

Netherlands

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A. PROCEDURAL ISSUES

1. *Merits Proceedings*

All patent cases are heard by the specialized IP chamber of the District Court of the Hague. Appeals (which are *de novo*) are heard by the specialized chamber of the Court of Appeal of the Hague. Thereafter an appeal (on points of law) is possible without the necessity of leave to the Supreme Court. The specialized chamber in first instance issues between about fifty and seventy decisions each year. The Court of Appeal issues about twenty and the Supreme Court around five. Of course, numbers vary from year to year. The courts have a good reputation in patent matters. The UK, German and Dutch courts take into consideration each other's decisions in cases invoking the same European Patent and normally give reasons if they do not follow each other's decision (which is more the exception than the rule). The Netherlands does not have a bifurcated system for patent cases: validity and infringement are always dealt with in the same proceedings. Thus, if an infringer challenges the validity of the patent, the court will normally first decide on the validity of the patent and only turn to infringement if the validity of the patent is upheld. In other words, a Dutch court will not order an injunction unless it has first established that the patent is valid, and the only way that an injunction can be granted on the basis of a patent that is later invalidated is if the decision on validity is overturned on appeal.¹

¹ This may also happen if the injunction is granted in interim proceedings but the patent is invalidated in merits proceedings; this happened, e.g., in *AstraZeneca/Sandoz* (DC The Hague 2018), which decision was overturned on appeal in *AstraZeneca/Sandoz* (CoA The Hague 2018). A strict liability standard for all damages arising out of enforcement has long been the rule if the injunction is enforced but the patent is later invalidated (or infringement denied), but it is questionable whether this is still tenable after the decision in *Bayer Pharma* (CJEU 2019).

This is true in proceedings on the merits, where the court will always rule on the validity of the patent if it is challenged, but also in interim relief proceedings, where the court will make a preliminary assessment of the patent's validity before imposing interim relief, denying it if there is a reasonable, not-to-be-ignored chance that the patent will be revoked or invalidated.

Once validity and infringement are established, the key provision relating to final patent injunctions under Dutch law is Article 3:296 Dutch Civil Code (DCC), which reads as follows: “Unless the law, the nature of the obligation or a legal act require otherwise, a person obliged to give, do or refrain from doing something to another person, **shall** be so ordered by the court upon request of the entitled party” (our translation; emphasis ours).

This provision is not specific to patent law but covers all civil law obligations. It was newly introduced in the revised civil code, which entered into force in 1992. Since the old civil code did not contain a similar provision, the question whether courts enjoyed discretion to issue injunctions was subject to extensive academic discussion.² The issue had long been resolved for contract law, where the Supreme Court had ruled that courts must order performance of a contract if the existence of the obligation is established.³ In 1985, the Supreme Court resolved the controversy for torts in its landmark decision *Claas/Van Tongeren*, when it held that “once the unlawfulness of acts which are requested to be enjoined is established, the injunction is, principle, allowable right away and is not subject to a further balance of interests, save for exceptions not relevant here”.⁴ Thus, these decisions by the Supreme Court make clear that, when it comes to injunctions in proceedings on the merit, Dutch law leaves no room for a balance-of-hardships test. This was codified in Article 3:296 DCC, which now governs all obligations under law, including those arising under foreign law and/or in foreign territory.⁵

However, the reference in Article 3:296 DCC to the law, the nature of the obligation or a legal act, and especially the Supreme Court's reference to “exceptions not relevant here” in its statement in *Claas/Van Tongeren*, make clear that this is not an absolute rule. Indeed, five exceptions to this rule have been identified by

² The discussion is summarized in Van Nispen 1978, no. 174 *et seq.*, with ample citations.

³ *Meegdes/Meegdes* (HR 1956).

⁴ *Claas/Van Tongeren* (HR 1985, para. 3.3) (our translation).

