific act, comparable with The Intellectual Property (Unjustified Threats) Act of 2017 in the UK, exists. As previously mentioned, restrictions and remedies for unjustified threats are more commonly found in the law against unfair competition or the general principle of the prohibition of abuse of rights which applies to the exercise of substantive as well as procedural rights.

2.2.1. Procedures available

If an unjustified threat is formulated towards an alleged infringer, we distinguish three possible procedural strategies on a civil level⁵⁸:

- First, if the threat is considered to harm commercial interests, the alleged (but harmed) infringer could introduce to a cease and desist action before the President of the competent commercial court. This action is based on the legislation against acts of unfair competition, i.e., article VL.104 CEL. He could demand that the threats are ceased (subject to penalty payments). The case will be handled as if in summary proceedings and, as such, judgement will follow within a very limited time frame. As mentioned above, the alleged (but harmed) infringer cannot demand for damages. He can, nonetheless, demand a publication order.
- Second, the alleged (but harmed) infringer could initiate ordinary summary procedures before the President of the competent court claiming a cease and desists order of the threats. Ordinary summary procedures can only be introduced if urgency is met (article 584 Judicial Code). In extremely urgent cases, these procedures could be dealt with *ex parte*. However, given the factual circumstances, i.e. the presence of a threat and only hearing one party, it is likely that the President of the competent court would desire to hear the IP owner and would not allow an *ex parte* procedure. *Inter partes* proceedings remain the rule while *ex parte* proceedings are highly exceptional. The President of the court will usually take into account whether the measures sought could be obtained within a similar timeframe in proceedings on the merits (including fast-track proceedings). Additionally, in order to preserve the interests of the parties while respecting the condition of urgency of summary proceedings, the President may decide to shorten the summons period⁵⁹ to a period considered adequate to the specific circumstances of the case.
- Third, the alleged infringer could initiate proceedings on the merits demanding a cease and desist order and/or damages before the competent court based on article 1382 Civil Code. The fault may consist in negligence according to the terms of article 1383 Civil Code which provides that “each one is liable for the damage which he causes not only by his own act but also by his negligence or imprudence” (Free translation). Taking into consideration the necessity to obtain a speedy decision this option will not be used frequently. This procedure may, nonetheless, remain useful for alleged (but harmed) infringers who, after having obtained a cease and desist order in a procedure as if in summary proceedings, would like to obtain damages.

2.2.2. Unfair competition

To send notices of infringement or cease and desist letters to alleged infringers or third parties (e.g. the customers of an alleged infringer) is not necessarily wrongful as it may allow for an amicable resolution of a dispute. However, it may become wrongful if it appears to be contrary to honest commercial practices.

Various elements have been taken into consideration by Belgian courts in order to assess whether a right holder who sends warning letters engages in acts of unfair competition in the framework of IP litigation. For example, it has been considered contrary to honest commercial practices for a right holder to send warning letters to (prospective) clients

⁵⁸ We will not include the possibility of filing a criminal complaint, as this seems to fall outside the scope of this report.

⁵⁹ Under article 707 Judicial Code the summons period is of 8 days in ordinary procedure. Under articles 1035 and 1395(2) Judicial Code this period is reduced to 2 days in summary proceedings as well as for orders to preserve and/or seize evidence.

of a competitor alleging infringement while an infringement procedure was still pending.⁶⁰ To invoke a non-existent patent in the name of a non-existent entity has also been considered contrary to fair market practices and constitutive of an aggressive and misleading advertising.⁶¹ In the same vein, to send a notice of infringement on the basis of a foreign patent application, and to misrepresent the territorial scope of a patent, was also considered contrary to honest commercial practices.⁶²

The knowledge of the recipients may be taken into consideration in order to determine whether the communication constitutes an act of unfair competition. A distinction may, therefore, be made between, on the one hand, alleged infringers who may have specific knowledge of the market in which they are involved, and, on the other hand, the clients (or potential clients) of alleged infringers who may lack such specific knowledge. Notices of infringement or acts of communication addressed to such third parties must be more carefully drafted than those addressed to alleged infringers.

Regarding the specific problematic of unjustified threats, acts of disparagement represent the most common acts of unfair competition undertaken by right holders.⁶³ Under Belgian law, the prohibition of disparagement is considered a general norm of economic behaviour and is therefore absolute.

Acts of disparagement occur when allegations are made and which throw discredit, in the mind of third parties (in particular the customers of a company), on a company, its products or services.⁶⁴ These allegations may harm the reputation of the company through calumny or slander, defamation or a simple critic. It is not necessary that the company be a competitor of the one at the origin of the disparagement. It is also not required that the company be directly identified in the disparagement as long as it is identifiable. It suffices that the notice comprises information which can harm the credit or reputation of an economic operator, its products, services or activities, vis-à-vis third parties. For example, an act of disparagement may be made of communication to publicly available media (e.g. magazines for professionals) when the purpose of such action is not to protect exclusive rights, but to induce professionals and consumers to believe that no other product may be available on the market. Such communication may throw discredit on other products and raises the risk that customers may not search for alternative products.

Disparagement can be direct or indirect and the allegations may be true or false. Therefore, a warning letter alleging, among other allegations, that a company is engaged in infringing activities may still be considered an act of disparagement, even if it is later found that there is, indeed, an act of infringement. What will be considered in this situation is the disproportional harm caused by the allegations as a whole on the recipient of the warning letter or the targeted company.

⁶⁰ Bruxelles, 16 Nov. 1988, *Ing.-Cons.*, 1989, p. 226. T. Comm Liège, 12 Nov. 2009, *Malvern Instruments Ltd., Sysmex Belgium c. SA Occhio, Logistique Spatiale Wallonne-Wallonia Space Logistics SA (A/09/882)* and CA Mons, 09 Fév. 2015, *IRDI* 2015/1, p. 26. T. Comm Bruxelles (prés.) 23 Déc. 2015, *SA ACP Belgium c. SA Air Liquide Benelux, SA Air Liquide Belgique, SA Air Liquide Belgium* (RG 15/06510 AC) p. 9. CA Bruxelles (9^e ch.) 08 Juin 2007, *Alnaco S.A. c. [M. de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, pp. 673-696. A contrario: TPI Antwerp, 20 Feb. 2004, *Fort Koffiebranderij, Cafes Liegeois and BeyersKoffie vs Sara Lee/DE* (AR/03/229/A).

