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Belgium

INTELLECTUAL PROPERTY

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This country-specific Q&A provides an overview of intellectual property laws and regulations applicable in Belgium.

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BELGIUM
INTELLECTUAL PROPERTY

1. What different types of intellectual property rights exist to protect: (a) Inventions (e.g. patents, supplementary protection certificates, rights in trade secrets, confidential information and/or know-how); (b) Brands (e.g. trade marks, cause of action in passing off, rights to prevent unfair competition, association marks, certification marks, hallmarks, designations of origin, geographical indications, traditional speciality guarantees); (c) Other creations, technology and proprietary interests (e.g. copyright, design rights, semiconductor topography rights, plant varieties, database rights, rights in trade secrets, confidential information and/or know-how).

Patents and SPCs

In Belgium, patents are available to protect inventions that are new, involve an inventive step and are susceptible of industrial application. There is also a requirement that the invention be sufficiently disclosed in the patent application to enable the person skilled in the art to carry it out. Patents provide their owner with an exclusive right of exploitation for a limited period of time.

As it can take some years after the patent application has been filed to obtain regulatory approval for a pharmaceutical or phytopharmaceutical product, supplementary protection certificates (SPCs) are available to extend the term of patent protection byup to five years.

Know-how and trade secrets

Know-how and trade secrets are protected in Belgium consistently with the EU Trade Secrets Directive. The law defines a trade secret as any information which (a) is secret, in the sense that it is not generally known or accessible to those who normally deal with that kind of information, (b) has commercial value because it is secret, and (c) has been subject to reasonable measures to keep it secret. Trade secrets are protected against unlawful acquisition, use and disclosure.

Plant variety rights

Both national and Community Plant variety rights are available in Belgium, by registration, for new, distinct, homogenous and stable plant varieties. They confer to the breeder, or successor in title, an exclusive exploitation right in respect of the plant variety at hand. The exclusive right is however limited by the so-called “farmer’s privilege”.

Trade marks, GI’s and unfair competition

A sign may be registered as a Benelux or EU trade mark if it able to distinguish goods and/or services of one company from those of another, and of being represented on the register in a clear and complete manner. Hence, it must not be devoid of distinctive character or exclusively indicate the kind, quality, quantity, geographical origin or other characteristics of the goods or services. However, a sign that does not immediately appear to have distinctive character can acquire distinctiveness through use.

Registered trade marks can include a variety of signs such as words, names, designs, logos colours and even the shape of goods or packaging.

Certification and collective marks do not have the same function as ordinary trade marks but instead exist to provide an indication of standards or quality. A certification mark provides a guarantee that the goods or services bearing the mark meet a certain standard or possess a particular characteristic, whereas collective marks are an indication that the goods or services bearing the mark originate from members of a trade association.

Designations of origin, geographical indications and traditional speciality guaranteed are also protected in

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Belgium, on the basis of the relevant EU Regulations.

Trade names are protected through the law of unfair competition.

Copyright

In Belgium, copyright can cover any work of art or literature, provided it is original, i.e. it is an intellectual creation of the author reflecting his personality and expressing his free and creative choices. Protection arises automatically when the work is created.

Designs

The appearance of the whole, or part, of a product, that is new and has individual character, may be registered as a Benelux and/or Community design. Even without registration, designs can be protected, for a limited duration though. It is not possible to register features of an article that have exclusively a technical function or that interconnect with another part so as to perform a function.

Databases and topographies of semiconductors

Semiconductor topographies and databases are also protected in Belgium without any registration requirement or formality.

