

# Damages - Belgium

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## Plan

### 1. Implementation of the Enforcement Directive (2004/48/EC) into Belgian law

- A. Act of 9 May 2007
- B. Act of 10 May 2007
- C. Belgian Code of Economic Law

### 2. Principles and Application

- A. Art. 52 Patent Act
  - General principles of Belgian Law
  - Methods
- B. Art. 29 Patent Act
- C. Procedural aspects

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## 1. Implementation of the Enforcement Directive (2004/48/EC) into Belgian law

### Introduction

- **The Enforcement Directive (2004/48/EC) has been implemented in Belgium by 2 different Acts :**

- Act of 9 May 2007 on civil law aspects of the protection of IPRs
- Act of 10 May 2007 on judicial law aspects of the protection of IPRs

- **Purpose of these 2 Acts:**

- To modernize the civil and judicial Belgian legislation concerning the enforcement of IPRs
- To centralize the competences of Courts concerning IPRs

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## 1. Implementation of the Enforcement Directive (2004/48/EC) into Belgian law

### A. Act of 9 May 2007 on civil law aspects of the protection of IPRs

- **Purpose : to improve IPR enforcement**

- Each IPR infringement leads to **civil liability** for the infringer (see Art. 52 Patent Act)
- **Insertion of rules concerning the evaluation and the compensation of damages (See preparatory works (doc 51-2943))**
  - ✓ Does not include the concept of qualified fault provided in article 13.1 of the directive (*Derogation more favorable for the rightholder*)
  - ✓ Willingness to refer to the caselaw of the Belgian Supreme Court ("Cour de cassation" / "Hof van cassatie") :
    - *The judge must ensure that all damage suffered by the victim is repaired*
    - *Each material breach of a law or a regulation constitutes in itself a fault which causes liability, provided that this fault is committed freely and consciously*
  - ✓ Based on Art. 1382 Civil Code (no derogation from substantive law)

➔ **OBJECTIVE LIABILITY ?**

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## 1. Implementation of the Enforcement Directive (2004/48/EC) into Belgian law

### B. Act of 10 May 2007 on judicial law aspects of the protection of IPRs

- **Changes in the competences of Courts hearing IPR litigation**
  - Exclusive competence of the Commercial Court concerning patent litigation
- **Changes concerning the “Descriptive Seizure” procedure** (“*Saisie-contrefaçon*”/ “*Beslag inzake namaak*”)
- **Preventive seizure of goods and freezing of bank accounts (to ensure the payment of damages)**
- **Measures to protect the alleged infringer**
  - **Liability of the rightholder where there is no infringement / valid right**
  - **Lodging by the rightholder of an adequate security**
    - In the procedure of “Descriptive Seizure” (“*Saisie-contrefaçon*”/ “*Beslag inzake namaak*”)
    - In interim measures

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## 1. Implementation of the Enforcement Directive (2004/48/EC) into Belgian law

### C. Belgian Code of Economic Law (not yet entered into force)

- **Codification of all the Belgian IPR laws (except for those concerning trademark and designs)**
- **References and changes in relation to the Unitary Patent**
- **Also lays down civil and judicial aspects of IPRs**
  - Centralization of the Patent Litigation before the (Commercial) Courts of Brussels

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# Plan

## 1. Implementation of the Enforcement Directive (2004/48/EC) into Belgian law

- A. Act of 9 May 2007
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## 2. Principles and Application

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## 2. Principles and Application – *Art. 52 Patent Act*

### Art. 52 Patent Act: (free translation) – Granted patent

(1) Any infringement to the rights of the patentee, as referred to in Article 27, constitutes an infringement involving the infringer's responsibility.

If the patent is a process used for creating a new product, every same product made by a person other than the patentee is, until proven otherwise, regarded as having created by this process. In producing evidence to the contrary, the defendant's legitimate interests in protecting his trade- and or business secrets are taken into account.

(2) (-)

Any licensee is entitled to intervene in infringement proceedings that are brought by the patentee or the usufructuary of the patent in order to obtain compensation for his own damage.

(3) Infringement proceeding may only be brought from the date when the patent is made available to the public and only for acts of infringement that have committed after that date.