⁵ *Lincoln/Interlas* (HR 1989, para. 4.2.4). Dutch courts will also deal with the infringement of foreign patents if the court has jurisdiction over the defendant. If validity is raised, the court will suspend the proceedings on the merit (until validity has been decided by the courts of the country for which the patent has been granted) but will grant a provisional injunction, which can immediately be executed, if it feels that there is no reasonable possibility that the patent will be invalidated. The court will apply the law of the patent but for procedural questions (such as whether or not an injunction should be granted) the courts apply Dutch law.

Advocate-General⁶ Vranken in his conclusion before the Supreme Court's decision in *Kimberly Clark/Procter & Gamble*:⁷

- (a) A lack of standing (Article 3:303 DCC);
- (b) Forfeiture of rights (*rechtsverwerking*);
- (c) Abuse of rights (Article 3:13 DCC);
- (d) Substantial public interests (Article 6:168 DCC); and
- (e) Reasonableness and fairness (*redelijkheid en billijkheid*, Articles 6:2 and 6:248(2) DCC).

An in-depth treatment of these exceptions is not intended here;⁸ only some observations on how these exceptions might apply to patent law will be made. Put briefly, in theory each of these exceptions could lead to refusal of an injunction, even if infringement of a valid patent is established and damages are awarded. However, most of these exceptions appear to leave courts insufficient leeway to perform a proportionality assessment as required by Article 3(2) Enforcement Directive. Crucially, all exceptions under (a)–(d) suffer from self-containment. That is, they justify departure from the main rule of Article 3:296 DCC if – and only if – the conditions relevant for the specific exception are fulfilled, disregarding other circumstances that may weigh in favour of denying an injunction. In other words, these exceptions do not allow courts to take into consideration *all* circumstances of a case when deciding whether an injunction is justified, but only those pertinent to the specific exception. It is submitted that this contravenes a court's duty to ensure patent enforcement measures are proportional as per Article 3(2) Enforcement Directive, which necessarily implies taking stock of all relevant circumstances.

Only the exception under (e) – derogation by way of “reasonableness and fairness”, two foundational concepts in Dutch private law – allows courts to take into account all circumstances of the case. It has been argued in the literature that this means taking into account not just the parties' interests, but also third-party and public interests.⁹ However, Articles 6:2 DCC and 6:248(2) DCC, on which this exception is based, are traditionally applied more specifically in contractual relations. Even though it has been accepted by the Supreme Court that they also apply in tort law, it is uncertain whether in this context they relate only to the tortfeasor's obligation to pay damages (which is construed as an obligation under Dutch law), or *also* to the injured party's entitlement to an injunction.¹⁰ The issue has never been

⁶ The Advocate-General is an independent lawyer nominated by the government which advises the Supreme Court. The Supreme Court follows the Advocate-General in the majority of cases.

⁷ *Kimberly Clark/Procter & Gamble* (HR 1995, para. 20 of the A-G's opinion).

⁸ See in more detail Van Nispen 2018a, 15–17.

⁹ Wolters 2013, chs. 6.3 and 6.4.

¹⁰ See, e.g. Schelhaas 2017, 2.10 (“In other words, Article 6:2 DCC renders applicable reasonableness and fairness to all legal relations of a contractual nature, whereby it is irrelevant whether they arise out of a contract or from another source (such as tort)”; translation ours). The

put before the Supreme Court and perhaps this is why reasonableness and fairness are only very rarely invoked in the context of patent proceedings; in any event, an injunction in a patent case was never denied because imposing it would contravene these principles.

2. *Interim Relief Proceedings*

The principles discussed apply to merits proceedings, i.e. court proceedings according to the ordinary procedural regime which end in a final decision that can acquire *res judicata*. Thus, Article 3:296 DCC is not applicable in interim relief proceedings, in which an injunction can be rendered much more quickly than in merits proceedings.¹¹ In interim relief proceedings, the situation is different and the Supreme Court has explicitly stated that the grant of interim relief, including an interim injunction, is always subject to a balance of interest.¹² Courts have long used this additional leeway sparsely and until recently the only case where the preliminary relief judge considered the patent valid and infringed but nonetheless refused an injunction dated from 1989.¹³ However, when hearing claims for preliminary relief, the Dutch patent courts have become decidedly more critical when granting injunctions. The best example is a 2020 decision by the Court of Appeal which held, in the context of a FRAND dispute, that the patentee's interest in immediate relief was outweighed by the substantial damage it would cause to the infringer, particularly because the patentee ultimately sought to recover a license fee.¹⁴ The sophistication of the balance of interests that the Court of Appeal applied, as well as the importance it attached to it (it declined to rule on the substance of the patentee's claim), were unprecedented in Dutch patent practice. This decision and a few others may indicate a less absolutist approach to injunctive relief by Dutch courts, at least in preliminary relief proceedings.