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

Right	Duration
Patents	20 years from the date of filing of the application, subject to the payment of renewal fees.
Supplementary Protection Certificates (SPC)	Up to 5 years from the date the relevant patent expires. The term of the SPC will be the time between the filing date of the relevant patent application and the date of grant of the marketing authorisation, minus 5 years, and subject to a maximum of 5 years, provided the appropriate fee is paid. An SPC for a medicinal active ingredient may be extended for a further 6 months if appropriate paediatric testing has been conducted.
Trade secrets	As long as the secret nature of the information is preserved.
Trade marks	
Registered trade marks	Indefinite, provided renewal fees are paid (every ten years).
Designs	
Registered Designs	25 years, provided renewal fees are paid (every 5 years).
unregistered Community Designs	3 years from the date the design was first made available to the public
Copyright	
Copyright	The life of the author plus 70 years from the end of the calendar year in which the author (or the last surviving author) dies. If the author is unknow, 70 years from publication.
Other	
Database rights	The duration of the *sui generis* database right is 15 years from the end of the calendar year in which the database was completed.
Plant varieties	30 years from the date of grant for potatoes, trees and vines and 25 years from the date of grant in all other cases.
Semiconductor topography rights	10 years from the end of the calendar year in which the topography was first commercially exploited, anywhere in the world; otherwise 15 years from the date the topography was fixed or coded for the first time.

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

The right to a patent belongs to the inventor(s) but may be freely assigned. If the invention is made by an employee in the course of the latter's employment, the employer is usually the first owner of the right. If the work is created outside of the normal duties of the employee's employment, the employee remains the owner.

The same applies in respect of plant variety rights.

Regarding copyright, as a general rule, all rights belong initially to the creator, even if the latter is an employee or if the work was created under a commission. It is therefore of primary importance, for businesses, to provide for a proper assignment clause in the agreements they conclude with a creator. As an

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exception, copyright is presumed to be assigned to the employer, unless the contract provides for the contrary, in respect of (original) software and databases.

Design rights belong to the designer but when a design is created by an employee or commissioned by a third party, the employer/the commissioning party is deemed to be the creator.

The first owner of a registered trade mark is the named applicant.

4. Which of the intellectual property rights described above are registered rights?

Patents (and SPCs), trade marks and plant variety rights are registered rights. The requirement of registration for a trade mark is particularly important because of a rule under Benelux law stating that a sign which is capable of registration as a trade mark but has not been registered, cannot receive any protection, even not under the laws on unfair competition (unless the trade mark is also used as trade name).

Designs can be registered or not, but the duration of protection for unregistered (community) designs is very short (cf. above).

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

Who?

The inventor or their successor in title, can file a patent application. The proprietor(s) of a patent can apply for an SPC.

The designer, or their successor in title, can file a design application.

Any individual or legal entity may seek registration of a trade mark. There is no prior use requirement.

For plant variety rights, the person entitled to the grant of plant breeders' rights in respect of a variety is the person who breeds it, or discovers and develops it, or their successor in title.

Patent applications may be filed by a qualified patent attorney, or a qualified lawyer. Designs and trademarks may be filed by a representative, including a qualified lawyer. It is usually advisable to use an IP professional to file registered rights and perform anteriority research.

Where?

For a Belgian patent, an SPC or a plant variety right, the application may be filed with the Belgian Intellectual Property Office. In contrast, a trade mark or a design may be filed either at EU level, with the EU Intellectual Property Office (EUIPO) or at the Benelux level, with the Benelux Intellectual Property Office (BOIP). There are no "Belgian" trade marks or designs.

Alternatively, a Belgian patent, a Benelux trade mark and a Benelux design may be obtained pursuant to the relevant international system, by filing an application with the World Intellectual Property Office (WIPO) or a competent national or regional office. For a plant variety right, an international application may be filed through the UPOV system.

For a European patent designating Belgium, an application is made to the European Patent Office. Alternatively, a European patent designating Belgium may be sought via the international system (governed by the Patent Cooperation Treaty) by filing an application at WIPO or with a competent national or regional office. Belgium is participating to the UPC system and an European patent shall therefore have unitary effect, in Belgium and the 16 other participating member states, unless the patent is opted out.

How?

While the European Patent Office examines the conditions of patentability before granting a patent, Belgian patents are granted without prior examination.

Regarding trade marks, the BOIP and the EUIPO verify the absence of so-called absolute refusal grounds.

6. How long does the registration procedure usually take?

Belgian patents are granted without prior examination and thus in average 2 years after the filing date. Due to the thorough examination process, European patents are granted much less rapidly (3-6 years following filing) and post-grant opposition before the EPO proceedings may further lengthen the duration of EPO proceedings.