⁶¹ Liège, 18 Fév. 2014, 2011/RG/1782, *AGMD e.a./ Ville de liege* (not published). As cited in P. de Jon, C. Ronse, K. Claeys, "Evolutions in het octrooirecht. Overzicht van rechtspraak 2014-2018", *T.B.H/R.D.C.* 2018/8, p. 798.

⁶² T. Comm Bruxelles (prés.) 23 Déc. 2015, *SA ACP Belgium c. SA Air Liquide Benelux, SA Air Liquide Belgique, SA Air Liquide Belgium* (RG 15/06510 AC). The right holder claimed that his technology was patented and that such protection was European. However, at the time of the notice, the right holder only benefited from a French patent application. It is only after the notice that it applied for a European patent. The Court therefore held that the right holder misrepresented the reality of the facts in a manner contrary to honest commercial practices.

⁶³ E.g.: Bruxelles, 16 Nov. 1988, *Ing.-Cons.*, 1989, p. 226.

⁶⁴ Comm. Hassel (prés.), 7 Nov. 2008, *Ann. Prat. Comm.*, 2008, p. 643. Comm. Anvers (prés.), 25 Sept. 2007, *Ann. Prat. Comm.*, 2007, p. 696. As cited in L. de Brouwer, "I - Interdiction des pratiques du marché déloyales à l'égard de personnes autres que les consommateurs" in *Les pratiques du marché*, Bruxelles, Éditions Larcier, 2011, p. 97-117 (at p. 103).

Next to article VI.104 CEL, recipients may also rely on article VI.105.2 CEL⁶⁵ as a legal basis for acts of disparagement. This provision is, nonetheless, more closely related to acts of commercial publicity. In 2015, the Brussels Commercial Court⁶⁶ held that, acts of communication which favour or reinforce the brand image of an entity and therefore, indirectly, promotes the products or services of such entity, may be qualified as publicity. Therefore, by representing a third party as an entity engaged in acts of infringement in its communication, the sender of a notice engaged in an act of disparagement, as it threw public discredit on an alleged infringer.

2.2.3. Vague or incomplete notice of infringement and further communication

When addressed to alleged infringers, the terms of a notice of infringement must be objective, prudent and carefully weighed. IP right holders must comply with a general norm of good conduct vis-à-vis competitors. Mere cease and desist letters generally do not constitute reasonable communications. The notice cannot be an indirect mean to harm the reputation and activities of a third party. In the context of IP enforcement, the sender of a notice, who requires that acts of infringement stop, must be able to, reasonably, invoke an exclusive right.⁶⁷

The importance of a clear and detailed notice of infringement was notably at the heart of the 2012 *UVP v. Telenet*⁶⁸ decision. In this case, the Belgian cable broadband provider *Telenet* developed a multimedia platform (*Yelo*) which allowed digital TV users to watch programs on TV and mobile devices. The American company *United Video Properties Inc. (UVP)* and its affiliated companies (jointly called *ROVI*) alleged that *Yelo* was infringing its European patent on an interactive television program guide system having multiple devices within a household.

Despite multiple requests from *Telenet* to obtain more information on the potentially infringed patents, *ROVI* constantly refused to provide such information. In its notice letters, *ROVI* invoked patents which had either been invalidated in the UK, subject to opposition proceedings at the EPO, or not even in force in Belgium and which were irrelevant for the case at hand. It also invoked patents which were subsequently not relied upon in the action. It also refused to provide information regarding the actual acts of infringement. It only provided a list of more than 100 patents and patent applications and argued that it was for *Telenet* to identify the relevant patents for its defence. *Telenet* repeatedly asked for more information and indicated to *ROVI* its intention to advance the matter amicably. *ROVI* only responded that it would be more expensive for *Telenet* to contract individual licences for the said-infringed patents than to opt for a general licence on *ROVI*'s portfolio.

In light of these circumstances, the President of the Commercial Court of Antwerp held that *ROVI* abusively exercised its right to send a notice of infringement without specifying the relevant patents infringed. The President highlighted the importance of the determination of the scope of the invoked patent by its holder in the event of an infringement action. It was stressed that, when patent holders decide to serve a notice of infringement to alleged infringers, they should specify which patents are actually infringed. If the right holder benefits from a portfolio of patents, it must, at least, indicate how the most essential and relevant patent claims are infringed. It was concluded that, if *ROVI* had an exclusive right to exclude third parties, this right, nonetheless, came with responsibilities and had to be exercised with caution. In particular, the general principle of freedom of commerce, in which the exclusive rights of IPRs holders find their sources, entails such obligations. To merely refer to various patents without specifying which patents were actually infringed and which actions were constitutive of patent infringement, especially when the alleged infringer sought clarification on this point, amounted to an abuse of rights constitutive of acts of unfair competition. The acts

⁶⁵ Article VI.105.2 CEL: “Sans préjudice d'autres dispositions légales ou réglementaires, est interdite toute publicité d'une entreprise qui [] comporte des éléments dénigrants à l'égard d'une autre entreprise, de ses biens, de ses services ou de son activité”.

⁶⁶ T. Comm Bruxelles (prés.) 23 Déc. 2015, *SA ACP Belgium c. SA Air Liquide Benelux, SA Air Liquide Belgique, SA Air Liquide Belgium* (RG 15/06510 AC). Referring to Cass. 12 Nov. 1999, Pas. I, 602.

⁶⁷ T. Comm Bruxelles (prés.) 23 Déc. 2015, *SA ACP Belgium c. SA Air Liquide Benelux, SA Air Liquide Belgique, SA Air Liquide Belgium* (RG 15/06510 AC).

⁶⁸ Kh. Antwerpen (voorz.), 03 April 2012, *United Video Properties Inc. (UVP) v. NV Telenet (A/11/05443)*, *ICIP-Ing.Cons*, 2012/1, p. 56.

of the right holders unduly and excessively affected the manner in which the alleged infringer could conduct its own business.