Interim injunction proceedings are separate proceedings and can be filed when proceedings on the merits have not (yet) been filed. Appeals to the Court of Appeal and the Supreme Court are possible. At the request of the plaintiff the court sets a day on which the writ of summons has to be served and the date of the hearing. In

doctrinal question, then, is whether the duty to cease infringing a patent is “of a contractual nature”.

¹¹ See, e.g., *Euromedica/Merck* (HR 2005, para. 3.5.1).

¹² *Kimberly Clark/Procter & Gamble* (HR 1995, para. 3.4).

¹³ *Schneider/ACS* (Prel. Rel. DC The Hague 1989, paras. 5.5.4–5.5.5) (upheld in appeal). In that case, the defendant had filed an affidavit by a doctor who declared that treating patients without the patented device would place patients at risk of receiving poor treatment, possibly even risking their lives in severe cases. According to the court, this was not sufficiently disputed by the patentee so it held that the interests of the patients outweighed those of the patentee. Note that this decision was rendered before the *Boehringer Mannheim/Kirin Amgen* decision of the Supreme Court, which is discussed below (Section B).

¹⁴ *Sisvel/Xiaomi* (CoA The Hague 2020).

extremely urgent cases hearings can take place in a matter of days. In the meantime, the court can issue an *ex parte* injunction in order to preserve the status quo, for instance. A decision normally follows after one or two weeks, but in very urgent cases a decision may follow immediately after the hearing.

In practice, interim relief proceedings take the form of a “mini-trial”, often including written rounds, expert statements and oral argument. However, to qualify for an interim injunction a patentee must demonstrate an urgent interest.¹⁵ Dutch courts are generally quite lenient when it comes to the urgency requirement, though it can bar claims for provisional relief, particularly where the patentee is not diligent in pursuing its claim.¹⁶ It must be noted, though, that in this case normally all claims are dismissed. Thus, the urgency requirement has so far not been used to deny an injunction specifically in a case where infringement is otherwise established.

An important feature of preliminary relief proceedings is that they allow for swift cross-border relief. In the 1990s, the Dutch courts famously pioneered cross-border injunctions in patent cases, but this practice was halted by a pair of decisions by the Court of Justice of the European Union (CJEU).¹⁷ However, a subsequent decision clarified that cross-border *preliminary* relief remains allowable.¹⁸ Since then, the District Court of the Hague has repeatedly granted cross-border (preliminary) injunctions in patent cases, either in summary proceedings or as interim relief within the context of pending proceedings on the merits.¹⁹

B. THE PRIVATE AND PUBLIC INTEREST

The Supreme Court’s formula in its *Claas/Van Tongeren* decision and the principle of Article 3:296 DCC, that unlawful acts *shall* be enjoined by the courts, are fully applicable in patent cases. In fact, some years later the Supreme Court suggested that they are *particularly* applicable to patent cases by finding that the duration of a patent is limited and that “this right normally can only be effectively protected by the expeditious grant of an injunction to prevent further infringements”.²⁰ Since then, a successful patentee’s entitlement to an injunction has become so commonly accepted that it is hardly ever challenged in patent cases.

¹⁵ See, e.g., *DSM/Novozymes* (Prel. Rel. DC The Hague 2017, para. 4.2.1).

¹⁶ See, e.g., *Becton/Braun* (Prel. Rel. DC The Hague 2016, para. 5.2) (waiting for three years after grant of patent to file infringement claims insufficiently diligent).

