

2023 – Study Question

Unjustified allegations of infringement of IP rights

National Group:	Belgium
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Date:	25 April 2024

I) Current law and practice

1) Does your current law draw a distinction between justified and unjustified allegations of infringement of IP rights?

Yes.

As an introduction, it can be stated that:

- On the one hand, the IP right holder notably has a fundamental right to an effective remedy and to a fair trial under Article 47 of the Charter of fundamental rights of the European Union (“**EU Charter**”) and a fundamental right to the protection of his intellectual property under Article 17 of the EU Charter;
- On the other hand, other economic operators have a fundamental right under Article 16 of the EU Charter to enjoy the freedom to conduct business in accordance with EU law and national laws and practices. Under Article II.2 of the Belgian Code of Economic Law (“**CEL**”), the freedom to conduct business is also guaranteed.

Although Belgian law does not provide for a statutory definition of the concept of “*unjustified allegations of infringement of IP rights*”, such practice is addressed and sanctioned through different areas of laws, including civil, procedural, economic and criminal law.

From the outset, it must be borne in mind that a finding that an allegation is unjustified is to a substantial extent decoupled from the question (on the merits)

of whether or not there has been an infringement of the right in question. An allegation is not *per se* considered unjustified because it is later found that there was no infringement and *vice-versa*.

2) What are the criteria for communications to be considered as an unjustified allegation of infringement under your current law?

The criteria applied by the Belgian courts to draw the line between “*justified*” or “*unjustified*” allegations of infringement depend on the area of law under which the practice is addressed.

a. Laws on unfair market practices

Unjustified allegations of IP rights’ infringement are generally addressed under the laws on unfair market practices, particularly under Article VI.104 CEL (formerly Article 95 of the Law of 6 April 2010 on market practices and consumer protection and Article 93 of the Law of 14 July 1991 on trade practices and consumer information and protection), which provides that:

“Any act contrary to fair market practices by which a company harms or may harm the professional interests of one or more other companies is prohibited.”⁽¹⁾

This catch-all provision covers a wide range of unfair market practices, including defamation (Dutch : *slechtmaking* or *zwartmaking* ; French : *dénigrement*) and abuse of rights (Dutch : *rechtsmisbruik* ; French : *abus de droit*).

As it appears from the case law (in particular see below), the Belgian courts classify unjustified allegations of IP rights’ infringement as an act of defamation in the vast majority of cases and as an abuse of rights in more exceptional cases (cf. *infra*), and thereby address these allegations as an act of unfair market practices falling within the scope of Article VI.104 CEL.

Defamation has been defined by the Brussels Court of Appeal – consistent with Belgian literature and case law – as follows:

“Defamation involves a particularly damaging attack on a trader, damaging his reputation or the reputation of his products, services or activities, by a defamatory or libelous act, or even by a simple criticism that allows him to be identified. In assessing whether there is unlawful defamation, it is irrelevant whether the allegation is correct or not and whether it is intended to confer a competitive advantage. Defamation can be explicit or implicit. In the latter case, it is sufficient that there can be no doubt among the public as

(1) Free translation.

to who is being targeted and what is meant. The right to freedom of expression does not prevent that information in the course of trade must be objective, correct, relevant and complete. If a seller has the right to criticise the business conduct and allegations of another seller, he must do so in such a way that he does not, unnecessarily, compromise that seller's reputation.”⁽²⁾

Examples of unjustified allegations of infringement that the Belgian courts have qualified as defamation include:

- e-mails sent by A-Fax and A-Safe to third parties whilst the question of infringement was still pending, in which they unsubtly stated that Boplan was counterfeiting and copying their products or otherwise infringing their IP rights.⁽³⁾
- a letter sent by Rovera Resine to Maison Rochette (i.e. the Belgian agent of Jaime) accusing Jaime of engaging in unfair market practices by slavishly imitating its collection of garden furniture, whilst the question of infringement was still pending before the Commercial Court of Paris.⁽⁴⁾
- a formal notice sent by Ohara and PA to Tawo's customers, in which they indicated that Tawo was infringing their IP rights and engaging in unfair market practices. The President of the Brussels Commercial Court held that the formal notice was clearly and primarily aimed at damaging Tawo's reputation, since Ohara and PA should have been aware at the time of sending the formal notice that any potential court proceedings could not lead to Tawo being held liable for infringing the design rights of Ohara and PA in the AHE-bracelet and that the copyrights to that design would be challenged in court.⁽⁵⁾
- letters sent by Clio Blue to Grabat's retailers who marketed the allegedly infringing jewellery, whilst Clio Blue's copyrights were being contested in ongoing proceedings on the merits. In particular, the fact that Clio Blue listed sanctions and threats in the letter (in particular the threat to report the matter to the public prosecutor so that criminal proceedings could be instituted)⁽⁶⁾ was considered disproportionate and clearly intended – by

(2) Brussels Court of Appeal, 13 September 2016, *RABG* 2017/5, p. 414. See also: Liège Court of Appeal, 13 December 2007, 2004/RG/254, *unpublished*, p. 18; Antwerp Commercial Court (Pres.), 4 October 2011, C/11/78, *unpublished*, p. 8-9; F. DE PATOUL, Z. PLETINCKX, L. VAN DE KERCHOVE, “Livre 84bis. Les pratiques de commerce (Volume 2)”, in *Guide juridique de l'entreprise – Traité théorique et pratique*, 2 ed., Liège, Wolters Kluwer, 2003, p. 23.

(3) Brussels Court of Appeal, 24 June 2014, *IEFbe* 1036, p. 39.

(4) Brussels Commercial Court (Pres.), 28 June 1985, *Ing.-Cons.* 1985, p. 300.

(5) Brussels Commercial Court (Pres.), 21 January 2021, *Ing.-Cons.* 2021/1, p. 156-157.

(6) Liège Court of Appeal, 13 December 2007, 2004/RG/254, *unpublished*, p. 19: “any manufacture, reproduction, adaptation or use whatsoever of the designs of the jewels in question, carried out without

means of intimidation – to stop these retailers from purchasing Grabat’s allegedly infringing jewellery.⁽⁷⁾

- e-mails sent by PVG International to customers after performing a descriptive seizure at SSG (a mere evidence-gathering procedure without any ruling on the merits of the infringement claim) stating that SSG was infringing its trade mark(s) by giving a vague presentation of what had actually happened during the descriptive seizure in support of its claims, in such a way as to create the impression among customers that two of SSG’s products had already been found to be infringing by a court ruling on the merits and, more generally, that the sale of all of SSG’s products was problematic.⁽⁸⁾
- letters sent by Alteximex to (i) Bowtex’ clients to inform them that Bowtex no longer had the right to market the disputed underwear, and to urge them to stop purchasing this product, failing which they would be complicit to the infringement;⁽⁹⁾ and to (ii) Bowtex’ suppliers asking to stop selling raw materials to Bowtex, failing which they would become complicit in the infringement; whilst no judgment had recognised any infringement of Alteximex’s IP rights and Alteximex’s request for an injunction had been dismissed.⁽¹⁰⁾
- a letter sent by Go Fast Sports Netherlands to its own customers, in which it described the energy drinks of Go Fast Sports Belgium (a former distributor and current competitor of Go Fast Sports Netherlands) as “*illegal imitations*” and warned that cooperation with Go Fast Sports Belgium would constitute a criminal offence; whilst proceedings on the merits were in progress to determine whether Go Fast Sports Belgium was entitled to distribute the allegedly infringing energy drinks.⁽¹¹⁾

the express prior consent of Clio Blue, is an infringement which the law punishes with a fine of between € 500 and € 500,000 and with imprisonment for a term of between one month and two years” [...] your retailing activity of counterfeiting jewels, presented as «knock-offs» of my customer’s original designs, therefore constitutes an illegal activity which Clio Blue intends to put an immediate end to. There is thus no doubt that Clio Blue will ensure that its rights are enforced by exposing you to the Public Prosecutor so that the fines and imprisonment provided for under criminal law can be applied to you [...] these criminal proceedings will be initiated without prejudice to the commercial proceedings to which you will be party in your capacity as an authorised distributor” (free translation).