2.3. The litigation itself

2.3.1. General remarks

After having informed alleged infringers and third parties of the existence of their rights as well as their claims of infringement, right holders generally initiate an infringement action before a competent court of their choice.⁶⁹ The right to claim infringement represents a fundamental mechanism of protection for IP right holders.⁷⁰ The right to initiate an action is protected under article 6 of the European Convention on Human Rights (Right to a fair trial) as well as article 47 of the EU Charter (Right to an effective remedy and to a fair trial). Therefore, only exceptional circumstances may justify the imposition of a limit to the exercise of such right. As previously mentioned, to initiate a procedure for infringement is not abusive *per se*. However, the exercise of such prerogatives may, under specific circumstances, turn into an abuse.

2.3.2. Choice of procedures

In some instances, defendants in infringement actions have claimed that it was abusive for right holders to pursue an action as if in summary proceedings, or in summary proceedings, instead of opting for an ordinary procedure on the merits. These claims have generally been rejected by the courts as the choice of procedure is part of the right to access to justice. As long as the procedural conditions to introduce an action are met, and there is no manifest abuse in the election of proceedings, right holders should not be prevented from opting from one type of procedure over another.

In one specific instance, the Brussels' Court of Appeal held that it was abusive (i.e. frivolous and vexatious) for a patent holder to demand the immediate cessation of acts of infringement that he knew of for years prior to the action and had, in fact, tolerated until then.⁷¹ The court found that the patent holder acted in a negligent manner by initiating an action against a group of alleged infringers (i.e. the users of the potentially infringing products) instead of pursuing his action against a more direct alleged infringer (i.e. the provider of the products).⁷² It was concluded that the right holder neglected a more appropriate way of enforcing his rights and that the injunction requested in summary proceedings could have caused great harm to the parties in the procedure. In particular, the court observed that the patent holder knew of acts of infringement for some time but, nonetheless, never initiated any action against the more direct infringer. It was considered that, the fact that the said infringer was located in France and not in Belgium, was not sufficient to justify the inaction of the right holder. Moreover, the court found that the right holder could have avoided some of the harm claimed if only he had acted earlier.

When IP right holders do not act for a certain period, despite the fact that a third party is infringing on their exclusive rights, the question may arise as whether such tolerance could create some legitimate expectations in the part of third parties to the point where IP right holders would be prevented (or estopped) from litigating.

In Belgium, such situation would potentially fall within the scope of the doctrinal principle of '*rechtsverwerking*'. This principle presents similarities with the acquiescence theory or the legitimate expectations principle under French law but also with the theory of appearances known under Belgian law. It has also been considered as an additional criterion of the more general principle of the prohibition of abuse of rights. '*Rechtsverwerking*' essentially means that

⁶⁹ If the communication did not lead to an out-of-court settlement.

⁷⁰ E.g. in copyright: Bruxelles, (9e ch.) 5 Mai 2011, *Auteurs & Media* 2012/2-3, p. 215.

⁷¹ CA Bruxelles, (9e ch.) 8 Avril 2004, *J.L.M.B.*, 2004, p. 881.

⁷² The patent holder sent (twice) cease and desist letters to multiple hotels, requesting them to cease their exploitation of specific mini-bars in their rooms.

a certain entitlement may disappear due to the behaviour of a right holder. The acquiescence theory as well as the principle of ‘*rechtsverwerking*’ can, nonetheless, only be invoked where the behaviour of the party is radically irreconcilable with the entitlement it aims to obtain.⁷³ Due to its difficulties of application, the principle is very rarely relied upon in IP litigation.

2.3.3. Procedural requirements

An infringement action can only be brought by a plaintiff with proper standing to sue, derived from the (valid) IP right, and against a proper defendant who is alleged to have infringed such IP right. To initiate an action without respecting these fundamental procedural elements may be considered wrongful (or abusive) by Belgian courts. For example, if it can be demonstrated that right holders knew (or should have known) that a defendant could not legitimately be considered an infringer, the exercise of the right to sue may turn into an abusive or unreasonable exercise of rights.

This example also touches upon questions of exhaustion and so-called implied licenses. As any other EU MS, Belgium has adopted a regime of regional exhaustion. Therefore, exhaustion occurs when products are put on the market, by the right holder or with its consent (e.g. through an affiliate or licensee) in the European Economic Area. The interpretation to be given to the principle of exhaustion has been widely provided by the CJEU and is to be considered by Belgian courts when required. If a right holder knew (or should have known) that its rights were exhausted or that, due to a chain of licensing agreements, he could not oppose to the actions of a third party (i.e. a licensee), the exercise of the right to initiate an infringement action may be considered abusive. In the event of a claim based on implied licenses, it is, nonetheless, generally up to the defendant to produce the contract determining that it is authorised to act. The burden of such proof may be particularly heavy on defendants.

2.3.4. Abuse of dominant position

In some instances, defendants have relied on the rules of competition law as a shield against cease and desist actions. They have argued the exercise of the right to initiate an infringement action amounted to an abuse of dominant position as envisaged under article VI.02 CEL (the equivalent of article 102 TFEU). These claims have, however, rarely been successful.⁷⁴

Arguably, this is due to the fact that the conditions required to demonstrate that bringing proceedings is a violation of competition law are interpreted strictly. Defendants are required to demonstrate that an IP right holder is not only in a dominant position on a product and geographical market, he also has to demonstrate that initiating an infringement procedure is abusive. The burden of such proof on defendants is particularly heavy. Moreover, and as previously mentioned, only exceptional circumstances may justify an interference with the fundamental right to access justice.