¹⁷ *Roche/Primus* (CJEU 2006) and *GAT/LUK* (CJEU 2006).

¹⁸ *Solvay/Honeywell* (CJEU 2012).

¹⁹ *DSM/Novozymes* (Prel. Rel. DC The Hague 2017) offers an example of a cross-border injunction in summary proceedings; *Carl Zeiss/VSY* (DC The Hague 2017) offers an example of a cross-border injunction granted within the context of proceedings on the merits.

²⁰ *Vredo/Veenhuis* (HR 1993, para. 3.4); note that the decision was about the duty of the specialized preliminary relief judge to hear a case. The judge had refused to do so because he ruled that the case was too complicated for preliminary relief proceedings.

Exceptions are few and far between, particularly in merits proceedings. The only outright refusal of an injunction where a valid patent was found to be infringed was in a Standard Essential Patent (SEP) case against a licensee willing to accept a licence on Fair, Reasonable, And Non-Discriminatory (FRAND) terms, while the patentee had given to the standard-setting body (ETSI) a declaration to grant licences on FRAND conditions to its SEPs.²¹ Prior to the decision of the Court of Justice of the European Union (CJEU) in *Huawei/ZTE*,²² such conduct was considered an abuse of rights under Dutch law (3:13 DCC).²³ After *Huawei*, it is generally assumed that FRAND cases should primarily be assessed under Article 102 Treaty on the Functioning of the European Union (TFEU).²⁴ Conversely, if a licensee is unwilling to accept a licence on FRAND terms, Dutch courts have no qualms about granting an injunction under a FRAND-encumbered patent.²⁵ In the first FRAND cases decided by the Court of Appeal of the Hague, this court has struck a fair and pragmatic balance between the interests of SEP holders and implementers in its interpretation of their respective obligations arising under the *Huawei/ZTE* framework.²⁶

There is only one other decision where requesting an injunction was (implicitly) considered an abuse of rights, but that was outside the context of patent law and mostly related to the way the case was brought before the court.²⁷ The requirements for finding an abuse of rights are so stringent that it is indeed unlikely that this ground will ever lead to refusal of an injunction in a case of infringement: a patentee that prevails in an infringement suit will always have a considerable interest in exclusivity which will be difficult for defendant to overcome.²⁸

²¹ *Apple/Samsung II* (DC The Hague 2012, para. 4.31) (finding that requesting an injunction against a willing licensee would put undue pressure on them to agree to non-FRAND terms). Infringement of Samsung's patent was later established but an injunction refused for reasons set forth in the decision of 14 March 2012 (see *Apple/Samsung III* (DC The Hague 2012, para. 3.5.11). The decision was preceded by preliminary relief proceedings where the same outcome was reached; see *Samsung/Apple I* (Prel. Rel. DC The Hague 2011, para. 4.36).

²² *Huawei/ZTE* (CJEU 2015).

²³ See also, *Philips/SK Kassetten* (DC The Hague 2010), which set out the Dutch approach to FRAND patents (with an explanation why it differed from the German approach).

²⁴ See e.g., *Archos/Philips* (DC The Hague 2017, para. 3.2).

²⁵ *Philips/Asus* (CoA The Hague 2019); *Philips/Wiko* (CoA, The Hague 2019).

²⁶ See generally, Larouche and Zingales 2018.

²⁷ *Media Monkeys* (DC Amsterdam 2014, para. 4.4). In this case, a web developer sued its client for copyright infringement after they refused to pay part of the agreed price, but the contractual dispute was not brought before the court. It therefore held that it could not hear the claim for an injunction "because of the way Media Monkeys had presented the case", fearing it would be used as undue leverage to obtain a disputed payment.

²⁸ To be sure, there are various situations in which suing for patent infringement can constitute abuse of rights within the meaning of Art. 3:13 DCC and where all claims will be rejected, including a damages claim; an example is *Medinol/Cordis* (Prel. Rel. DC The Hague 2004), in the context of double patenting. However, this chapter is not concerned with such cases and only relates to cases where requesting an injunction could be abusive where a valid patent is found infringed.