Applying for a registered trade mark will generally take between 2-4 months in the Benelux, and on average 5 months before the EUIPO.

Applying for a registered design is a relatively short process and can take just a few days or weeks in both the Benelux and EUIPO since there is no formal examination.

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

Third party observations can be filed in relation to a patent application, enabling third parties to raise comments or objections. The examiner will consider any information provided in third party observations during the examination, but the third party will have no further involvement in the procedure.

In the case of trade marks, there is also a pre-grant opposition procedure, which will be discussed in questions 28 and 29.

In the case of European patents, any person may file a written opposition to the grant of the patent at the EPO, on one of the prescribed grounds (lack of patentability, insufficient disclosure, added subject matter) within nine months of the patent being granted. The parties' submissions in the *inter partes* opposition procedure are considered and decided upon by the EPO's Opposition Division, with possible appeal to be lodged with the Board of Appeal.

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

Generally, if, during the examination in the registration process of an IP right, the examiner raises objections to the right being granted, the examiner will write to the applicant explaining the objections and reasons therefor. In an attempt to overcome the objections, the applicant may correspond with the examiner (or attend an oral hearing) to further explain and, if appropriate, propose changes to the application.

Changes to a trade mark application may include, for instance, limiting the classes of goods or services for which the trade mark registration is sought. When a change is made to a patent application, it is usually to the claims of the patent, which delimit the scope of the invention. An applicant is not permitted to add new material to a patent application, so any changes must be supported by the content of the existing application.

If the final decision of the examiner is to refuse the application, detailed reasons will be given and the applicant may appeal the decision. For Benelux trade marks and designs, appeal can be lodged with the Benelux Court of Justice. The decisions of the EU-IPO may be appealed before the appeal division thereof, and the decisions of the latter me further be challenged before the European General Court. For European patent applications, appeal lies to the relevant Board of Appeal.

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

Patents

The official fee for filing an application for a Belgian patent is only EUR 50, while the search fee, is EUR 400. There is no substantive examination and thus no examination fee.

Annual renewal fees are payable for Belgian patents and patent applications, beginning on the second anniversary of the filing date (i.e. for the third year). The renewal fees increase from year to year, starting from EUR 40 (for the third year) up to EUR 320 (for the 20th year).

The official fee for an online application for a European patent up to 35 pages with up to 15 claims, including the application fee, European search and examination fee and grant fee, is approximately EUR 4.600. Annual renewal fees are payable for pending European applications, beginning on the second anniversary of the filing date. The renewal fee is EUR 530 for the third year, increasing to up to EUR 1775 as of the tenth (and following) year(s). After grant of a European patent designating Belgium the same renewal fees as for a Belgian patent will be due to the Belgian IPO. Renewal fees cease to be payable to the EPO once the patent is granted.

Trademarks

The filing fee for a Benelux (individual) trademark is EUR 244 for one class; additional fees are payable on additional classes (EUR 27 for the second, EUR 81 for the third and following classes), as well as for an accelerated registration.

The basic filing fee for an electronic application for an individual EU trade mark is EUR 850.

Registered designs

The filing fee for a Benelux Design is EUR 150. Supplements apply per extra drawing or design in the same application.

The basic filing fee for an electronic application for a Community design is EUR 350.

Fees for professional advice

It is important to note that applying for an intellectual property right can be complex and expensive. Very often, an applicant will instruct an appropriately qualified

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intellectual property professional, whose fees will be additional to the registration fees listed above.

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

Trade marks

Benelux and EU trade marks may be renewed 6 months before, or up to 6 months after, the renewal date. The renewal fee is EUR 350 for a Benelux (individual) trademark (plus EUR 29 for a second class and EUR 87 for each additional class of goods or services in the registration, plus EUR 135 if renewing in the 6 months after the renewal date). The basic renewal fee is EUR 850 for an EU trade mark. If not timely paid, the mark will be removed from the register; it may not be restored.

Patents

As mentioned above, annuities must be paid for a patent to be maintained in force. In case of late payment, additional fees are due. If no payment occurs within 6 months of the anniversary date of the patent, it will expire. It can however be restored in very specific circumstances; in particular, the applicant must show that, despite the non-observance of the deadline, they have been diligent. A restoration fee is due.