⁷³ P. Van Ommeslaghe, “Rechtsverwerking en afstand van recht”, *T.P.R.*, 735-791 (1980). S. Stijns and I. Samoy, “la confiance légitime en droit des obligations” in S. Stijns and P. Wery (eds) *De bronnen van niet-contractuele verbintenissen – Les sources d’obligations extra-contractuelle*, Bruges, Die Keure (2007). S. Stijns, “La résilience de la ‘rechtsverwerking’ (note sous Cass. 17 mai 1990)”, *JT*, 6738, 582-587 (2018). S. Stijns, “La ‘rechtsverwerking’: Fin d’une attente (dé)raisonnable? Considérations à propos de l’arrêt de la Cour de cassation du 17 mai 1990”, *JT*, 5567, 685-60 (1990).

⁷⁴ F. Petillon, J. Janssen, A. Heirwegh, D. Noesen, “Chapter 3: Enforcement of Intellectual Property Rights in Belgium”, in F. Petillon, *Enforcement of Intellectual Property Rights in the EU Member States*, Intersentia (2019) p. 151. X. Taton et al., “Les actions civiles pour infraction au droit de la concurrence. Chronique de jurisprudence (2011-2015). Private handhaving van het mededingingsrecht in België. Overzicht van rechtspraak (2011-2015)”. *T.B.H./R.D.C.*, 2017/8, pp. 779-828, at 63 and 97. P. de Jong, O. Vrins, C. Ronse “Evolutions in het octrooirecht. Overzicht van rechtspraak 2007-2010”, *T.B.H./R.D.C.*, 2011/5, p. 440. E.g. in copyright: CA Bruxelles (9e ch.) 5 Mai 2011, *Auteurs & Media* 2012/2-3, p. 215. Vz. Kh. Antwerpen 19 Juli 2013, *I.R.D.I.*, 2013/4, P. 290. Reversed on appeal by CA Antwerpen 2 Juni 2014, *I.R.D.I.*, 2014/3, p. 593. In patent law: Kh. Gent (6^{de} kamer) 20 Jan. 2011, *I.R.D.I.*, 2011, p. 62.

The case law of the CJEU, in particular its decision in *Huawei v. ZTE*⁷⁵, remains applicable in Belgium. However, at the time of writing, we are not aware of national decisions which would provide some guidance as to how Belgian courts may interpret the decision of the Court.

2.4. During litigation

Diverse strategies used by IP owners, during litigation, could result in findings of abusive exercise of rights and prerogatives. The generic criterion as well as the specific criteria of abuse, mentioned hereabove, are applicable in order to assess whether these strategies are indeed abusive. The subjective intentions of right holders in requesting specific measures are particularly relevant for this assessment. Additionally, a grossly disproportionate request may also be rejected on the basis of abuse.

Overall, abusive exercises of rights and prerogatives during litigation may include the following: to divert the evidentiary purpose of seizure measures to actually engage in fishing expedition or to eliminate a competitor, to request unnecessary or disproportionate measures (e.g. injunctions or seizure measures), to refuse to provide relevant information in a manner which frustrates the right of defence of alleged infringers⁷⁶, to unduly multiply demands and enforcement of seizures, to choose a particularly harmful place of enforcement of such invasive enforcement mechanisms, to stall procedure before a competent court having to decide on the merits⁷⁷ after having obtained a preliminary injunction and, as such, put disproportionate pressure on an alleged infringer...

IP right holders may also make abusive requests to obtain damages. For example, in 2013, the Mons Court of Appeal⁷⁸ emphasised that, if in principle, patent holders are entitled to obtain compensation for the harm suffered due to infringing actions, this compensation must be proportionate and claims for damages should not be made abusively. The court held that it was abusive for the patent holder to seek disproportionate damages, notably because the patent holder had encouraged, during negotiations, the commercialisation of infringement goods, but also because the infringement actions had only led to a minimal benefit for the infringer. The court balanced the interests of the parties in light of all the circumstances of the case and considered that it would have been abusive to allocate a disproportionate amount of damages to the patent holder.

The harm arising from the wrongful request and/or enforcement of preliminary injunctions has occasionally been repaired via the application of the prohibition of abuse. It is in the framework of patent litigation in the pharmaceutical sector that the argument of abusive preliminary injunctions has sometimes been raised.

This was notably the case during one dispute between the Israeli company *Medinol Ltd.*, and the American group *Johnson & Johnson*, before the President of the Brussels Commercial Court.⁷⁹ *Medinol* was the holder of a divisional European patent (EP450) which was cleaved off from another European patent (EP856) which had been revoked at the EPO in March 2004. Before the revocation of EP856, *Medinol* already entered into numerous litigations across Europe.⁸⁰ However, given the invalidity of EP856, *Medinol* started to launch proceedings on the basis of EP450.⁸¹ In

⁷⁵ Judgment of 16 July 2015, *Huawei Technologies Co. Ltd. v. ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477.

⁷⁶ This was also mentioned in Kh. Antwerpen (voorz.), 03 April 2012, *United Video Properties Inc. (UVP) v. NV Telenet (A/11/05443)*, *ICIP-Ing.Cons.*, 2012/1, p. 56.

⁷⁷ It should be noted that the time frame to decide proceedings on the merits in Belgium is way too lengthy. A case introduced before the Brussels commercial court followed with appeal proceedings can take up to four years.

⁷⁸ CA Mons (1^{er} ch.) 02 Déc. 2013, *X c. SPRL Green & Co.* (2012/RG/1003).

⁷⁹ Rb. Brussel (kort geding) 26 Oct. 2004, *Medinol Ltd. c. Janssen Pharmaceutica, Johnson & Johnson Medical, Cordis Holding Belgium (Johnson & Johnson Group)* (NR. 04/607/C).

⁸⁰ In 2000 and 2003, *Medinol* brought proceedings in the Netherlands and Belgium, notably to obtain cross-border injunctions against the defendants.