(4) Notwithstanding paragraph (6), the injured party is entitled to compensation for any prejudice suffered as result of infringement.

(5) When the extent of injury cannot be determined in any other way, the judge may reasonably and fairly set the damages as a lump sum.

As damages, the judge may order that the plaintiff be given directly the infringing goods and, in appropriate cases, the materials and implements principally used in the creation or manufacture of these goods, and which are still in possession of the defendant. If the value of such goods, materials and implements are beyond the scope of the actual damage, the judge will fix a sum as balance to be paid by the plaintiff.

If the infringement is committed in bad faith, the judge may order, as damages, the transfer of all or part of the profits that have been realized as a result of the infringement, as well as accountability. Only expenses directly related to the concerned infringing activities are deducted when determining the transferred profit.

(6) If the infringement is committed in bad faith, the judge may order, for the applicant, the confiscation of the infringing goods, and, when appropriate, the materials and implements principally used in the creation or manufacture of those goods, and which are still in possession of the defendant. If the goods, materials and instruments are no longer in the possession of the defendant, the judge may allocate an amount equal to the price received for the goods, materials and implements sold. Confiscation as pronounced would cover damages up to the value of the goods confiscated.

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## 2. Principles and Application – Art. 52 Patent Act

### A. General principles of Belgian Law

- Principle of equivalence (= principle of actual harm suffered) (see Art. 52 (4) Patent Act)
  - Full compensation (*restitutio in integrum*) to the patentee for the loss he has suffered → to put him back in the position in which he would have been if the wrongful act had not occurred (see Cass 13 may 2009)
  - Demonstration of the existence and the extent of the damage – “*IN CONCRETO*” evaluation
  - Special rules in case of infringement in bad faith!
- But if no sufficient objective criteria: “*EX AEQUO ET BONO*” appreciation - **LUMP SUM** (see Art. 52 (5) Patent Act)
- In practice : often lack of objective tools; especially in the IP field → *Ex aequo et bono* assessment of damages
- **Remark** : No punitive damages allowed in Belgian Law!

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## 2. Principles and Application – Art. 52 Patent Act

### B. Methods

- ✓ **Compensation for loss of earnings (*Lucrum Cessans*)**
  - Assessment of the extent of the infringement (i.e. : number of infringing products,...)
    - Descriptive Seizure
    - Evaluation by the judge or by the judge-appointed expert
    - Right of information (see Art. 53 (2) Patent Act)
  - Calculation of lost earnings
    - Exploitation directly by the patentee:
      - ✓ Based on the **ASSUMED PROFITS** that the patentee would have made if he/she has commercialized the products him/herself
      - ✓ Evaluation criteria : production capacity and marketing, price elasticity, competition, target audience, ...
    - Exploitation by a third party (or no exploitation at all)
      - ✓ **LOSS OF ROYALTIES** that the infringer would normally have to pay if he/she had obtained the authorization of the patentee (license)

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## 2. Principles and Application – *Art. 52 Patent Act*

### B. Methods

#### ✓ Compensation for the loss suffered (*Damnum emmergens*)

- Decrease in the value of the patent, infringement of monopoly/exclusivity or brand image/reputation, compensation for the expenses incurred because of the presence of infringing products on the market
- Loss of an opportunity (eg. to increase profits or range of customers)
  - But limited by the Belgian Supreme Court (Cass. 1 April 2004) : only for a real loss of a probable opportunity (causal link)

#### ✓ Alternative for the allowance of damages:

- Possibility for the judge to **TRANSFER** to the patentee the infringing goods and the materials and implements principally used in the creation or manufacture of these goods if still in possession of the infringer (see Art. 52 (5) Patent Act)
  - ✓ If value of goods, materials and implements beyond the scope of actual damage compensation must be paid by the patentee

#### ✓ Case-by-case appreciation by the judge

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## 2. Principles and Application – *Art. 52 Patent Act*