(7) Liège Court of Appeal, 13 December 2007, 2004/RG/254, unpublished, p. 17-20.

(8) Brussels Commercial Court (Pres.), 22 October 2020, *Jaarboek Marktpraktijken* 2020/1, p. 43 and f.

(9) Brussels Commercial Court (Pres.), 1 April 2020, *Ing.-Cons.* 2020/2, p. 562: “We would like to draw your attention to the fact that by purchasing goods that infringe our design/model, you are making yourself complicit in Mr Souery’s/Bowtex’s infringement of our IP rights” (free translation)

(10) Brussels Commercial Court (Pres.), 1 April 2020, *Ing.-Cons.* 2020/2, p. 562-563.

(11) Hasselt Commercial Court (Pres.), 7 November 2008, *Jaarboek Handelspraktijken & Mededinging* 2008, p. 649.

- a formal notice sent by Air Liquide Benelux to ACP Belgium, in which Air Liquide Benelux invoked the infringement of a French patent,⁽¹²⁾ without (i) establishing the territorial scope of its rights in Belgium (ii) establishing the validity of the patent invoked; and (iii) referring to the claims of the patents concerned.⁽¹³⁾
- a letter sent by Alnaco to Collin-Lucy, in which Alnaco warned that Caltec's 'Santar' lime neutralizer that Collin-Lucy was selling infringed its Belgian patent, while the infringement was not established.⁽¹⁴⁾
- e-mails sent by A. to prospects of R., in which A. (i) emphasised the design of his 'Micro Designer Tag' by attaching drawings of the design to his emails, while he could not claim protection for such design; and (ii) warned them about proceedings concerning the use of "variants" that would infringe a patent without providing concrete and precise information in that regard, limiting oneself to attaching 'a' patent drafted in English of which only the accompanying drawings were comprehensible to them.⁽¹⁵⁾
- letters sent by Herbica to its customers, in which it claimed that it had the exclusive right to sell the products associated with the Calendula and Herbica beauty line and that all other sellers (thereby implicitly referring to ACL Aditi) were selling counterfeit products.⁽¹⁶⁾

Abuse of rights is defined in Article 1.10 of the Belgian Civil Code ("C.C.") as "*the exercise of a right in a manner which manifestly exceeds the limits of*

(12) Brussels Commercial Court (Pres.), 23 December 2015, 15/06510 AC, unpublished, p. 3: "We have been informed by our client Crystal Computing in Ghlin, at whose premises we carried out tests, that you were proposing to implement a technology patented by Air Liquide without our consent and perhaps without knowing it."

On 2 December 2014, the Air Liquide group filed a patent in France concerning the use of coupling certain biocides with CO₂ and in particular hypochlorites/CO₂ to improve, among others, the disinfection of water circulating in cooling towers.

As you are no doubt aware, this first filing in France confers to the Air Liquide group an IP right protecting this invention in particular in Europe as of 2 December 2014. Consequently, we are giving you formal notice to immediately cease the implementation of the technology patented by the Air Liquide group.

A copy of this letter will be sent to the client.

In the event of infringement of the Air Liquide group's rights, we will take all appropriate measures to cease such infringement, without prejudice to any damages to which we may be entitled [...]" (free translation).

(13) Brussels Commercial Court (Pres.), 23 December 2015, 15/06510 AC, unpublished, p. 8-9.

(14) Brussels Court of Appeal, 24 October 2000, 1999/AR/2510, unpublished, p. 6-7.

(15) Antwerp Commercial Court (Pres.), 25 September 2007, RABG 2012/1, p. 58-59.

(16) Ghent Commercial Court (Pres.), 22 December 2003, *Jaarboek Handelspraktijken & Mededinging* 2003, p. 290: "It should be pointed out, however, that Els Lombaert has exclusive sales of this product and that all others, both past and present seller(s) are no longer allowed to offer this product and this on the entire European market. Others offering a similar product are therefore offering a counterfeit product" (free translation).

the normal exercise of that right by a prudent and reasonable person placed in the same circumstances”.⁽¹⁷⁾

This statutory definition is consistent with the broad definition given to the concept of abuse of rights by the Belgian Supreme Court in its landmark judgment of 10 september 1971.⁽¹⁸⁾ The Belgian Supreme Court has also developed a number of specific criteria that can be applied to determine whether an abuse of rights is present in a particular case. For example, there will be abuse of rights when “*a right is exercised without a reasonable and sufficient interest*”⁽¹⁹⁾ or “*laws or legal institutions are used contrary to the purpose for which they were established*”.⁽²⁰⁾

An *example* of an unjustified allegation of IP rights’ infringement that qualified as an abuse of rights by Belgian courts was United Video Properties Inc. (“ROVI”)’s formal notice to Telenet, in which ROVI invoked three patents (i.e. one of which had no legal effect in Belgium and the other two were respectively subject to opposition and invalidity proceedings) to get Telenet to agree to acquire a licence to ROVI’s portfolio of around 100 patents, and in which ROVI failed to indicate not only which relevant patent from its portfolio (or patent claims) it considered applicable, but also which act it considered to infringe the patent claim in question. The President of the Antwerp Commercial Court also took into account in its assessment ROVI’s failure to provide such indications following Telenet’s express request during their negotiations about the licensing of ROVI’s patent.⁽²¹⁾

In another case, the Brussels Court of Appeal judged that “*the authorisation to proceed with a descriptive seizure is not a judgment on the merits of the existence of an intellectual property right and/or the allegation of infringement thereof. A descriptive seizure cannot be diverted from its purpose (in particular, the collection and preservation of any evidence of infringement or its extent) in order to give third parties the impression that the seized party*

(17) Free translation.

(18) Cass., 10 september 1971, *Arr.Cass.* 1972, p. 42.

(19) Cass., 30 January 2003, *RW* 2005-2006, p. 1220; Cass., 4 March 2010, C.08.0324.N, www.juportal.be, p. 2-4.

(20) Cass., 27 January 2020, *RW* 2020-2021, p. 495; Cass., 15 February 2019, C.18.0428.N, www.juportal.be, p. 2; Cass., 28 September 2018, C.18.0058.N, www.juportal.be, p. 2.

(21) Antwerp Commercial Court (Pres.), 3 April 2012, *Jaarboek Marktpraktijken* 2012, p. 929: “*Given the breadth and depth of our portfolio, we believe that it is not necessary for us to illustrate infringement by reference to every relevant patent in the portfolio. In our view, it is sufficient to illustrate infringement of at least one patent in the portfolio and provide TELENET with the information regarding the entire portfolio that allows TELENET to determine the conditions under which it wishes to take out a licence. This is the same process we have used with respect to UPC and all our other operator licensees*” (free translation).

has already been found to have infringed an intellectual property right and to discredit him.”⁽²²⁾ However, it was not expressly qualified as “abuse of rights” in this decision.

b. Laws on misleading market practices

In some cases, the Belgian courts have addressed unjustified allegations of IP rights infringement under the laws on misleading market practices, particularly under Article VI.105, 10°, CEL, which provides that:

“A market practice that is accompanied by false information and is therefore based on untruths or, even if the information is factually correct, deceives or is likely to deceive a company in any way, including by its general presentation, with regard to one or more of the following elements, and causes or is likely to cause it, in either case, to take a decision on a transaction that it would not otherwise have taken : (...) 10° communicating degrading information about another company, its goods, services or activity.”⁽²³⁾ (emphasis added)

Examples of unjustified allegations of IP rights’ infringement that the Belgian courts have qualified as degrading advertising include:

- e-mails sent by PVG International to customers after performing a descriptive seizure stating that SSG was infringing its trademark rights.⁽²⁴⁾
- a formal notice sent by Air Liquide Benelux to ACP Belgium (and having been passed on in a commercial communication to an Air Liquide Benelux client), in which Air Liquide Benelux invoked the infringement of a French patent, without establishing the territorial scope of its rights in Belgium and the validity of the patent invoked, and without referring to the claims of the patents concerned.⁽²⁵⁾
- a false communication by Pollogen about La Poppe BV’s Oxygen+ device being counterfeit.⁽²⁶⁾
- a communication by Occhio to Malvern Instruments’ clients and prospects with the purpose of informing them or insinuating that some of Malvern Instruments’ products infringed some of Occhio’s patents.⁽²⁷⁾
- e-mails sent by A. to prospects of R., in which A. tried to persuade them not to purchase R.’s “variants” by warning them that these “variants” were

(22) Brussels Court of Appeal, 18 March 2013, *Ing.-Cons.* 2013/1, p. 225 and f. (free translation).