⁸¹ In Germany, the Netherlands and Belgium. The Dutch court rejected *Medinol's* claim for infringement in light of the fact that EP450 was actually identical to EP856 and therefore constituted a double patenting activity. In a summary proceeding, the district court also rejected *Medinol's* claim and ruled that considering the revocation of EP856 and the double patenting activity of *Medinol*, there was no reason to grant a preliminary injunction against the defendants. The judge also granted an 'anti-suit' injunction in favour of the defendants.

this case, *Medinol* attempted to obtain a preliminary (cross-border) injunction against *Johnson & Johnson*. The court held that *Medinol*'s behaviour was inconsistent with the requirement of urgency and that the multiplication of legal actions did not reflect the general principles of patent law. EP450 did not add anything to EP856 and it was considered that multiple patents were confusing. *Medinol* essentially attempted to keep its competitors "on the hook" as long as possible by initiating various legal proceedings across Europe on the basis of a divisional patent,⁸² although the parent patent had been revoked at the EPO. In light of these circumstances, the President declared that the patent holder exercised abusively its rights to exclude third parties through the grant of a preliminary (cross-border) injunction in a summary proceeding.

In a second Belgian pharmaceutical case, the German company *Merck* was opposed to the UK company *GSK*. *GSK* held a European patent on the anti-depressant *Paxil*. At the time of the procedure, this patent had lapsed in most countries where it was validated, including Belgium. *GSK* obtained a new term of protection due to the grant of another European patent. In 2002, *Merck* announced it would start commercialising its own anti-depressant. In light of this up-coming commercialisation, *GSK* initiated an infringement action and requested an injunction. *Merck* petitioned that the principle of reasonableness and fairness should be taken into consideration when assessing the necessity of an injunction, in particular in light of the public interest.

The Brussels Commercial Court⁸³ recognised that the injunction would have profound repercussion on the company's business and that, although judges deciding on the grant of an injunction have wide discretion when deciding upon such measure, they nonetheless have to take into consideration the interests of the various parties involved. On the one hand, the company, which will have to suffer the consequences of the injunction, will not be able to sell its product for the duration of the preliminary order. On the other hand, in case of infringing products, to deny the injunction could cause an important harm to the patent holder. In the particular case of generic-originator pharmaceutical dispute, the court must take into account the benefits for the public interest of cheaper generic drugs, and the financial cost of R&D suffered by the patent holder.

In first instance, a preliminary injunction was granted, as it appeared more harmful to the patent holder to deny such measure than it would be harmful for the defendant not to be able to sell its product for a certain period. However, the Brussels Court of Appeal reversed this decision.⁸⁴ It held that it was implicitly admitted that the second patent provided for a second period of protection on the original product and did not protect a new product. The court declared that the interest of the patent holder, who attempted to obtain an extended period of protection beyond the one intended by the legislator, could not prevail over the interest of the defendant who invoked the expiry of the legal period of protection. The injunctions were therefore revoked.

These cases present two similarities. First, judges in charge of granting preliminary injunction did take the interests of the parties into account before granting such measure. In the pharmaceutical sector, and specifically in litigation between an originator and a generic company, judges held that the impact of the measure on the public interest contributed greatly to the proportionality exercise.⁸⁵ Second, the decisions of abuse were based on the fact that patent holders aimed at illegitimately extending the scope of their patents beyond what had been conceived by the legislator. Patent holders obtained a patent on a product which had already been patented and for which the term of protection had expired.

3. Remedies for recipients of unjustified threats or unjustified actions

⁸² P. De Jong, O. Vrins and C. Ronse, "Evoluties in het octrooirecht. Overzicht van rechtspraak 2003-2006", *R.D.C./T.B.H.* 2007/5, Mai/Mei 2007, pp. 423-480.

⁸³ Rb. (beslag kamer) Brussel, 13 Jun 2003, *N.V. Merck v. SmithKline Beecham Plc.* (2003/AR/1606) *I.R.D.I.*, 2003, pp. 275-282.

⁸⁴ HvB te Brussel (17 kamer) 29 Jun 2004, *N.V. Merck v. SmithKline Beecham Plc.* (2003/AR/1606) *I.R.D.I.*, 2004, pp. 402-407.

⁸⁵ TPI Bruxelles (ch. des saisies) 01 Jan. 2003, *S.A. Eurogenerics v. Smith Kline Beecham Plc.* (RG/02/11.997/A).

There are no remedies envisaged in the laws of IP for recipients of such claims. It should be mentioned that, in theory, the lack of exploitation of a patent may lead to the grant of a compulsory licence. Under article 5A(2) of the Paris Convention, the lack of exploitation may, under certain circumstances, be considered abusive.⁸⁶ In Belgium, specific conditions of application are provided under article XI.37 CEL. This provision, however, does not explicitly refer to the wording of abuse. In practice, this remedy has very little impact in Belgium.⁸⁷

The rules of unfair competition (in particular article VI.104 CEL), the regime of extra-contractual liability (articles 1382 and 1383 Civil Code), the rules envisaged in the judicial code for procedural abuses (article 780bis Judicial Code), as well as the rules related to the allocation of litigation costs (article 1022 Judicial Code), represent the main legal basis providing remedies for unjustified claims.

3.1. Unfair competition

Upon findings of acts of unfair competition, a court will generally order that the threats cease, and penalty payments will accompany the order. Moreover, and in order to pacify a market which may have been particularly disturbed by the acts, a publication (or rectification) order may also be issued.⁸⁸

Contrary to an action based on article 1382 Civil Code, this action is not meant to repair a particular damage but to put an end to an illicit act.⁸⁹ It is nonetheless required to demonstrate that the acts may harm the interests of a company and that such (potential) harm be substantial.⁹⁰ In practice, commercial and/or reputational harm, resulting from the communication to either the company itself, or to its (potential) clients, must be demonstrated.

These sanctions may be complemented with damages if the conditions of article 1382 Civil Code are met.

3.2. The principle of the prohibition of abuse of rights and article 1382 Civil Code

The sanction of an abuse is not the forfeiture of the right which has been abused. Rather, the sanction of abuse materialises in the reduction of the abusive exercise to what may be considered, by a judicial authority, as a proper exercise. The prohibition of abuse is considered a “shield rather than a sword”⁹¹. The sanction is there to remove the ability from the right holder to assert his right in a manner considered improper by a judge as well as to compensate for the harm caused. The objective of the sanction is to re-establish the victim of abuse in a state as if the abuse did not occur.

⁸⁶ Article 5A(2) stipulates that participating countries shall have the right to take measures to provide for the grant of compulsory licences to prevent “abuses which might result from the exercise of the exclusive rights conferred by the patent, for example, failure to work”.

