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BELGIUM

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PATENTS

Patentable Subject Matter

Any invention that fulfills the requirements to obtain a valid patent (novelty, inventive step and fit for industrial application) is patentable.

Explicitly excluded from patent protection are: discoveries, scientific theories, mathematical methods, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business (business methods), and programs for computers (software), presentations of information, new plant varieties, animal varieties and essentially biological processes for the production of plants or animals.

Requirements for Obtaining a Patent

In order to be patentable, an invention needs to meet the following requirements:

novelty: the invention must be new on the filing date, i.e., may not form part of the existing state of the art; *inventive step*: the invention must be the result of an inventive step, i.e., the invention may not be obvious to a person skilled in the art; *fit for industrial application*: it must be possible to apply the invention in the industry, i.e., the object of the invention must possibly be made or used in any kind of industry, including agriculture.

Bars to Patentability

In Belgium, the system is based on “first to file,” i.e., the first applicant has the right to the patent.

Any publication or public disclosure of the invention, anywhere in the world before the filing or priority date, can be used to destroy the novelty of the invention. Thus, an invention should be kept secret until a patent application has been duly filed.

A Belgian patent is granted without prior examination of the patentability of the inventions, without guarantee of the value of the inventions or the exactness of their description and at the applicant’s own risk. Belgian patents are so-called “duty-stamp” patents.

Challenges to Patent Applications and Patents

Belgian patent law provides no oppositions or protests prior to the granting of the patent.

Term of Patent for Different Kinds of Patent and Available Extensions

The term of patent is 20 years and cannot be extended.

If a Belgian patent is desired with a maximum lifetime of 20 years, a search fee has to be paid within 18 months as from the filing or priority date. In this case, a search report will be drawn up by the Search Division of the European Patent Office and the applicant will be given an opportunity to amend the patent application in view of any cited prior art.

If no search fee is paid within this 18-month time limit, the maximum lifetime of the Belgian patent is limited to 6 years as from the filing date.

Types of Patents and Rights Conferred by Each

Belgian patent law only knows one type of “patent” (“octrooi” in Dutch and “brévet” in French).

The patent confers to its owner the right to prevent all third parties not having his consent:

- from making, offering, putting on the market or using a product which is the subject matter of the patent, or importing or stocking the product for those purposes
- from using a process which is the subject matter of the patent
- from offering, putting on the market, using, or importing or stocking for those purposes the product obtained directly by the process which is the subject matter of the patent.

Ownership

The right to a patent shall belong to the inventor or its successor in title.

Infringement Standards

Any violation of the rights of the patent owner constitutes an infringement involving the infringer's liability. Good faith shall not exclude infringement.

The doctrine of equivalence is accepted.

Remedies for Infringement

Counterfeit seizure ("beslag inzake namaak," "saisie contrefaçon"). The procedure of counterfeit seizure is a unilateral procedure initiated before the court of seizures which mainly leads to a surprise visit to the premises of the allegedly infringing party with an expert to describe the alleged counterfeit. Bookkeeping and accounting information on the amounts of infringing products sold or produced may also be revealed. The main purpose of the descriptive seizure is to obtain a precise expert description of the infringing goods, in order to facilitate the proof of the counterfeit. At the same time the court can authorize the seizure of the goods.

After the filing of the expert report, the findings therein may be used to found a contradictory claim on the merits of the case.

Injunctive relief/summary proceedings. Summary proceedings are technically possible, but not often used in practice in patent cases, for the following reasons:

- summary proceedings only lead to preliminary measures
- summary proceedings may only be initiated when the case is urgent
- summary proceedings require a *prima facie* (at first sight) investigation of the validity of the invoked patent rights, while in most patent cases this validity is questioned by the defending party.

The order is merely injunctive without legally touching the merits of the matter and without value as a precedent on the merits. In order to obtain damages or any other compensation, proceedings on the merits must be initiated following or along with the ordinary summary injunctive relief.

Proceedings on the merits/damages. The court may order any infringer to cease infringement and to pay to the petitioner compensation for the damages caused by the infringement. The court may also order publication of the judgment.

In the event of bad faith, the court may order the confiscation for the benefit of the petitioner of the articles manufactured in infringement of the patent and of the instruments and means specially intended for their manufacture. Where appropriate, the court shall award an amount equal to the price of the articles already sold.