### B. Methods

#### ✓ Special rules in case of infringement in bad faith (see Art. 52 (5) and (6) Patent Act)

##### Not foreseen in the directive

- **Alternative to the allowance of damages**
  - ✓ Possibility of **THE TRANSFER OF ALL OR PART OF THE PROFIT** made as a result of the infringement with deduction of the expenses directly incurred related to the infringing activities.
- **Complement to the allowance of damages**
  - ✓ If the goods, materials and implements are still in possession of the infringer; possibility of **CONFISCATION** of the infringing goods, and, in appropriate cases, the materials and implements essentially used in the creation or manufacture of these goods.
  - ✓ If the goods, materials and implements are no longer in possession of the infringer, possibility to allocate **AN AMOUNT EQUAL TO THE PRICE** received for the sale of the goods, materials and implements.
    - Value of the confiscated goods < damages → Additional damages
    - Value of the confiscated goods > damages → No compensation required !



➔ Full discretion of the judge to grant the measures provided in Art. 52 (5) and (6)

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## 2. Principles and Application – *Art. 52 Patent Act*

### B. Methods

#### ✓ Others Measures

- **In any event, order that the infringement be ceased ( + Cease and desist order)**
  - Also possible against an intermediary whose services are being used by a third party to infringe the patent (see Art. 53 (1) Patent Act)
- **Corrective measures (see Art. 53 (2) Patent Act)**
  - Recall, definitive removal from the channels of commerce or destruction of the infringing goods and materials and implements used to manufacture / import / market infringing
  - At the expense of the infringer
  - Proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties.
- **Publication of the decision (see Art. 53 (4) Patent Act)**

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## 2. Principles and Application – *Art. 52 Patent Act*

### B. Methods

#### ✓ Fees and Costs proceedings

- **Payment of the lawyers fees (see Belgian law of 23 April 2007 on the recoverability of fees and cost related to the assistance of an attorney)**
  - Fixed range of amounts – In conformity with the Enforcement Directive ?
- **Technical expert costs**
- **Costs of proceedings to be paid by the unsuccessful party**

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## 2. Principles and Application – *Art. 52 Patent Act*

### C. Responsibility of the patentee

- Enforcement of preliminary measures
- Non-infringement
- Invalidity of the patent

OBJECTIVE LIABILITY ?

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## 2. Principles and Application – *Art. 29 Patent Act*

### Art. 29 Patent Act (free translation) – Patent application

A reasonable compensation under the circumstances may be claimed by the patent applicant or by any third party who, between the date when the application was made available to the public on request of the applicant or given as a copy to the interested third party and the date of the patent's granting, has exploited the invention in a way that would be prohibited pursuant to the patent after this date.

(...)

If the parties do not reach an agreement, the compensation is determined by the judge; he may also impose the measures he considers necessary to safeguard the interests of the patent applicant and the third party.

(...)

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## 2. Principles and Application – *Procedural aspects*

### PROVISIONAL MEASURES

- ❑ Ex-parte proceedings
  - Preliminary injunctions (ex parte)  
(Art. 584 of the Judicial Code ; strict conditions)
  - Descripting seizure (“*Saisie-contrefaçon*” – “*Beslag inzake namaak*”)  
(Art 1369bis 1/10 of the Judicial Code)
- ❑ Preliminary injunctions (contradictory)  
  
➔ **NO DAMAGES**

### PROCEEDINGS ON THE MERITS

- ❑ “Normal” procedure on the merits  
➔ **DAMAGES**
- ❑ Cease and desist procedure  
➔ **NO DAMAGES**

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## 2. Principles and Application – *Procedural aspects*

- ✓ **Allowance of damages in cross-border litigation** (See Belgian Supreme Court, 29 November 2012, Liège 14 October 2010, Liège 6 December 2007)
  - If there is patent infringement **outside Belgium**, the Belgian court shall only be competent to decide on damages caused in Belgium by the infringing act.
  - BUT if there is patent infringement **in Belgium**, the Belgian court shall be competent to decide on all consequences of the infringement (including damages occurred in other countries).
- ✓ **Evidence and burden of proof**
  - **No implementation required ➔ Art. 870 Judicial Code** : Each party must provide evidence for the facts they are relying on.
  - **Right of information** (see Art. 53 (3) Patent Act) : Order that the infringer has to give all information available concerning the origin and the distribution networks of the infringing goods or services provided that such a measure is justified and proportionate.

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# Questions



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# Thank You !



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