⁸⁷ L. Van Bunnin, “Examen de jurisprudence (2012 à 2017). Brevets d’invention”, *R.C.J.B.*, (2018) p. 582. F. de Visscher, “Quelques propos sur la déchéance du brevet et la licence obligatoire”, in *Hommage à B. Remiche*, Bruxelles, Larcier, 2014, pp. 397-411.

⁸⁸ CA Bruxelles (9^e ch.) 08 Juin 2007, *Alnaco S.A. c. [Sir de M.] et SPRL Caltec* (2003/AR/1614), *ICIP-Ing.Cons.*, 2007, n.5, p. 675: “Considering the appellant’s contempt of former judgments and the defendants’ legitimate fear that the appellant will continue its unfair activities, it is important that the market in which the parties are active be pacified, since the appellant has initiated various denigrating campaigns. It is important that the publication of the enacting terms of this judgment should be published in two specialist journals chosen by the defendants []”.

⁸⁹ T. Léonard, “Pour une théorie de l’acte de concurrence illicite affranchie des articles 1382 et 1383 du code civil”, *T.B.H.* 2010/7, p. 573.

⁹⁰ T. Léonard, “Pour une théorie de l’acte de concurrence illicite affranchie des articles 1382 et 1383 du code civil”, *T.B.H.* 2010/7, p. 580. E. Terryn, D. Voinot, “Chapitre 2 - Vers un droit européen des pratiques commerciales déloyales entre professionnels ?”, in *Droit européen des pratiques commerciales déloyales*, Bruxelles, Éditions Larcier, 2012, p. 165.

⁹¹ D. Anderson, “Abuse of rights”, 11 *Jud. Rev.* 348 (2006). Inspired by: E. Teller, *Better a Shield Than a Sword: Perspectives on Defense and Technology*, Free Press (1987).

Mis en forme : Français (France)

This reduction of exercise may also be accompanied by the allocation of damages⁹² if a prejudice has to be repaired. To obtain compensation for the harm suffered, a victim of the abuse must show that the conditions of article 1382 Civil Code are met. Accordingly, the right holder must be at fault, a harm must have been suffered, and a causal link must exist between the fault and the harm suffered. To quantify such harm is burdensome, therefore, courts frequently rely on an evaluation *ex aequo et bono* and grant a lump sum to compensate the harm.⁹³

In the context of an abusive exercise of the right to initiate an infringement action (i.e. the scenario envisaged under the heading of the litigation itself), since the sanction of abuse is the reduction of the exercise of a right to what may be considered a proper exercise, it is generally understood that Belgian courts cannot issue antisuit injunctions. These injunctions would prevent a right holder from introducing an infringement action and would be considered as encroaching *prima facie* on the right of access to justice of a right holder.⁹⁴ The sanction of an abusive exercise of the right to initiate an infringement action is therefore the rejection of such action. As for abusive exercises of IP rights and prerogatives during litigation (i.e. essentially abusive requests), Belgian courts generally refuse to grant these requests or tailor them to what may be considered a proper request.

Although not directly related to a limitation on the right of IP right holders to bring or threaten to bring legal actions, we believe it is important to mention a Belgian specificity regarding the enforcement of preliminary injunctions and/or seizure measures which may, in turn, be considered wrongful. Belgian procedural law provides that judicial decisions are enforced at the risk of the parties. If a first instance decision is enforced while an appeal is pending, the party that has enforced the decision will be liable for all damages if the decision is overturned in appeal (strict liability).⁹⁵

It is, however, controversial whether the enforcement of a preliminary injunction decision or an order to seize evidence, when the IP right holder subsequently loses in infringement proceedings on the merits, should respond to a regime of liability with or without fault (i.e. objective or subjective liability).⁹⁶ When implementing article 9(7) of the Enforcement Directive, the Belgian legislator has adopted some rules providing that a court can order the IP right holder to pay damages following a seizure or a preliminary injunction if it is later established that there was no (imminent) infringement of the right at stake.⁹⁷ It is, however, not clear whether this liability should be construed as a strict liability or a fault-based liability. The case law in this respect is divided. In 2018, a decision of the Brussels Court of Appeal, nonetheless, seems to favour a regime of liability with fault with regard to the enforcement of seizure measures following a decision on the merits.⁹⁸ Under this approach, it is required from the debtor of the measures to show that the right holder engaged in a faulty or abusive enforcement in order to be compensated. The court of appeal held that the regime of liability with fault was compliant with the Enforcement Directive. In particular with the high level of protection envisaged by the text (recital 10), as well as the objectives (in particular the effectiveness of enforcement), and spirit of the Directive (in particular recitals 20, and 22 to 24).⁹⁹ Overall, the court observed that

⁹² A. Lenaerts, "The role of the general principle of abuse of rights in a codified European contract law", in I. Samoy (ed.) *Evolutie van de basisbeginselen van het contractenrecht*, Metro No. 50, Intersentia (2010). S. Stijns, "Abus, mais de quel(s) droit(s)?" *J.T.*, n 5533, 33-44 (1990). P. Ancel, "L'abus de droit en droit français et en droit belge" in E. Van Den Haute (ed.) *Le droit des obligations dans les jurisprudences française et belge*, Bruxelles, Bruylant (2013) p. 99. P. Bazier, "Abus de droit, rechtsverwerking et sanctions de l'abus de droit", *T.B.B.R.*, 2012/8, 393-403 (2012). G. Ripert, "L'exercice des droits et la responsabilité civile", 35 *Rev. Critique Legis. & Juris. n.s.* (1906) p. 365.

⁹³ G. Eloy, "La procédure téméraire et vexatoire", in X., *Droit judiciaire. Commentaire pratique*, 1.5-1-1.5-34 (2015) p. 28.

⁹⁴ CA Bruxelles (9e ch.), 10 Jun 2015, *J.T.*, 2015, p. 696.

⁹⁵ C. Dekoninck, "Belgium", in T. Cook (ed.) *The Patent Litigation Law Review*, 2nd ed., (2018). Available at: <https://thelawreviews.co.uk/edition/the-patent-litigation-law-review-edition-2/1176055/belgium>. Last accessed: 24 May 2019.