Custom measures. Brussels airport and Antwerp harbor play a very active role in the action against infringing goods on the European market. In 2003, in particular, nearly 60% per cent of the infringing goods uncovered in the whole Community were uncovered in Belgium (more than 55 million infringing articles).

Customs can intervene prior to the filing of an application for action by the right holder (*ex officio* procedure) or after such an application (formal procedure).

Regarding the *ex officio* procedure, customs authorities will contact the right holder informally if they believe that sufficient grounds for suspecting an infringement of intellectual property rights exist. The right holder will have to confirm within three days whether the goods infringe an intellectual property right.

The formal procedure gives right holders the possibility to file an application for customs action. Right holders will still be addressed by customs authorities in order to confirm the infringement.

In both cases, customs will send an official notification of suspension of release or detention of the goods.

In the absence of an agreement regarding the immediate destruction of the goods, it must be established whether there is an infringement of an intellectual property right under national law. The goods will not be released if the customs office is notified within ten days that a procedure to establish infringement has been lodged.

Criminal procedure. For a criminal procedure, it must be proved beyond doubt that the adverse party has acted in bad faith. Such bad faith is not required for a civil procedure.

TRADEMARKS

Trademark Subject Matter

A trademark is a sign that has the capacity to distinguish goods and services of their proprietor from those of others.

Signs may include words, design, colours, sounds, the packaging of goods, the shape of goods and also combinations of these elements.

Trademark owners have an exclusive right to use their trademark; they can prevent others from using their trademark or a similar sign for goods and services that are the same or similar to the goods and services for which the trademark is registered.

Is Registration Required/Available?

Registration is required and available at the Benelux Office for Intellectual Property and at the Intellectual Property Office of the Ministry of Economy.

Requirements for Registration

The following conditions must be met in order for a sign to obtain trademark protection:

- the sign is capable of being presented graphically
- the sign has a distinguishing capacity; it must be able to demonstrate the origin of goods or services in the eyes of the public concerned
- the sign may not be submitted in bad faith and it may not be contrary to public order

- the sign must be available as a trademark; the sign must not be covered by anterior opposing rights.

Term

A Benelux Trademark is initially registered for a period of 10 years. Prolonging the registration for 10-year terms is possible.

Requirements after Registration

The trademark right can be extinguished if it has not been used for an uninterrupted period of five years. Otherwise, registration can be prolonged for 10-year terms.

Laws Regarding Unfair Competition or Passing Off: Existence of, Requirements and Remedies

Even when no trademark registration exists, a person who uses a particular sign in relation to goods or services may still prevent others from using the sign by making a claim for "passing off."

Requirements for Showing Infringement

The owner must show that the third party, in absence of the holder's consent:

- uses in the course of trade a sign identical with the trademark for products identical to those for which the trademark is registered
- uses in the course of trade a sign which, because of its identity or its similarity with the trademark and because of the identity or the similarity of the products covered by the trademark and the sign, there exists, on the part of the public, a risk of confusion; this risk includes the risk of association between the sign and the trademark
- uses in the course of trade a sign identical or similar with the trademark for products which are not similar with those for which the trademark is registered, when this trademark has a reputation in the Benelux territory and that the use without due cause of that sign takes unfair advantage of, unduly benefits from or is detrimental to the distinctive character or the reputation of the trademark
- uses a sign otherwise than to distinguish the products and that the use without due cause of that sign takes unfair advantage of, unduly benefits from or is detrimental to the distinctive character or the reputation of the trademark.

Remedies

See *Patents*.

A typical procedure often introduced in trademark infringement cases is a cessation action (prohibitive injunction). This procedure is comparable to summary proceedings and has the advantage of speed compared to an ordinary procedure. However, no urgency is demanded and the judge will render judgement as to the merits of the case. In a cessation action, no compensation for damages can be awarded. That involves a separate procedure.

COPYRIGHTS

Copyrightable Subject Matter

Copyright protects all works that are original, whether or not they possess artistic value. Neighboring rights are granted to performers, producers of phonograms and film producers as well as to broadcasting companies. Software can be by copyright-protected under the same conditions as other works.

Originality implies that the work must be:

- expressed in a tangible form (ideas are not copyright protected)
- the product of an intellectual activity
- a personal expression of the creator.

In general, the threshold for originality is rather low in Belgium.