Registered designs

A registered design may be renewed up to 6 months before the renewal date, and up to 6 months after. The fees start at EUR 102 for a Benelux design, at EUR 90 for a Community design. If not timely paid, the registration will lapse.

11. What are the requirements to assign ownership of each of the intellectual property rights described above?

All intellectual property rights described above may be assigned, with the exception of the moral rights of authors.

Regarding copyright (and the neighbouring rights of performers), there are various requirements including clauses with respect to (a) the remuneration, extent and duration of the assignment for all means of exploitation considered, and (b) the payment of an appropriate and proportionate remuneration.

Regarding all registered rights, there is a requirement that the assignment shall be made in writing and be recorded with the relevant office.

If the IP right is jointly owned, in order to assign the whole of the right, each of the joint owners must execute the assignment. In case of an assignment in a share of a patent by one of the joint-owners, the other joint owners enjoy a right of first refusal.

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

There is no mandatory requirement to register assignments of IP rights in Belgium. However, registration is highly advisable because unless assignments are registered, they will not be enforceable towards a third party, e.g. who later acquires, in good faith, a conflicting interest in the right, and an action for infringement might moreover be inadmissible.

13. What are the requirements to licence a third party to use each of the intellectual property rights described above?

As far as copyright/neighbouring rights are concerned, the same requirement apply as regarding the assignment, provided the licensing party is the author or performer.

Regarding patents, trade marks and designs, there are no statutory formalities for licences to be in writing. In practice though, it is highly advisable for licences to be in writing, and signed by both parties, in order to confer certainty about their terms and to enable the licensee to have the benefit of registration for enforceability (where relevant).

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

There is no mandatory requirement to register licences of IP rights under Belgian law. However, it is prudent to do so because, until registered, the relevant transaction is ineffective against a third party who acquires a conflicting interest in good faith.

If a registered trade mark or design were to be infringed by a third party, and the licensee would like to take

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action together with the owner, the failure to register the license may not be invoked by the infringer (unless they claim a conflicting interest in the trademark/design in question). Whether it may be opposed in case of patent infringement, remains a matter of controversy.

There is no requirement (or even option) to register a licence of copyright or other unregistered rights.

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

A licensee shall, for the purpose of obtaining compensation for damage suffered, be entitled to intervene in infringement proceedings initiated by the owner of the IP right. In some instances, the exclusive licensee has moreover standing to sue, unless the license agreement provides otherwise.

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

Yes, there are criminal sanctions for the infringement of all IP rights, when the infringement occurs with an intention to harm the rightholder. The infringer may be sentenced both to penalties (in significant amounts) and prison (up to 3 years).

17. What other enforcement options are available for each of the intellectual property rights described above? For example, civil court proceedings, intellectual property office proceedings, administrative proceedings, alternative dispute resolution.

In Belgium, IP rights are most commonly enforced through civil court proceedings, most often before an Enterprise Court. In respect of patents, SPCs, EU trademarks and infringement and validity of Community designs, only the Enterprise Court of Brussels has jurisdiction.

Alternative dispute resolution requires the voluntary engagement of both parties (unless the parties have entered a contract which obliges them to use ADR). It is encouraged by the Code of civil procedure.

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

The duration of civil procedures depends on the complexity of the case, the conduct of the parties and the diary of the relevant court. Importantly, a fast track procedure is available for cease and desist actions (no damages are then awarded), which is usually completed within a 6 months' time.

The fees for bringing an action are very limited (a few hundred euros). The successful party in civil litigation is able to recover such fees as well as partially the legal fees .

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

An IP owner seeking to prevent the importation into the EU of products infringing its IP rights can file a customs notification with customs. An application is valid for a year, after which it must be renewed. Belgian customs prove to be particularly efficient in the detection of counterfeit goods.

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

No, they are never mandatory.

21. What options are available to settle intellectual property disputes in your jurisdiction?

Claims may be settled at any time, whether before, during or after the proceedings have been launched.

22. What is required to establish infringement of each of the intellectual property rights described above? What evidence is necessary in this context?