The legitimate interests of third parties have likewise almost never sufficed to persuade courts to refuse a final injunction. In a controversial decision – *Boehringer Mannheim/Kirin Amgen* (HR 1995, para. 3.7) – the Supreme Court refused even to consider the fact that an injunction would threaten the availability of a certain drug, preventing patients from receiving that drug for which there was no satisfactory alternative on the market, holding that “the protection of the interests of third parties such as patients should not take place through allowing patent infringement”. It is submitted that this holding is hard to accept. Apart from the fact that it is questionable whether this decision remains valid in light of recent case law from the CJEU (to which we return in Section E.2), the decision seems incorrect insofar as it suggests the interests of third parties are protected by “allowing patent infringement”. The infringement is not “allowed” since the patentee would be entitled to payment of damages, which, in light of the possibility for a patentee to claim forfeiture of profits (Article 70(5) Dutch Patent Act), can be quite substantial. In addition, it is not an all-or-nothing matter: the injunction could also be suspended, e.g. subject to an escrow payment or for a limited time period, so as to allow switching patients to a substitute pharmaceutical (if available).²⁹ Be that as it may, a “tailored” injunction to protect patient interests was granted only once. In that case, the District Court proved willing to withhold an injunction until infringement and validity were definitively established, subject to a royalty payment; however, it appears from the decision that at the hearing the patentee agreed this moratorium on the normally immediately enforceable decision of the District Court until the final decision (on appeal) on validity and infringement.³⁰ In all other cases, patient interests have either been considered insufficiently proven or not capable of justifying refusal of an injunction.³¹

Nor have other societal interests that could fall within the ambit of Article 6:168 DCC ever been able to convince courts to refuse an injunction.³² The most interesting case in this respect is *Schneider/Cordis*, which involved a medical device where the (specialized IP chamber of the) District Court of the Hague had granted an injunction, immediately enforceable, to Schneider.³³ Cordis thereupon immediately applied to the Court of Assen, where their manufacturing facility was located,

²⁹ See, in the United Kingdom, *Edwards v. Boston* (EWHC 2018) where Mr Justice Arnold granted an injunction but stayed it for twelve months to safeguard patient interests.

³⁰ *Medinol/Boston Scientific* (DC The Hague 2003, para. 3.29). It probably also helped that a licence agreement had previously entered into by the parties, so that the reasonable royalty payable for the duration of the proceedings could be taken from it.

³¹ *Cordis/Medinol* (Prel. Rel. DC The Hague 2003, paras. 11–13); *Roche/Primus* (CoA The Hague 2002, para. 11); *C. R. Bard/TD Medical* (Prel. Rel. DC The Hague 1995, para. 25); and *Cook/Fujinon* (Prel. Rel. DC The Hague 1995, paras. 14–15).

³² It has been questioned whether Article 6:168 DCC can even be applied in IP cases; see the opinion of Advocate-General Franx under *Stichting CAI/Columbia Pictures* (HR 1984, para. 6) and Gielen 1994. Both believe the application of Article 6:168 DCC is precluded by provisions on compulsory licensing in the various IP laws.

³³ *Schneider/Cordis* (DC The Hague 2005).

for a stay of enforcement, stating that enforcement of the injunction would force it to fire around 300 of its employees and possibly relocate its operations from the Netherlands entirely. The preliminary relief judge granted the stay.³⁴ However, the decision was reversed on appeal, primarily because Cordis had apparently refused to conclude a licence when Schneider offered one, but also under reference to the Supreme Court's holding on the protection of interests of third parties in *Boehringer Mannheim/Kirin Amgen*.³⁵ Thus, employees' interests have in principle also been found insufficient to even suspend the immediate enforceability of an injunction, pending appeal. In principle, a party that enforces a preliminary injunction which is later quashed in merits proceedings will be fully liable for the damages suffered as a result of the wrongful enforcement.³⁶ But a decision on the merits can take a long time to obtain and during this time the injunction will remain in full force, which can substantially harm an undertaking and even lead to bankruptcy. In addition, the difficulty of calculating damages suffered as a result of wrongful enforcement makes obtaining full compensation (very) difficult. This means the prospect of a damages claim will not always suffice to safeguard the infringer's interests.