(23) Free translation.

(24) Brussels Commercial Court (Pres.), 22 October 2020, *Jaarboek Marktpraktijken* 2020/1, p. 43 and f.

(25) Brussels Commercial Court (Pres.), 23 December 2015, 15/06510 AC, *unpublished*, p. 3, 8-9.

(26) Brussels Commercial Court (Pres.), 5 May 2023, *IEFBE* 3686, p. 24.

(27) Liège Commercial Court (Pres.), 12 November 2009, *IEFBE* 1230, p. 12.

infringing his patent rights, while A. had not brought any infringement proceedings against R.⁽²⁸⁾

Examples of allegations of IP rights infringement that were *not* considered as an *unfair market practice and/or a misleading market practice* include:

- a letter sent by Laboratoires Titra to film industry professionals warning that “*it is well known that certain laboratories use processes that infringe our patent*”,⁽²⁹⁾ by which Laser Title Industry felt implicitly targeted by the fact that it was in Belgium the main if not the only competitor of Laboratoires Titra, was *not* considered as an act of *defamation nor* as a *degrading advertisement*. The Brussels Court of Appeal held, among other things, that the warning in question was expressed in very general terms, namely by using an indefinite plural (“*certain laboratories*”), and that the statement “*it is well known that certain laboratories use processes that infringe our patent*” might be denigrating, but was nonetheless a permissible advertising exaggeration and was countered by the statement “*we will take appropriate legal action against any unlawful use of our process*”,⁽³⁰⁾ the outcome of which was still open.⁽³¹⁾
- a formal notice sent by Geobra Brandstatter to Jouets Eisemann, in which it referred to a German court decision declaring Big Spielwarenfabrik–Jouets Eisemann’s supplier – to be infringing its designs, was *not* considered as *fault nor* an *abuse of rights*. The Liège Court of Appeal considered that (i) although the German court had ruled that Big Spielwarenfabrik had not infringed Geobra Brandstatter’s designs nor committed any act of unfair competition, several courts had concluded that there was infringement at the time that the formal notice was sent (ii) the injunction given to Jouets Eisemann was not made inconsiderately or in such a way as to mislead Jouets Eisemann as to its chances in opposing it (iii) Geobra Brandstatter was in no way seeking to surprise Jouets Eisemann, which was invited to involve Big Spielwarenfabrik in the dispute (iv) Jouets Eisemann complied too easily with the injunction that it knew was not a court decision and did not even try to obtain information or request indemnification from Big Spielwarenfabrik (v) it was as if Jouets Eisemann, likewise Geobra Brandstatter, was convinced of the counterfeit.⁽³²⁾

(28) Antwerp Commercial Court (Pres.), 25 September 2007, *RABG* 2012/1, p. 56-58.

(29) Free translation.

(30) Free translation.

(31) Brussels Court of Appeal, 4 December 1997, *Ing.-Cons.* 1997 p. 186-187.

(32) Liège Court of Appeal, 18 May 1993, *Ing.-Cons.* 1997, p. 284.

- the insinuations made by Grosfillex’s managers to the manager of Hubo – Dumaplast’s client – that, in the context of the ongoing Belgian proceedings concerning the alleged counterfeit of certain decors of Dumaplast by Grosfillex, Dumaplast had already had to recall products from the French and English markets, were not considered to constitute an act of *defamation* nor a *degrading advertisement*. The Court considered that the email presented as evidence of the alleged defamation and in which Hubo’s manager said to Dumaplast that “*Grosfillex did indicate during a conversation that a judgment had been handed down against you in France and/or England in which goods were taken away from customers. I don’t know where/when and from whom exactly*”,⁽³³⁾ was very vague and did not allow identification with sufficient accuracy what exactly was discussed during the conversation between Hubo’s and Grosfillex’ managers.⁽³⁴⁾

c. General tort liability regime

Unjustified allegations of IP rights’ infringement can also be addressed under the *general tort liability regime*. Article 1382 of the Old Civil Code (“**Old C.C.**”) provides that:

“Any act whatsoever by man which causes damage to another person obliges the person through whose fault it occurred to make reparation for it.”⁽³⁵⁾

The damage suffered as a result of an attack on the reputation may open the right to compensation. If it is found that the allegation was unjustified, then it is likely that it constitutes a wrongful act. The damaged person must then establish the existence and extent of the damage suffered and the causal link between the damage and the wrongful act.

For example, the Antwerp Court of First Instance held Koninklijke Philips Electronics’ instruction to the Belgian customs authorities to detain Far East Sourcing’s razors, whereas Koninklijke Philips Electronics had failed to provide any indication that Far East Sourcing intended to ship those goods to consumers of one of the EU Member States where it enjoyed design and copyright protection constituted a fault. The Court ruled that Far East Sourcing suffered damage because of this fault, particularly since the razors in question had become worthless and unmarketable in the meantime. The Court

(33) Free translation.

(34) Brussels Court of Appeal, 30 March 2021, *Ing.-Cons.* 2021/2, p. 373; *IRDI* 2021/2, p. 159; *RABG* 2021, n° 19-0, p. 1933.

(35) Free translation.

therefore ordered Koninklijke Philips Electronics to pay a compensation of 21,353.70 EUR.⁽³⁶⁾

3) What kind of communications (and by whom) are considered as allegations of infringements of IP rights under your current law? E.g., *inter partes* correspondence, mass communications, communications by advisers, etc.

As detailed above, various types of communication originating from a wide range of actors can be considered as (unjustified) allegations of IP rights' infringement.

In the cases reported under Question 2, these were mainly communications (letters, e-mails) sent by the IP right holder to third parties,⁽³⁷⁾ such as agents,⁽³⁸⁾ retailers,⁽³⁹⁾ customers/clients,⁽⁴⁰⁾ prospects,⁽⁴¹⁾ suppliers of the alleged counterfeiter.⁽⁴²⁾

Nonetheless, it could also be communications such as a formal notice sent by the IP right holder to the alleged counterfeiter⁽⁴³⁾ or letters sent by the IP right holder to his own customers.⁽⁴⁴⁾

Legal actions and the provisional enforcement of Court decisions that are still under review by a higher court could also be understood as unjustified allegations for the purpose of this question.

4) Under your current law, does the doctrine concerning unjustified allegations apply to all kinds of allegedly infringing activities alike?

Yes, the doctrine concerning unjustified allegations applies to all kinds of allegedly infringing activities. However, in essence, the current case law is comprised of unjustified allegations against secondary (notably sellers and distributors) alleged infringers rather than primary infringers (manufacturers).

(36) Antwerp Court of First Instance, of 14 February 2014, *Ing.-Cons.* 2014, p. 268.

(37) Brussels Court of Appeal, 24 June 2014, *IEFBE* 1036, p. 39.

(38) Brussels Commercial Court (Pres.), 28 June 1985, *Ing.-Cons.* 1985, p. 300.

(39) Liège Court of Appeal, 13 December 2007, 2004/RG/254, *unpublished*, p. 17-20.

(40) Brussels Commercial Court (Pres.), 21 January 2021, *Ing.-Cons.* 2021/1, p. 156-157; Brussels Commercial Court (Pres.), 1 April 2020, *Ing.-Cons.* 2020/2, p. 562-563; Liège Commercial Court (Pres.), 12 November 2009, *IEFBE* 1230, p. 12; Brussels Court of Appeal, 24 October 2000, 1999/AR/2510, *unpublished*, p. 6-7.