The necessary evidence of course depends on the IP rights concerned and the infringement invoked. In general all kinds of evidence are admissible.

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23. How does the court acquire any necessary information (fact or technical) and in what circumstances does it do so? In particular a) Is there a technical judge, a judge with technical experience, a court appointed expert, an expert agreed by the parties, and/or parties' expert witness evidence? b) What mechanisms are available for compelling the obtaining and protecting of evidence? Is disclosure or discovery available?

a. In patent disputes, parties' expert witness evidence is key. There are few judges with technical experience but this will change with the Unified Patent Court.

b. A tool which turns out to be very efficient in Belgium is the seizure in matter of counterfeit, which allows a right holder to collect evidence at the suspected infringer's premisses on the basis of an ex parte order of the court. A report will be filed by the court appointed expert, and samples may be taken.

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

There is no cross-examination under Belgian law. Both parties can access and comment on all evidence.

25. What defences to infringement are available?

One of the most common defences in infringement proceedings is that the right is invalid (for registered rights) or does not subsist (for unregistered rights). The burden of establishing such a defence lies upon the alleged infringer.

Another very common defence is that the disputed act does not constitute an infringement. For instance, the alleged infringer may argue that the product or process does not fall within the scope of what is claimed in the patent, or that copyright is not infringed because there was no copying, or the copying does not relate to a substantial part of the work.

Further, and generally speaking, once goods are put on the market in the European Economic Area by the proprietor of the relevant intellectual property right or with their consent, it is not an infringement to deal with those goods in Belgium.

Other defences depend upon the IP right in question (e.g. experimental use in patent litigation, parody in copyright, etc.).

26. Who can challenge each of the intellectual property rights described above?

A challenge against an IP right may be brought by anyone having a legitimate interest thereto, including of course the defendant to an infringement action.

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

Third party observations may be filed in respect of all registered rights during the registration procedure. In respect of European patents, a post-grant opposition is possible before the EPO, while a pre-registration opposition is possible in respect of (Benelux and EU) trade marks. A registered design may only be challenged through cancellation proceedings, either before the office or in court.

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

Benelux trade mark and designs may be challenged before the relevant office or in court by way of a counter claim. European patents can be opposed before the EPO and are also subject to cancellation by a court, including the Unified Patent Pourt if they have not been opted out. The main grounds of invalidity regarding patents are the lack of novelty, inventiveness or industrial application, insufficient disclosure and added matters. As far as trade marks are concerned the most frequently invoked grounds of invalidity are the absence of distinctiveness and the infringement upon a prior right.

29. Are there any other methods to remove or limit the effect of any of the intellectual property rights described above, for example, declaratory relief or licences of

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right?

Although declaratory relief actions are possible under Belgian law, there are not commonly used.

30. What remedies (both interim and final) are available for infringement of each of the intellectual property rights described above?

The main remedies in civil proceedings are preliminary injunctions, including as the case may be on the basis of ex parte proceedings (seizure in matter of counterfeit), damages, account of the infringer's profit, injunctive relief, delivery up or destruction of the infringing articles, and publication of the judgment.

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

In civil proceedings in Belgium, the losing party is liable for a capped amount in respect of the lawyer costs of the successful party. These amounts, set by Royal Decree, depend on the complexity of the case and the value of the dispute; they are not very high though (e.g. up to EUR 14.000 for preliminary order proceedings; up to EUR 45.000 for a dispute with a value exceeding 1million euros). The costs of technical expert witnesses, on the other hand are recoverable in full.

32. The Unified Patent Court ("UPC") [came into] [will come into] existence in certain European states on 1 June 2023, as did the introduction of European patents with unitary effect ("unitary patents"). Have industry-specific trends developed in your country in terms of the number of patent applicants seeking unitary patent protection and/or enforcing European patents or unitary patents before the UPC?

Belgium is a party to the UPC Agreement and it has established a local division thereof, which shall handle cases in not less than 4 languages, including English.

There is at this stage no available data about industry-specific trends developed in Belgium in terms of the number of patent applicants seeking unitary patent protection and/or enforcing European patents or unitary patents before the UPC.

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