Is Registration Required?

No registration or other formalities are required in order to obtain copyright in Belgium. However, in order to obtain proof of the date of creation, works can be registered in different ways (collecting society, notary, etc.).

Protection

The protection begins as from the moment the copyrightable subject matter has been materialized and expressed in tangible form.

Term

The duration of copyright protection is 70 years from the year of death of the author.

The duration of protection for ancillary rights is 50 years. The starting date of the protection depends on the type of ancillary right (performer's rights: as from the date of performance or date of publishing; producers and TV-broadcasting: as from the date of fixation).

Rights Conferred by Copyright

The author/creator of a work is entitled to two major categories of rights: patrimonial rights and moral rights.

In general terms, *patrimonial rights* consist of the right to:

- perform the work in public/broadcast the work
- reproduce the work (e.g., adaptations, translations, etc.)
- lend and rent the work.

The *moral rights* of the author/creator consist of the paternity right (the right to claim authorship of a work and have the name mentioned), the integrity right (the right to object to distortions and mutilations of the work or any other violation of the work, which damage his honour or reputation) and the right to public announcement (right to determine whether or not and in what way the work will be made public).

Exceptions and Limitations

The copyright owner's rights are limited in the sense that under certain conditions the following are allowed: literary or informative quotations of the work for scientific or educational purposes; the use of the work for educational purposes; the use of the work when reporting on current events; the use of the work as occasional background information; free private performance or reproduction (free private copy) of the work (with a restrictive interpretation of "private" or "domestic" use); audiovisual home copy of the work; criticism and parody of the work; performance of the work during a public exam; and copying the work for the preservation of cultural and scientific patrimony.

Ownership

The person who created the work, the author, is in principle the owner of the copyright.

An exception to this rule exists when an employee created the work and when the employment contract explicitly states that the copyright on works transfers to the employer.

For creations related to software, the roles are reversed: the employer is the owner of the copyright, unless the employment contract states the contrary.

In general, the creator can transfer copyright to a third party by means of a license agreement (temporary and limited transfer) or by means of a cession agreement (definite transfer).

Transfer contracts in Belgium must specifically stipulate all relevant rights of exploitation.

Standards of Infringement

There is copyright infringement as soon as one or more elements which reflect the originality of a given work are reproduced in another work, even if there is no risk for confusion between the two works.

Remedies

See *Patents and Trademarks* (cessation action).

International Treaties and Bodies of Law

- *EU Directives*
- *Bern Convention for the Protection of Literary and Artistic Works of September 9, 1886 (Paris Act of July 24, 1971, as amended on September 28, 1979)*
- *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961*
- *WIPO Copyright Treaty (December 20, 1996)*
- *WIPO Performances and Phonograms Treaty (December 20, 1996).*

TRADE SECRETS

Technical know-how is protected by general law. Also, a series of regulations is also implemented in laws and acts concerning co-workers or employees who have professional knowledge of industrial and trade secrets. These legal regulations are of both civil and penal nature.

Protection towards employees

- Penal protection.

Article 309 Penal Code: He who communicates to third parties, maliciously or deceptively, the secrets of the factory (industrial plant) where he was or still is employed, will be punished with correctional penalties.

- Labor-law protection.

Prohibition of communication: Employees may not divulge industrial secrets, business secrets or secrets connected to personal or confidential matters, of which they have obtained knowledge through the execution of their professional activities.

Prohibition of competition: A prohibition of competition indirectly protects the know-how of an undertaking by prohibiting employees when they leave the undertaking to

perform similar activities, or to be involved in promoting a competing company, or to work for a competing company. The scope of such a prohibition of competition is however strongly limited in time and subject matter.

Protection towards third parties

The principal, and almost sole, efficient weapon under Belgian law to protect the secret or confidential character of technical know-how towards third parties may be found in the general principles of contract law.

The holder of confidential knowledge may defend himself against theft of this knowledge by:

- on a contractual basis: prohibiting making the knowledge known to persons who receive the knowledge through a contractual route
- by initiating a claim based on civil liability against those who misappropriate the secret knowledge.

Third parties

- Infringements to contractual secrecy or confidentiality agreements.
- Based on extra contractual liability (torts): misappropriation of the secret knowledge in a way that may be judged tortious.