(41) Liège Commercial Court (Pres.), 12 November 2009, *IEFBE* 1230, p. 12; Antwerp Commercial Court (Pres.), 25 September 2007, *RABG* 2012/1, p. 56-59.

(42) Brussels Commercial Court (Pres.), 1 April 2020, *Ing.-Cons.* 2020/2, p. 562-563.

(43) Brussels Commercial Court (Pres.), 23 December 2015, 15/06510 AC, *unpublished*, p. 8-9; Antwerp Commercial Court (Pres.), 3 April 2012, *Ing.-Cons.* 2012/1, p. 81-82.

(44) Hasselt Commercial Court (Pres.), 7 November 2008, *Jaarboek Handelspraktijken & Mededinging* 2008, p. 649; Ghent Commercial Court (Pres.), 22 December 2003, *Jaarboek Handelspraktijken & Mededinging* 2003, p. 290.

5) What kind of remedies are available under your current law to the party who has been subject to such unjustified allegations of infringement:

a. Damages?

Yes, as discussed above, Article 1382 Old C.C. provides for the general tort liability regime.

However, the award of damages, even substantial damages, is not frequent in the current case law. One example is the compensation of 21.353,70 EUR awarded by the Antwerp Court of First Instance, in its judgment of 14 February 2014, to Far East Sourcing for the damages suffered as a result of the fault of Koninklijke Philips Electronics NV in instructing the Belgian customs authorities to detain Far East Sourcing's razors, whereas Koninklijke Philips Electronics had failed to provide any indication that Far East Sourcing intended to ship those goods to consumers of one of the EU Member States where Koninklijke Philips Electronics enjoyed design and copyright protection.⁽⁴⁵⁾

Another possible source of damages is when the alleged infringer refrained from marketing or was ordered by a court decision not to market the alleged counterfeits (resulting in missed revenues):

- If the alleged infringer refrained from marketing, then he should establish that it was as a result of the unjustified allegation and that this unjustified allegation is a wrongful act. The precise request made by the IP right holder is a relevant element: did he put the alleged infringer on notice to refrain from marketing his products or did he merely inform the alleged infringer of his rights? In addition, the Supreme Court considers that *“the injured party of a wrongful act is in principle entitled to full compensation for his damages. He is not obliged to limit the damage as much as possible. He must only take reasonable measures to limit the harm if that is consistent with the conduct of a reasonable and prudent person.”*⁽⁴⁶⁾ This case law can be relevant in the case of unjustified allegations if a reasonable and prudent person would not have refrained from marketing his products after being informed or put on notice by the IP right holder.
- If the alleged infringer was ordered by a court not to market the alleged counterfeits, then two situations must be distinguished:
 - (i) If a court order containing a market ban (be it as a provisional measure or as a decision on the merits) is reversed after review by a higher

(45) Antwerp Court of First Instance, 14 February 2014, *Ing.-Cons.* 2014, p. 268.

(46) Free translation.

court but has been provisionally enforced by the IP right holder (i.e not voluntarily by the alleged infringer) in the meantime, there is under Article 1398 of the Belgian Judicial Code (“**J.C.**”) a strict (risk-based) liability (Cour de cassation, 3 May 2018 and 7 April 1995) (discussed by some).⁽⁴⁷⁾⁽⁴⁸⁾

- (ii) If a provisional court order containing a market ban was enforced, but it is later found in the procedure on the merits that the IP right invoked was not valid or not infringed, then the IP right holder is NOT objectively liable and the alleged infringer must establish that the IP right holder made a wrongful act in requesting and/or enforcing the provisional court order.

In this regard, Article 1369^{ter} J.C. provides that:

“§1. Where Article 584 of the Judicial Code is applied by a person entitled to take legal action to stop an act infringing an intellectual property right referred to in Article 1369bis/1, the provisional measures shall be revoked or shall cease to have effect, at the request of the defendant, if the plaintiff has not instituted, within a reasonable period of time, an action leading to a decision on the merits before a court of competent jurisdiction, which period of time shall be determined by the judicial authority ordering the measures or, in the absence of such determination, within a period not exceeding twenty working days or thirty-one days, whichever is the longer, from service of the order.

§2 The court may make the measures referred to in §1 subject to the provision by the claimant of a suitable bond or an equivalent guarantee adequate to ensure possible compensation for any loss suffered by the defendant, in accordance with the provisions of paragraph 3.

§3 In cases where the provisional measures are revoked or cease to apply as a result of any action or omission by the plaintiff, or in cases where it is subsequently found that there has been no infringement or threat of

(47) Prof. Ludo Cornelis question whether this provision effectively provides for a regime of objective liability, see for example p. 14 and f. of the advice of 2 July 2015 of the Belgian council for intellectual property on the amendments to be made to various provisions of the Judicial Code relating to seizure-description.

(48) *“Pursuant to Article 1398(1) of the Judicial Code in its applicable version, provisional enforcement of the judgment shall be at the sole risk of the party ordering it. It follows that if such a judgment is reformed or set aside in whole or in part, the party ordering its enforcement shall, in addition to the restitution of what it has received pursuant to the reformed or set aside judgment, compensate for the damage caused by the mere enforcement, without requiring any bad faith or fault within the meaning of Articles 1382 and 1383 of the Civil Code”* (Cass., 3 May 2018, *RABG* 2018/18, p. 1683 and f., free translation; in this sense, see also Cass., 24 September 2018, *TIBR* 2019/2, RS-89).

infringement of the intellectual property right in question, *the court may order the plaintiff, at the request of the defendant, to pay appropriate compensation for any damage caused by these measures.*”⁽⁴⁹⁾ (emphasis added)

The distinction between (i) and (ii) was criticised by legal scholars⁽⁵⁰⁾ notably because the obstruction of the legitimate commerce is an objective wrongful act (art. II.2 and II.3 CEL) and a provisional court order cannot by its very nature affect the merits of the case (art. 1039 J.C.). However, this distinction is still applied by the Belgian courts following the Bayer decision (12 september 2019, C-688/17) from the ECJ.⁽⁵¹⁾ However, in the recent Mylan decision (C-473/22), the ECJ held that “*article 9(7) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as not precluding national legislation which provides for a mechanism for compensation for any injury caused by a provisional measure, within the meaning of that provision, based*

(49) Free translation.

(50) See, among others, the note by F. de Visscher under Cass., 11 March 2005, A&M 2005, p. 400 and f.; J. VAN COMPERNOLLE and G. DE LEVAL, “Effets d’une décision contraire du juge du fond sur l’exécution ‘une ordonnance de référé antérieurement ordonnée, ou ‘qui perd gagne’”, JT, 2014, p. 537 and f.

(51) See, among other examples, for a recent application: Brussels Court of Appeal, 11 october 2022, Ing.-Cons. 2022/4, p. 893 and f. Referring to § 50 to § 70 of the Bayer decision from the European Court of Justice (“ECJ”) of 12 september 2019 (C-688/17) the Court of Appeal of Brussels ruled, among other things, that:

“*The Court of Justice’s considerations cited above leave no room for objective liability based solely on the withdrawal of provisional measures (...)*

This applies even if the patent on the basis of which the provisional measures were granted was later revoked or invalidated. Even if the conditions of Article 9(7) of the Directive are met, and it is established that there is no infringement or threat of infringement of an intellectual proprietary right, that fact does not, according to the Court of Justice, imply that the competent national courts are automatically and in any event obliged to order the applicant for provisional measures to compensate for the damage suffered as a result of those provisional measures (Court of Justice, Bayer, § 52). To hold otherwise, according to the ECJ, would have the effect of deterring the holder of the intellectual property right from making use of the measures provided for in Article 9 of the Enforcement Directive, and that would be contrary to the purpose of that directive, which is to ensure a high level of protection of intellectual property. However, the Court of Justice does leave room for national rules that allow the court to take due account of all the objective circumstances of the case. In doing so, national courts should provide guarantees to ensure that, in particular, the procedures set out in Article 9 of the Enforcement Directive are not used unlawfully, and should consider whether the claimant in a particular case has not abused those measures and procedures.