⁹⁶ S. Cattoor and M. Van Meerbeek, "Compensation to the alleged infringer of an IP right for harm caused by provisional measures in case of a different outcome on appeal or on the merits" in F. Pétillon (ed.) *Handhaving van intellectuele rechten in België/Respect des droits intellectuels en Belgique*, Gent, Uitgeverij Larcier (2017) pp. 127-146. T. de Haan and C. Brion, "Pas de responsabilité objective en matière de saisie-contrefaçon", *ICIP-Ing.Cons.*, n.2, p. 334 (2018). D. Dessard, "Les abus de la saisie-description", *ICIP Ing.-Cons.*, 2005, p. 304. F. de Visscher, "Note sous Cass., 11 mars 2005", *A&M*, 2005/5, p. 400.

⁹⁷ C. Dekoninck, "Belgium", in T. Cook (ed.) *The Patent Litigation Law Review*, 2nd ed., (2018). Available at: <https://thelawreviews.co.uk/edition/the-patent-litigation-law-review-edition-2/1176055/belgium>. Last accessed: 24 May 2019.

⁹⁸ HvB te Brussels (8^e kamer), 28 Feb. 2018 (2016/AR/4), *ICIP-Ing.Cons.*, n.2, p. 316 (2018).

⁹⁹ T. de Haan and C. Brion, "Pas de responsabilité objective en matière de saisie-contrefaçon", *ICIP-Ing.Cons.*, n.2, p. 334 (2018).

article 1382 Civil Code provides sufficient protection against the exercise or the abusive exercise of the ‘*saisie-contrefaçon*’ without being too dissuasive for right holders.

A request for a preliminary ruling has been submitted to the CJEU on the interpretation of article 9(7) of the Enforcement Directive and is still pending at the time of writing.¹⁰⁰

3.3. Procedural abuses

There are essentially two types of sanctions for an abuse in the course of litigation, the allocation of damages to the injured party (mentioned hereabove) and a civil fine.¹⁰¹ These two sanctions repair two different effects of an abusive exercise of procedural prerogatives. The first compensates the injury caused to the litigant victim of the abuse, while the second essentially corrects the harm caused to the judicial system.

A specific provision to remedy this second effect exist in the Belgian Judicial Code. Article 780bis clearly stipulates that the party who uses judicial proceedings to obviously delay the procedure or for unlawful purposes (i.e. in a dilatory or abusive manner), shall be sentenced to a civil fine (between EUR 15 and EUR 2,500), without prejudice to other damages which could be claimed.¹⁰² This provision has notably been adopted in the Belgian Judicial Code by the law of 26 April 2007 to reduce the backlog of cases.¹⁰³

The civil fine aims at compensating the fact that a procedural abuse twists the judicial process and disrupts the good functioning of justice.¹⁰⁴ This fine is determined by the judge based on multiple factors such as the harm in terms of time and/or efforts for the judicial system, the behaviour of the party, including his intentions, the importance of the dispute... The imposition of such a fine is part of the discretionary powers of the court¹⁰⁵ and is limited to the amount provided by law.

Judges benefit from large discretionary powers to order the fine, they can also decide not to sanction. The main criticism of article 780bis Judicial Code resides in the fact that it may be necessary to reopen the debates in order to sanction a party if, during the procedure, none of the party did request damages. Since judges cannot reopen the debates on their own, it is required that one of the parties does so. However, in practice, it would turn out to be the party who would have to pay the fine which would also have to reopen the debate. Therefore, this option is rarely, if ever, used.

Regarding the relationship between article 780bis Judicial Code and the responsibility of lawyers, it is not in the competence of judges who may issue a fine to also decide on the responsibility of lawyers. Lawyers nonetheless have a duty to inform their clients of the risk to be sanctioned under 780bis Judicial Code.¹⁰⁶

¹⁰⁰ Request for a preliminary ruling from the Fővárosi Törvényszék (Hungary) lodged on 8 December 2017 — *Bayer Pharma AG v. Richter Gedeon Vegyészeti Gyár Nyrt., Exeltis Magyarország Gyógyszerkereskedelmi Kft.* (C-688/17). *O.J.*, 2018, L 157, p. 45.

¹⁰¹ G. Eloy, “La procédure téméraire et vexatoire”, in *X., Droit judiciaire. Commentaire pratique*, 1.5-1-1.5-34 (2015) p. 3. G. Closset-Marchal, “L’appel abusif (note sous Cass., 5 Mai 2008)”, *R.G.D.C.*, 2009/07, 385 (2009).

¹⁰² Article 780bis al. 1-2 of the Belgian judicial code: “*La partie qui utilise la procédure à des fins manifestement dilatoires ou abusives peut être condamnée à une amende de 15 euros à 2.500 euros sans préjudice des dommages-intérêts qui seraient réclamés. En ce cas, il y sera statué par la même décision dans la mesure où il est fait droit à une demande de dommages et intérêts pour procès téméraire et vexatoire []*”. References to reckless and vexatious proceedings can also be found in article 563.3 and article 620 Judicial Code.

¹⁰³ M. Stassin, “L’amende civile”, *J.T.* n. 6679 (2017) p. 165 et s.

¹⁰⁴ G. Eloy, “La procédure téméraire et vexatoire”, in *X., Droit judiciaire. Commentaire pratique*, 1.5-1-1.5-34 (2015) p. 30, 32. B. Vanlerberghe, “Rechtsmisbruik in het procesrecht” in J. Rozie, S. Rutten and A. Van Oevelen (eds) *Rechtsmisbruik*, Intersentia (2015) p. 125.

¹⁰⁵ E.g.: Cass., 28 Juin 2013 C.12.0502.N.

¹⁰⁶ M. Stassin, “L’amende civile”, *J.T.* n. 6679 (2017) p. 165 et s.