Using someone's know-how (for instance, by taking over a method) is not illegal or wrongful as such. Only when these activities lead to misleading and confusing the clientele, is there unfair competition. Apart from activities that lead to confusion, using someone's know-how becomes an act of unfair competition when one uses a combination of someone's efforts and knowledge.

DATABASE RIGHT

Database Right Subject Matter

Database right protects databases, which are defined as collections of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

The subject matter is twofold, and is protected by two types of rights:

- the content of the database is protected by *sui generis* rights (also called "rights of the producers of databases")
- the manner in which this content is arranged and/or selected (structure and selection criteria) is protected by copyright.

Requirements for the Database Right

A database is protected by *sui generis* rights if there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents.

Is Registration Required?

No registration is required to obtain *sui generis* rights.

Term

Fifteen years from the first of January of the year following the date of completion of the making of the database. If the database is made available to the public during this period,

the fifteen years term of protection shall start from the first January of the year following the date when the database is first made to the public. Any qualitatively or quantitatively substantial change will make the database qualify for a new fifteen years term of protection.

Ownership

Sui generis rights are owned by the producer of the database, namely the person who takes the initiative and bears the risks of the investments from which the database originates.

Rights of the Owner

The owner of *sui generis* rights can prevent:

- the extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database
- the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database, implying acts which conflict with normal exploitation of that database or that unreasonably prejudice the legitimate interests of the maker of the database.

DESIGN RIGHT

Design Right Subject Matter

Design right protects the aspect or look of a product. A product is defined as an industrial or handicraft article, including the elements made for assembly in a more complex product.

Computer programs and the products of which the aspect or look is not visible during the normal functioning are excluded from design protection.

Requirements for Registration

There are two main requirements for registration:

Novelty: Novelty in design right is an objective concept without territorial limitation, contrary to copyright protection. A design is new even if an identical design or a design that is only slightly different has not been made public before.

There is no novelty when the design could not have been known by the specialized people in the European Community, nor when the design has been secretly made public to a third person.

Individual Character: A design has an individual character when the overall impression that it has on a user differs from the impression every other design has on that same user.

Benelux law on design protection has a must-fit exception. Every design of which the aspect or look is necessary in order to connect it to another product is excluded from protection.

Requirements for Unregistered Designs

Unregistered designs are not protected under Benelux law design right. The adequate protection for a design that could be protected as an unregistered Community Design is copyright protection.

Term

The term is five years from the moment of application for registration. This term can be renewed for four periods of five years each, with a maximum of twenty years.

Ownership

The principle is that design-right protection is conferred on the creator of the product. However, legal persons can also be the owner of a design right, when the creator acts on behalf of the legal person or when the creator offers a service to the legal person.

Two situations are treated differently, unless contractually agreed otherwise:

- when an employee is creating a product in the execution of his work, the employer is the owner of the design right
- when a person commissions a product from a contractor, the commissioner will be the owner of the design right.

Rights of the Owner

The owner of the design right has an exclusive right to use the product that incorporates the design. He can thus object to the use of a product in which the design is incorporated or through which the design is applied and which has an identical appearance to the design that has been applied for or that does not give the informed user a different overall impression. The use is defined as the fabrication, offer, distribution, sale, delivery, rental, importation, exportation or exposition of the product or the storage of the product for such purposes.

Requirements for Showing Infringement

A design right is being infringed if two conditions are met:

- the product used has differences that are only secondary to the registered design
- the product is used for one of the exclusive rights conferred under the enelux law on design protection.

Defenses to Infringement

The exclusive right to a design does not confer the right to oppose:

- activities in the private environment and for non-commercial purposes, e.g., use for personal purposes
- activities for experimental purposes
- acts consisting of reproduction for educational purposes, if these actions are in conformity with honest trade practices, if they do not unnecessarily prejudice the normal exploitation of the work and when the source is mentioned.

Nor can the exclusive right can be opposed to:

- the equipping of vessels and planes that are registered in another country, but are temporarily situated in Belgium
- the importation of repair equipment and accessories for the reparation of vessels and planes registered in another country but temporarily situated in Belgium
- repairs to vessels and planes situated in another country but temporarily situated in Belgium.

International Treaties and Bodies of Law

Design right protection is the same in The Netherlands, Luxemburg and Belgium, of which the rules are laid down in the *Benelux Act on Design Rights*.