Article 1382 Old Civil Code allows the court to take into account the objective circumstances of the case, and provides a sufficient safeguard and counterweight against abuse of provisional measures, without this safeguard or counterweight overly discouraging recourse to this procedure.

The fact that the damage caused by a patentee may not be compensated in the absence of proven fault within the meaning of Articles 1382 and 1383 of the Old Civil Code or proven bad faith if a decision is later taken to invalidate or revoke the patent does not create a situation contrary to public policy.” (free translation – emphasis added)

A Supreme Court review is pending against this decision and the impact of the ECJ’s more recent decision of 11 January 2024 in the Mylan/Gilead case (C-473/22) remains to be seen.

on a system of strict liability of the applicant for those measures, in the context of which the court is entitled to adjust the amount of damages by taking into account the circumstances of the case, including whether the defendant played a part in the occurrence of the injury”. This decision’s impact in Belgium remains to be seen.

In addition, in the case where an IP right holder obtained and enforced an order for descriptive seizure (whether or not coupled with a seizure *in rem*), Article 1369bis/3 J.C. provides that:

“The President may impose on the applicant the obligation to deposit a suitable bond or an equivalent guarantee intended to ensure possible compensation for any prejudice suffered by the defendant, in accordance with the provisions of §2. In this case, a copy of the order shall only be issued upon proof of the deposit made. § 2 In cases where the measures of description or seizure are repealed or cease to apply as a result of any action or omission on the part of the claimant, or in cases where it is subsequently established that there has been no infringement or threat of infringement of the intellectual property right in question, the court may order the claimant, at the request of the defendant, to pay the latter appropriate compensation for any damage caused by these measures.”⁽⁵²⁾ (emphasis added).

The view of the majority of the case law until now is that this provision does not establish an objective liability regime and that the seized party must establish a wrongful act from the IP right holder.⁽⁵³⁾

(52) Free translation.

(53) In this sense, see Brussels Court of Appeal, 28 February 2018, *Ing.-Cons.* 2018/2, p. 316 and f.: “Neither from Article 1369bis/3, § 2, of the Judicial Code nor from the parliamentary preparatory works of the Law of 10 May 2007, does it appear that this Article created an objective liability on the part of the applicant, in the scenario that a court decision was executed pursuant to which authorisation was granted to proceed to seizure in respect of counterfeiting, when the measures of description or seizure were revoked or when they lapsed on account of any act or omission, on the part of the applicant, or when it was later established that there was no infringement or threat of infringement of an intellectual property right.

In this regard, it makes no difference whether descriptive or seizure measures were resorted to.

Moreover, determining an objective liability could discourage the applicant-holder (or the one who believes to be the holder) of an intellectual property right from using the procedure of seizure of counterfeiting, which could lead to an erosion of this procedure.

Even where the applicant-holder of an intellectual property right has no doubt whatsoever about his intellectual property right or, more so, this intellectual property right enjoys a legal presumption of validity (which is, for example, the case for the Union trademark, under Article 127, 1 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the Union trade mark, and for the registered Community design under Article 85, 1 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, in short ‘CMR’), it can indeed never with certainty foresee the outcome of judicial or administrative proceedings for instance as a result of a (counter)action for a declaration of invalidity or revocation of his intellectual property right. Moreover, different competent authorities may rule differently in that respect.

In a case where the IP right holder made a statement about a model disclosed to the public prior to its registration, the Brussels Court of Appeal considered that:

“By virtue of the disclosure referred to above, the infringement of the design invoked by D2P could reasonably be challenged, in particular by challenging the validity of the ‘snowfall design’ (no infringement if no valid design), which D2P knew or at least should have known. By failing to inform the President of the aforementioned circumstances, by seeking seizure measures in those circumstances and proceeding to execute the authorised attachment measures, D2P committed a fault within the meaning of Article 1382 of the Civil Code. It did not behave as an honourable and reasonable applicant/holder of an intellectual property right, placed in the same circumstances. He fell short of his general duty of care.”⁽⁵⁴⁾

b. Injunctions against such allegations?

Yes. Under Article XVII.1 CEL, the President of the Commercial Court may establish the existence and orders the cessation of an act that violates the provisions of the CEL.

Several of the decisions referred to in Question 2 have also resulted in injunctions to put an end to unjustified allegations of IP rights infringement:

- In his judgment of 3 April 2012 (referred to under Question 2), the President of the Antwerp Commercial Court ordered ROVI to cease the unfair market practice, subject to a penalty of 25,000 EUR per breach of this injunction.⁽⁵⁵⁾
- In its judgment of 24 June 2014, the Brussels Court of Appeal prohibited A-FAX and A-SAFE from communicating by any means, directly or indirectly, in any form whatsoever, that Boplan was counterfeiting and/or

[...] The Court refers to recitals 20, 22, 23 and 24 of the Enforcement Directive.

The objective of the provisions of the Enforcement Directive is to provide effective means for the holder of an intellectual property right to enforce that right.

Objective liability may create an undesirable barrier to this objective of the Enforcement Directive. That a claim based on Article 1369bis/3, § 2, of the Judicial Code is assessed pursuant to Article 1382 of the Civil Code is in line with the objectives of the Enforcement Directive and in particular with the provisions of Article 3 thereof.

Article 1382 of the Civil Code provides the seized party with a sufficient safeguard and counterweight (cf. recital 22 of the Enforcement Directive and Articles 7.4. And 9.7 thereof) against use and abuse of the seizure procedure for counterfeiting, without this safeguard or counterweight unduly dissuading the IP right holder from relying on this procedure” (free translation).

See also p. 14 and f. of the advice of 2 July 2015 of the Belgian Council for Intellectual Property on the amendments to be made to various provisions of the Judicial Code relating to seizure-description.

(54) Brussels Court of Appeal, 28 February 2018, *Ing.-Cons.* 2018/2, p. 485 (free translation).

(55) Antwerp Commercial Court (Pres.), 3 April 2012, *Ing.-Cons.* 2012/1, p. 84.

unlawfully copying their products (i.e. safety barriers), subject to a penalty of 2,000 EUR per breach of this injunction.⁽⁵⁶⁾

- In a judgment of 28 June 1985, the President of the Brussels Commercial Court ordered Rovera Resine to cease (i) sending threats to Jaime's co-contractors, correspondents or clients to take legal action against them if they continued to purchase, retain or sell garden furniture supplied to them by Jaime (ii) prohibiting their distribution and resale by accusing them of unfair competition; and (iii) intimidating them, verbally or in writing, for purchasing, retaining or selling Jaime's garden furniture.⁽⁵⁷⁾
- In his judgment of 21 January 2021, the President of the Brussels Commercial Court ordered Ohara and PA to cease sending communications to Tawo VOF's customers, subject to a penalty of 5,000 EUR per breach of this injunction.⁽⁵⁸⁾
- In his judgment of 23 December 2015, the President of the Brussels Commercial Court ordered Air Liquide Benelux to cease any oral or written communication, regardless of the medium and the addressee, invoking (i) the existence, in Belgium, of patents of which Air Liquide Benelux is not the holder or which do not have a territorial scope in Belgium; and (ii) the existence of acts of ACP Belgium constituting an alleged infringement of Air Liquide Benelux's patent rights without specifying the relevant elements of its patents and how ACP Belgium's activities would infringe them, subject to a penalty of 10,000 EUR per breach of this injunction.⁽⁵⁹⁾
- In his judgment of 1 April 2020, the President of the Brussels Commercial Court ordered Alteximex to cease contacting Bowtex's clients and suppliers to claim or insinuate that Bowtex was infringing Alteximex's IP rights, subject to a penalty of 2,000 EUR per individual breach of the injunction.⁽⁶⁰⁾
- In his judgment of 5 May 2023, the President of the Brussels Commercial Court ordered Pollogen to cease making degrading advertising about La Poppe's Oxygen+ device, subject to a penalty of 500 EUR per breach and per day that these breaches would continue.⁽⁶¹⁾
- In his judgment of 7 November 2008, the President of the Hasselt Commercial Court ordered Go Fast Sports Netherlands to cease acts of defamation

(56) Brussels Court of Appeal, 24 June 2014, *IEFBE* 1036, p. 42.