3.4. Costs of litigation

As for the procedural costs involved in litigation, Belgium has adopted a loser pays rule¹⁰⁷ (or fee-shifting), meaning that the losing party has to bear the procedural costs (i.e. judicial expenses and costs of the winning party). The application of the fee-shifting rule does not depend on the (mis-)behaviour of the parties. In addition, article 1022 Judicial Code provides for the allocation of a (fixed) recoverability of attorney's fees.¹⁰⁸ In the assessment of these costs, judges can take into consideration all the circumstances of the case in order to grant an appropriate compensation (including the behaviour of the litigants).¹⁰⁹

Notice should be taken of the fact that, if a party asks for damages for reckless proceedings under 1382 Civil Code, it cannot use the same argument to raise its legal costs. Reciprocally, if the behaviour of a litigant has already been taken into consideration in order to grant higher legal costs, it cannot also be the basis for obtaining damages.

4. Conclusion and future policy

To answer the main question, there should be, and there are, sufficient restrictions under Belgian law (including IP law, competition law, procedural rules, the general principle of abuse of rights, and the laws of unfair competition) to limit unjustified threats or unjustified actions from IP right holders against their competitors or other parties. We believe that the current framework applicable to unjustified threats and actions forms an adequate regime of protection for recipients of such threats and contains sufficient safeguards for their rights and interests. In particular, the possibility for recipients to obtain an order to cease the threats, accompanied by the possibility to obtain damages, seems adequate and dissuasive.

Specific, and more minor, elements related to the current approach could nonetheless be improved.

- First, we believe that a clearer framework regarding protective letters should be put in place. There are currently no rules in the Judicial Code which provide guidance to judges as to how to proceed with such letters. For example, we believe it would be useful to provide for a central database or repository, to ensure that protective letters benefit from a file number, to make clearer that judges are under an obligation to take these letters into account when an *ex parte* procedure is initiated...The information required or the practicalities related to such letters could be developed on the basis of Rule 207 of the rules of procedure of the Unified Patent Court. The aim of these protective letters is not to systematically prevent seizures measures or preliminary injunctions, but rather to limit the scope of possible actions requested *ex parte* by a holder of IP rights against an alleged infringer. In particular, they provide (potential future) defendants with a right of defence (i.e. the right to be heard) which is generally limited due to the nature of *ex parte* decisions.
- Second, we consider that it would be helpful to adopt, in our proceedings, the possibility for alleged infringer to introduce an action for the declaration of non-infringement in as if in summary proceedings (i.e. before the President of the competent court). In the event of unjustified threats, such procedure would be more advantageous than the current procedure on the merits as the President would more rapidly reach a decision. Having no access to such expeditious proceedings puts the alleged infringer at the will of the alleged IP

¹⁰⁷ Arts. 1017-1021 Judicial Code, C. Hodges, S. Vogenauer and M. Tulibacka (eds) *The costs and funding of civil litigation: A comparative perspective*, Hart Publishing (2010).

¹⁰⁸ Arrêté royal fixant le tarif des indemnités de procédure visées à l'article 1022 du Code judiciaire et fixant la date d'entrée en vigueur des articles 1er à 13 de la loi du 21 avril 2007 relative à la répétibilité des honoraires et des frais d'avocat (26 Oct. 2007). Available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2007102635&table_name=loi. Last accessed: 24 May 2019.

¹⁰⁹ Article 1022 Judicial Code stipulates that the judge, upon request from one of the parties, may take into consideration the financial ability of the losing party, the complexity of the case, any contractually agreed compensation between the parties, and the manifestly unreasonable character of the situation, to either increase or decrease the amount granted.

owner who can opt for slower proceedings on the merits (and as such pressure the alleged infringer to settle on non-advantageous terms).

- Third, regarding the regime of liability which should follow the enforcement of preliminary injunctions or seizure measures, when it is later established that there was no infringement of the right at stake, we deem important to make a distinction between these two measures. A regime of liability without fault (strict liability) may be more adequate to repair the harm caused by the enforcement of a preliminary injunction than for the enforcement of a seizure. This is notable due to the object of the measures. The object of a seizure is to preserve evidence while a preliminary injunction aims at putting an end to particular activities. The execution of the later may, therefore, per se, be particularly harmful to the interests of a debtor. On the other hand, the execution of a seizure is less likely, but not immune, to have the same effects. Therefore, a regime of liability with fault may seem more appropriate. Additionally, it should be noted that, due to the potential invasiveness of a seizure, Belgian judges thoroughly assess all the circumstances of a particular case before ordering such measure. In light of these elements, a regime of strict liability for the enforcement of seizure measures, when it is later established that there was no infringement, may be criticised.
- Finally, the threshold for defendants to win a case on the argument that an IP right holder has exercised its rights abusively is fairly high. The limited discretionary powers of judges (due to their '*marginal toetsing/contrôle marginal*') and the requirement that an abuse be manifest, to be sanctioned, renders the reliance on the principle of abuse particularly difficult. Even confronted with certain practices by right holders which were somewhat frivolous or irritating, courts have considered some of these insufficient to substantiate a claim of abuse fully. Alternatively, defendants have argued that the excessive exercises of IP prerogatives might qualify as acts of unfair competition. Courts showed a preference for deciding on arguments of unfair competition rather than on the general principle of abuse. The more objective assessment of these acts compared to the usual need to demonstrate an intention to harm by right holders under the test of abuse may have favoured this position.

Additionally, under the current approach adopted by national courts, there is an intricate relationship between finding and sanctioning over-enforcement practices and the more traditional questions of IP litigation, i.e. infringement and/or validity. In various instances, judges held that since an IP right (in particular patents) had been found valid and infringed, the exercise of prerogatives deriving from such right, in particular the right to sue for infringement, could not amount to an abusive conduct. At the interim level, the presumption of validity played a similar role and impacted the review of potential wrongfulness in the exercise of the right to obtain evidentiary measures and/or preliminary injunctions. We believe that the inquiry of validity and/or infringement of IP rights does not necessarily mean that the way in which this IP right is exercised is legitimate. A distinction needs to be made between the entitlement of exclusive IP rights as subjective rights and the enforcement of prerogatives and its consequences as remedies. A valid and infringed IP right may still be enforced in an abusive manner.