Another interesting case is *Monsanto/Cefetra*, which concerned patented soybeans that had been planted on a large scale in Argentina.³⁷ Because of the importance of this case for its agricultural sector, the state of Argentina intervened in the proceedings on the side of Cefetra and argued that an injunction in the Netherlands preventing imports from Argentina because of alleged infringement of a European patent would substantially harm its exports, after Monsanto had allegedly made Argentina dependent on this soybean by encouraging the use of the genetically modified seed for growing these soybeans. However, also here the court would not give in: it held that even if the soybeans were not patented in Argentina, it could reasonably have expected that Monsanto would enforce its patents in Argentina's export markets where possible. The situation is not much different in interim relief proceedings, where an injunction was denied only once, in that case to safeguard patient interests.³⁸ This decision, however, is rather old (1989) and pre-dates the aforementioned Supreme Court decision in *Boehringer Mannheim/Kirin Amgen*, which held that patient interests cannot outweigh a patentee's interest in an injunction.

To be sure, this is not to say that the injunctions were wrongfully granted in *Schneider/Cordis* and *Monsanto/Cefetra*: it is just to show that various attempts have

³⁴ *Schneider/Cordis* (Prel. Rel. DC Assen 2005).

³⁵ *Schneider/Cordis* (CoA Leeuwarden 2005, paras. 12–13).

³⁶ See Jansen 2017, 3.10. The principle was accepted specifically for patent law early on: *XY* (HR 1934). See also *Voorbraak-Ciba Geigy* (HR 1986). However, it seems that applying such strict liability is not in accordance with the recent decision in *Bayer Pharma* (CJEU 2019). See also Dijkman 2019a, 918.

³⁷ *Monsanto/Cefetra* (DC The Hague 2008, paras. 4.32–4.33).

³⁸ *Schneider/ACS* (Prel. Rel. DC The Hague 1989, paras. 5.5.4–5.5.5). Note that the decision carries the suggestion that the case was poorly argued on this point by the patentee.

been made to persuade Dutch courts that third-party interests should lead to refusal of an injunction, but never with any success. Most recently, this strict approach was confirmed in the *Nikon/ASML* decision.³⁹ It was one of eleven cases brought by Nikon against its Dutch competitor ASML on the basis of patents that related to various aspects of immersion lithography, a technology used in highly complex machines to make computer chips. ASML argued that the grant of an injunction would be disproportional as it would force it to accept Nikon's (allegedly) unreasonable royalty demands, despite the fact that Nikon's patents related only to minor aspects of its machines so that it would effectively be forced to pay to use its own innovations.⁴⁰ The court refused to grant ASML's request for relief: tellingly, it assessed each (strict) ground that ASML had invoked to support refusal of an injunction one by one, rather than taking into account all circumstances of the case in one general proportionality test.⁴¹

Dutch courts and commentators have traditionally assumed, implicitly or explicitly, that the compulsory licensing provision in the Dutch Patent Act (DPA) (Article 57) and Article 6:168 DCC determine the extent to which third-party interests can be taken into account in patent infringement cases.⁴² Article 57 of the DPA gives the possibility to ask for a compulsory licence in three situations: (1) for the general interest; (2) for being able to exploit one's own (dependent) patent which has a great economic benefit; and (3) because of non-use during three years after grant without good reason in any country that is part of the World Trade Organization (WTO and part of the agreement on Trade Related Aspects of Intellectual Property (TRIPS)). The provision is basically a dead letter. Over the last 100 years very few compulsory licences have been granted. Under one view, third-party interests cannot be taken into account separately at the injunction stage and cannot lead to denial of an injunction if the requirements under these provisions are not met. We think this is incorrect: under these provisions, an injunction is straight-out denied and the patentee must make do with a reasonable remuneration. By contrast, proportionality need not always lead to a denial of injunctive relief but may instead result in temporary suspension thereof. And, in any case, the patentee retains its auxiliary claims and in particular its damages claim, which may far exceed the payment that would have been due as a reasonable royalty because Dutch patent law allows for disgorgement of profits.⁴³

³⁹ *Nikon/ASML* (DC The Hague 2018, para. 4.40 *et seq.*).