(57) Brussels Commercial Court (Pres.), 28 June 1985, *Ing.-Cons.* 1985, p. 301.

(58) Brussels Commercial Court (Pres.), 21 January 2021, *Ing.-Cons.* 2021/1, p. 158.

(59) Brussels Commercial Court (Pres.), 23 December 2015, 15/06510 AC, *unpublished*, p. 10-11.

(60) Brussels Commercial Court (Pres.), 1 April 2020, *Ing.-Cons.* 2020/2, p. 564.

(61) Brussels Commercial Court (Pres.), 5 May 2023, *IEFBE* 3686, p. 24-26.

against Go Fast Sports Belgium until a final decision on the rights to the “Go Fast” sign was issued, subject to a penalty of 50,000 EUR per breach.⁽⁶²⁾

- In its judgment of 24 october 2000, the Brussels Court of Appeal ordered Alnaco to cease any written or oral communication to retailers of Caltec that Caltec’s “Santar” lime neutralizer infringed its Belgian patent, when no proof of infringement had been provided, subject to a penalty of 25,000 Belgian francs per breach of this injunction. The Court ruled that the injunction applied as long as Alnaco could not bring a proof of infringement and that such proof could only result from a final decision on the merits establishing the invoked infringement.⁽⁶³⁾
- In his judgment of 12 november 2009, the President of the Liège Commercial Court ordered Occhio to cease communicating and/or insinuating to any third party whatsoever that Malvern Instruments’ products and/or process infringe(s) its IP right(s), subject to a penalty of 10,000 EUR per communication in breach of the injunction.⁽⁶⁴⁾
- In his judgment of 25 september 2007, the President of the Antwerp Commercial Court ordered A. to cease communicating to third parties that R.’s products infringed his EU patent, insofar as the infringement had not been established by a final decision, subject to a penalty of 10,000 EUR per breach of this injunction.⁽⁶⁵⁾
- In his judgment of 22 December 2003, the President of the Ghent Commercial Court ordered Herbica to cease carrying out advertising from which it could be inferred that the other sellers of Calendula-based products would be offering only counterfeit products, subject to a penalty of 2,500 EUR per copy of an advertising text.⁽⁶⁶⁾

c. Declarations that such allegations are unjustified?

Yes. Actions for a declaration of non-infringement are available under Belgian law. Based on Article 18 J.C.:

“The interest [to start a judicial procedure] must be born and present. The action may be admitted where it has been brought, even as a declaratory

(62) Hasselt Commercial Court (Pres.), 7 november 2008, *Jaarboek Handelspraktijken & Mededinging* 2008, p. 649-650.

(63) Brussels Court of Appeal, 24 october 2000, 1999/AR/2510, *unpublished*, p. 9.

(64) Liège Commercial Court (Pres.), 12 november 2009, *IEFBE* 1230, p. 12.

(65) Antwerp Commercial Court (Pres.), 25 september 2007, *RABG* 2012/1, p. 59-60.

(66) Ghent Commercial Court (Pres.), 22 December 2003, *Jaarboek Handelspraktijken & Mededinging* 2003, p. 295.

action, to prevent the infringement of a right that is seriously threatened”.⁽⁶⁷⁾
(emphasis added)

Such actions can, among other things, be filed in response to allegations of IP rights’ infringement if the claimant establishes his interest to obtain a declaration of non-infringement.

For instance, in its judgment of 8 June 2007, the Brussels Court of Appeal held that the first judge had rightly granted Caltec’s request for a declaration that, by producing and marketing the “SANTAR” lime neutraliser, Caltec did not infringe Alnaco’s patents (despite a previous decision, Alnaco had renewed a defamation campaign against Caltec).⁽⁶⁸⁾

d. Fines or punitive damages?

Punitive damages, as such, may not be awarded under Belgian law, as damages should be proportionate to the harm suffered by the aggrieved party.

On the other hand, criminal law provide for fines in case of criminal offences, which may be related to “Unjustified allegations”:

- Article 443 of the Belgian Criminal Code (“**Cr.C.**”):

“Anyone who, in the cases set out below, has maliciously imputed to a person a specific fact which is likely to damage that person’s honour or to expose him or her to public contempt, and for which legal proof has not been provided, is guilty of slander where the law allows proof of the imputed fact, and of defamation where the law does not allow such proof. (...) If this proof is sufficient, the allegation will not give rise to any criminal proceedings.”⁽⁶⁹⁾

In addition, Article 444 Cr.C. provides that:

“The guilty party shall be punished by imprisonment of between eight days and one year and a fine of between twenty-six euros and two hundred euros, where the imputations have been made:

- *Either in public meetings or places;*
- *Either in the presence of several individuals, in a non-public place, but open to a certain number of persons entitled to assemble there or frequent it;*
- *Or in any place whatsoever, in the presence of the person offended and before witnesses; – By printed or unprinted matter, images or emblems displayed, distributed or sold, offered for sale or exposed to public view;*

(67) Free translation.

(68) Brussels Court of Appeal, 8 June 2007, *Ing.Cons.* 2007 p. 691-692.

(69) Free translation.

- *Or by writings not made public, but addressed or communicated to several persons.*”⁽⁷⁰⁾

The amounts foreseen in this provision must be multiplied by 8. When the offender is a legal person, Belgian law provides for a conversion mechanism of imprisonment sentence to fines.

Finally, Article 452 Cr.C. provides that:

“Speeches made or writings produced before the courts shall not give rise to any criminal proceedings where such speeches or writings relate to the case or the parties. Slanderous, insulting or defamatory allegations unrelated to the case or the parties may give rise either to public prosecution or to civil action by the parties or third parties.”⁽⁷¹⁾

These criminal law provisions are rarely used in practice in the field of IP law.

- Article XV.83, 13°/1, CEL provides for fines in case of a violation of, among others, Article VI.104/1, 1°, CEL (misleading commercial practices, including within the meaning of Article VI.105, 10°), but this provision is rarely used in practice in the field of IP law.

As far as civil cases are concerned, one should also mention Article 780bis J.C., which provides that:

“A party who uses the proceedings for manifestly dilatory or abusive purposes may be fined from 15 euros to 2,500 euros without prejudice to any damages that may be claimed. In this case, the same decision will be handed down insofar as a claim for damages for reckless and vexatious litigation is upheld.”⁽⁷²⁾

e. Other remedies?

In accordance with Article XVII.4 CEL, the President of the Commercial Court may allow his decision or a summary of it (i) to be displayed during the period he determines, both outside and inside the offender’s premises, and (ii) to be published in newspapers or in any other manner, at the offender’s expense. However, these publication measures may only be allowed if they can contribute to the cessation of the contested act or its effects.

Examples of cases of unjustified allegations of IP rights’ infringement (most of which have already been cited in Question 2) where publication

(70) Free translation.

(71) Free translation.

(72) Free translation.

measures were sought by the alleged counterfeiter and *awarded* by the Belgian courts:

- In his judgment of 1 April 2020, the President of the Brussels Commercial Court allowed Bowtex to communicate the judgment to its clients and suppliers that had received Alteximex's letter, considering that such communication would help to cease the effects of these denigrating letters.⁽⁷³⁾
- In his judgment of 7 November 2008, the President of the Hasselt Commercial Court ordered Go Fast Sports Nederland to inform the addressees of its letter of 10 September 2008, which was deemed to be defamatory, of the intervened judgment and to expressly refute the content of such letter, subject to a penalty of 10,000 EUR per day of non-compliance.⁽⁷⁴⁾
- In its judgment of 24 October 2000, the Brussels Court of Appeal ordered the publication of the operative part of its judgment, albeit only in so far as it confirms the injunction of the first judge, in two specialised journals chosen by Caltec.⁽⁷⁵⁾
- In its judgment of 8 June 2007, the Brussels Court of Appeal granted Caltec's request for publication of the operative part of the judgment in two specialised journals of Caltec's choice, in bold text, in a box separate from the editorial text and stating the names of the parties in capital letters. The Court took the view that it was important to order this publication measure considering that (i) Alnaco had disregarded the previous injunctions (ii) Caltec had a legitimate concern that Alnaco would continue its unfair practices and (iii) it was important – given the various defamation campaigns that Alnaco had conducted – that the market in which Alnaco and Caltec were operating should be reassured as to the outcome of the proceedings.⁽⁷⁶⁾
- In his judgment of 12 November 2009, the President of the Liège Commercial Court ordered Occhio to send, at its own expense, to several of Malvern Instruments' clients and prospects, a letter informing them that the allegations that Malvern Instruments infringed its patents were falsely made insofar as there was no final and binding decision as to the existence of the alleged infringement, subject to a penalty of 5.000 EUR for each letter that has not been sent.⁽⁷⁷⁾

(73) Brussels Commercial Court (Pres.), 1 April 2020, *Ing.-Cons.* 2020/2, p. 563-564.

(74) Hasselt Commercial Court (Pres.), 7 November 2008, *Jaarboek Handelspraktijken & Mededinging* 2008, p. 649-651.

(75) Brussels Court of Appeal, 24 October 2000, 1999/AR/2510, *unpublished*, p. 9.

(76) Brussels Court of Appeal, 8 June 2007, *Ing.-Cons.* 2007/5, p. 695-696.

(77) Liège Commercial Court, 12 November 2009, *IEFBE* 1230, p. 12.

Here is an *example* of a case of unjustified allegations of IP rights' infringement where publication measures were sought by the alleged counterfeiter and *dismissed* by the Belgian courts:

- In his judgment of 23 December 2015, the President of the Brussels Commercial Court dismissed the publication measure (i.e. to order Air Liquide Benelux to publish the judgment or a summary of it in newspapers to be specified, subject to a penalty of 25.000 EUR per day of non-compliance) that was requested by ACP Belgium, because the measure was deemed unlikely to contribute to the cessation of the contested act or its effects.⁽⁷⁸⁾

II) Policy considerations and proposals for improvement of your group's current law

6) According to the opinion of your Group, is your current law regarding the boundaries for the legitimate exercise of an IP right holder's rights adequate and/or sufficient?

In the Belgian Group's opinion, our current law is generally adequate and sufficient. It is essential for the IP right holders to be able to communicate and act in the event of an alleged infringement of their rights, while the law provides several mechanisms for punishing unfair or abusive allegations. This being said, the Belgian legal system might be seen as imperfect and even as unbalanced in certain respects, notably:

- It is difficult to understand why an IP right holder who executes a provisional decision that is subsequently overturned on the merits is not subject to a same or similar objective liability as an IP right holder who executes a first-instance decision that is subsequently overturned on appeal. In both cases, the IP right holder is taking "the risk" of executing a decision that may be overturned, and it would therefore be reasonable for them to be subject to the same liability regime.
- However, considering the ECJ ruling in *Mylan v. Gilead* under which all circumstances of the case are to be taken into consideration, a less strict liability regime could be envisaged based on the objective character of the wrongful behaviour but with the usual liability rules as regards possible restrictions, exonerations or the like.
- The rules on reimbursement of procedural costs applicable in Belgium can also be seen as unbalanced to some extent: the alleged infringer who wins his case,

(78) Brussels Commercial Court (Pres.), 23 December 2015, 15/06510 AC, *unpublished*, p. 10.

without the IP right holder's action being deemed unfair or abusive, has to bear potentially substantial procedural costs for which he will generally be able to obtain only limited reimbursement, despite the fact that he has been found not guilty of the alleged infringement and should never have been prosecuted in the first place. Moreover, it is generally very difficult for the alleged infringer to demonstrate and quantify the damage caused by the unjustified allegation for which he could obtain compensation from the IP right holder.

7) According to the opinion of your Group, what is the policy rationale for restricting the making of unjustified allegations of infringement of IP rights?

Firstly, the Belgian Group notes that, on the basis of the available case law, there are no *a priori* restrictions on the “tools” that can be used by IP right holders to inform a suspected infringer of their suspicions concerning an alleged infringement of their rights. Restrictions only come into play *a posteriori*, if the allegations (whatever the “tool” used for this purpose) are subsequently deemed unjustified.

Similarly, the law does not *a priori* prohibit IP right holders from informing third parties of a potential infringement of their rights. In practice, however, such allegations are generally subject to restrictions more quickly than allegations addressed directly to the alleged infringer.

As for the rationale behind restricting (when it does occur) the making of unjustified allegations of IP rights' infringement, the aim is to strike the right *balance* between the *fundamental right* of the (alleged) IP right holders *to the protection of their IP rights*, and the need to ensure that this right is not exercised in a way that unduly infringes the (alleged) counterfeiter's *freedom to conduct business*.

This policy was emphasized by the President of the Antwerp Commercial Court in his judgment of 3 April 2012:

“ROVI rightly argues that its patent rights are prohibition rights to prohibit third parties from exploiting the invention. However, this prohibition right, which is the concretised extension of the exclusive property right as opposed to freedom to conduct business, also entails duties.

(...) the patent holder must also exercise due care when exercising the prohibition rights. This caution relates, among other things, to the preparatory work when giving notice of default and/or concretely initiating proceedings in which an opposing party's conduct of business is affected. Invoking prohibition rights constitutes an interference with the freedom to conduct business.”⁽⁷⁹⁾ (emphasis added).

(79) Antwerp Commercial Court (Pres.), 3 April 2012, *Ing.-Cons.* 2012/1, p. 80-81.

In its judgment of 14 February 2014, the Antwerp Court of First Instance made express reference to Article 41(1) TRIPs⁽⁸⁰⁾ and Recitals of Council Regulation n°3295/94 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods⁽⁸¹⁾ and subsequently applied it to its case:

“Applied to the present dispute, the TRIPS Agreement and the Piracy Regulation aim to combat the marketing of copied razors in the Member States in which Philips’ models are protected. However, they cannot affect the commercialisation of razors, whether identical or not, in those States in which Philips’ models are not protected.

[Koninklijke Philips Electronics NV’s] actions towards [Far East Sourcing Ltd.] do not respect the balance between piracy and legitimate trade. Indeed, it has the effect of withdrawing the razors from the market regardless of whether they are destined for Member States in which Philips’ designs are protected or for Member States in which Philips’ designs are not protected. In this way, Philips abuses the Piracy Regulation to create an exclusive market in which there is no more room for competing goods. Consequently [Koninklijke Philips Electronics NV’s] practices are diametrically opposed to the initial objective of the European legislator, which is to maintain a balance between legitimate trade and illegal trade in pirated goods”⁽⁸²⁾ (emphasis added).

8) Is there a policy conflict between such restrictions and the availability of effective methods of enforcing IP rights, including without the need to resort to costly litigation by issuing cease and desist letters and if so how is such a conflict resolved?

There is no real conflict since, as indicated in Question 7, there is no *a priori* restriction on the “tools” that the IP right holders can use to communicate their suspicions about the alleged infringement (only the way in which these “tools” are actually used being can be penalised at a later stage if it proves unfair or abusive).

(80) “Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse” (emphasis added).

(81) “Whereas the marketing of counterfeit goods and pirated goods causes considerable injury to law-abiding manufacturers and traders and to holders of the copyright or neighbouring rights and misleads consumers; whereas such goods should as far as possible be prevented from being placed on the market and measures should be adopted to that end to deal effectively with this unlawful activity without impeding the freedom of legitimate trade; whereas this objective is also being pursued through efforts being made along the same lines at international level” (emphasis added).

(82) Court of First Instance of Antwerp of 14 February 2014, *Ing.-Cons.* 2014, p. 283-284 (free translation).

This absence of an *a priori* restriction of the “tools” available to IP right holders is essential since:

- IP right-holders must have affordable means to assert their rights effectively;
- Depending on the circumstances, it is not always appropriate/necessary for rights to be enforced in court, so the IP right holder must have access to other non-judicial “tools”.

9) Is it better, from a policy perspective, to judge whether an allegation was unjustified based on (a) an objective hindsight-based view on whether the IP right in question was valid and being infringed at the time notifications were made, or (b) the reasonable subjective belief of the IP right holder.

It is difficult to assess whether option (a) would in all cases be better than option (b) or *vice versa*. Choosing one or the other option is not appropriate since such an approach could, in practice, lead to disregarding the specific circumstances of the case, including, for example, the attitude of each of the parties.

However, the Belgian Group believes that a particular approach could generally be preferred in the following scenarios (without necessarily implying that such an option should always apply regardless of the case’s specific circumstances):

- When the allegation is made solely by non-judicial means (such as a formal notice, a simple letter, etc.) directly with the alleged infringer, the fact that it is subsequently considered to be unjustified on the merits, should give rise to an assessment of the liability more on the basis of a reasonable (“prudent”) subjective belief of the right holder.
- When the IP right holder takes the risk of executing a judicial decision that is still liable to be overturned (either in the same procedure, such as at appeal level, or on the merits), the liability should be assessed on an objective basis without consideration of what the right holder might have believed about his legal situation.

10) Are there any other policy considerations and/or proposals for improvement to your Group’s current law falling within the scope of this Study Question?

We refer to our answers to Question 6.

III) Proposals for harmonisation

11) Do you consider harmonisation regarding unjustified allegations of IP infringement and their consequences as desirable in general?

Yes.

12) In what kind of circumstances should an allegation of IP infringement be considered as “unjustified” so as to be considered abusive? Please add a brief explanation.

As a general rule, IP right holders should always act as a generally prudent and diligent person by taking into account all relevant circumstances regarding in particular the strength of the right at stake, the extent of the allegation and requirements made, the possible ongoing court proceedings, etc. When it is established that this is not the case, their allegations should then be qualified as unjustified.

13) As continuation to question 12) above, in more specific, should any of the following be categorically considered as unjustified (abusive) allegations:

a. Making an allegation of infringement which later is proved incorrect, e.g. because a court determines that the IP right in question was not infringed or was invalid, regardless of the knowledge of the parties?

No.

b. Making an allegation of infringement while having actual knowledge of validity-destroying circumstances?

Yes.

c. Making an allegation of infringement while the person making the allegation should have known (constructive knowledge) of validity-destroying circumstances?

Yes.

d. Are there other situations in which alleging IP infringement when having concerns about the validity of the IP right in question should be considered unjustified so as to be abusive?

No.

e. Making an allegation of infringement before the IP right has been granted?

No, unless the considered allegation is misleading as to the status of the IP rights invoked.

f. Making an allegation of infringement while having actual knowledge of circumstances leading to non-infringement?

Yes.

g. Making an allegation of infringement when one knew or should have known (actual or constructive knowledge) that the likelihood of the infringement claim succeeding is low?

No.

h. Making an allegation of infringement in public or commencing formal proceedings (e.g., seeking injunctions) when settlement negotiations or other resolution processes (e.g., license fee determinations) are on-going?

Initiating formal proceedings while settlement negotiations are underway should not be categorically considered an unjustified allegation. On the other hand, publicly alleging an infringement while negotiations are underway with the other party is more questionable and could be considered an unjustified allegation (though not necessarily “categorically”).

i. Are there other specific scenarios or circumstances that in your Group’s view should categorically result in an allegation of infringement being considered unjustified?

When the invoked IP right has expired and the IP right holder aims to obtain (in court or otherwise) an injunction from further “infringement” (a claim which, being valid only for the future, has in fact no object).

14) Should the (a) motivation or (b) knowledge of the alleging party play a role in assessing whether an allegation is unjustified so as to be considered abusive?

Yes. As mentioned above, if the alleging party has (actual or constructive) knowledge of validity-destroying circumstances or circumstances leading to non-infringement, then this should be taken into account in the assessment.

Furthermore, the alleging party’s motivation should also be considered. If it can, for instance, be established that the allegations are specifically made with the intent to damage the alleged infringer’s reputation or to unduly prevent competing products from being put on the market, then it will be more likely that the allegations are considered as unjustified.

15) What kind of communications should be considered as allegations of IP infringement:

a. Should only proceedings formally commenced before a court or other authority be considered as allegations of infringement?

No.

b. If you answered NO to (a) above:

(i) Apart from formal proceedings, should only communications with an express threat of formal proceedings be considered as allegations of infringement?

No, even if IP right holders do not expressly threaten legal action, their communication can still contain claims that their rights have been infringed and influence the economic behaviour of the alleged infringer or third party. The communication may also possibly threaten to use other actions or measures, such as commercial retaliation (re)actions.

(ii) If you answered NO to (i) above, what other kinds of communications should be considered as allegations of infringement?

Any type of formal notice or communication to the alleged infringer or third parties can be considered as an allegation of infringement, as long as it contains any type of allegation that IP rights have been infringed.

16) Should only allegations of infringement by the IP right holder itself be considered? Please answer YES or NO and add a brief explanation. In particular, if you answered NO, please specify whose allegations should be considered (e.g., allegations by a non-exclusive licensee, an exclusive licensee, group companies, attorneys and other advisors, third parties, etc.).

No. All the examples provided above are valid, as these allegations can come from any (third) party and not only the IP right holder itself. There should not be a closed list of possible authors of (unjustified) allegations.

17) If an allegation of infringement of IP right is determined to have been unjustified so as to be abusive, what should be the consequences of unjustified allegations of infringement of IP rights:

a. Should damages be available to the party having been alleged to infringe the IP right?

Yes, if he can establish that he has suffered prejudice as a result of the unjustified allegations.

b. Should declaratory judgements that such allegations are unjustified be available to the party having been alleged to infringe the IP right?

Yes.

c. Should injunctions against such unjustified allegations be available to the party having been alleged to infringe the IP right?

Yes, but the extent of the injunction should be sufficiently detailed, and it should not result in an anti-suit injunction.

d. Should fines or punitive damages be ordered against the party making the allegation?

There may be no punitive damages. Fines should be available when the allegations were unjustified and particularly harmful for the reputation of the alleged infringer, which may happen when the allegations are made publicly.

e. Other than the consequences referred to in a-d above, should there be other types of consequences?

It should be possible for the alleged infringer to demand the publication of (an excerpt or summary) of the judgment or an appropriate communication to the third parties who had been notified about the unjustified allegations.

18) Who should bear the burden of proof of the unjustified/justified nature of the allegation of infringement?

The claimant should bear the burden of proof, but the defendant must also be subject to an obligation of loyal contribution to the burden and the administration of proof. In the specific case of a declaratory action for non-infringement, although the burden of proof remains in principle with the claimant, the obligation to contribute to the burden of proof will be heavier for the defendant having alleged the infringement.

19) Please comment on any additional issues concerning any aspect of equivalents that you consider relevant to this Study Question.

See the response to Question 13 above (i): when the IP right invoked has expired and the IP right holder formulates a request for an injunction (which, being valid only for the future, has in fact no object).

20) Please indicate which industry sector views provided by in-house counsels are included in your Group's answers to Part III.

Food & Beverages – more particularly, the following views are supported by this sector:

- Any type of communication where an IP right infringement is claimed should be able to be considered as unjustified depending on the circumstances, not only those made by the IP right holder himself or those allegations expressly threatening formal proceedings.
- Making an allegation of infringement while the person making the allegation has (actual or constructive) knowledge of validity-destroying circumstances or circumstances leading to non-infringement, should categorically be considered as unjustified.