⁴⁰ See Siebrasse et al. 2019, which contains a theoretical and economic analysis of this problem as well as a comparative study. *Nikon/ASML* is the only Dutch case to date where the small-component issue was raised as an argument to deny an injunction, but the argument was refused by the court.

⁴¹ *Nikon/ASML* (DC The Hague 2018, para. 4.44). Nikon's patent was invalidated by the court, so it did not actually grant the injunction.

⁴² See Van Nispen 2018b for references to cases and literature outside the field of intellectual property law.

⁴³ See in more detail Dijkman 2019b, para. 33; and Stierle 2019, at 353 *et seq.*

The Netherlands does not know immunity for injunctions for the state. So injunctions could be granted against the state if the state cannot successfully invoke misuse/proportionality under Article 168 DCC or obtain a compulsory licence under Article 57 DPA.⁴⁴

C. ALTERNATIVES AND MODIFICATIONS

As stated in Section B, Dutch courts have so far been reluctant to tailor injunctions to specific cases or to substitute the injunction by another remedy. This is largely due to the mandatory language of Article 3:296 DCC: courts *shall* grant the injunction in case of unlawful behaviour. Traditionally, Dutch law did not recognize exceptions to this principle that would allow courts to substitute or modify the injunction.

In theory, a court could suspend the effect of an injunction pending appeal. Under Dutch law, the effect of a merits decision is suspended once an appeal is filed, unless the court declares its decision provisionally enforceable (Article 350(1) Dutch Code of Civil Procedure (DCCP)). Although the Supreme Court has held that the judgement whether to declare a decision provisionally enforceable is subject to a balance of interests; in practice courts virtually always allow provisional enforceability of a decision.⁴⁵ Still, a court wishing to avoid disproportionate consequences of an injunction could suspend its effect pending appeal.⁴⁶ Another option is for the infringer to appeal the decision and to request the Court of Appeal to suspend the enforceability of the injunction. Such requests have rarely been granted as the traditional test required evident mistakes in the first-instance decision or extreme hardship on the part of the infringer. However, in a recent decision the Dutch Supreme Court relaxed these requirements to a balance of interest between the parties.⁴⁷ Just two weeks prior, the Court of Appeal of the Hague had suspended the enforcement of a first-instance decision in a patent case where some of the infringer's arguments had apparently not been considered, the enforcement would cause significant damage to the infringer and the patentee was unlikely to provide recourse for these damages.⁴⁸ The case is unusual as the Court of Appeal does not normally find that important arguments of a party were not considered, and such decisions remain rare. But the Supreme Court's relaxation of the standards for suspension, coupled with the Court of Appeal's taking into account the severity of the

⁴⁴ Art. 57 DPA contains three grounds for grant of a compulsory licence: general interest, non-use of the invention and dependency licenses. Contrary to other jurisdictions, "Crown" or government-use licences are not provided for in the DPA.

⁴⁵ *Gommans/Evers* (HR 1996, para. 3.4).

⁴⁶ See, e.g., *Medinol/Boston Scientific* (DC The Hague 2003, rov. 3.29), where the district court suspended the injunction until infringement and validity were definitively established, subject to a licence payment along the terms of an earlier licence agreement between the parties.

⁴⁷ *XY* (HR 2019, para. 5.8 (a)).

⁴⁸ *VG Colours/HE Licenties* (CoA The Hague 2019).

consequences of the decision for the infringer, may herald a more liberal approach to the grant of stays pending appeal in the Netherlands.

Alternatively, a court could safeguard the interests of the infringer by making provisional enforcement subject to a security deposit (Article 233(3) DCCP).⁴⁹ This possibility was used by interim relief judges in some older decisions, where the injunction was suspended subject to payment by the defendant of an amount in escrow.⁵⁰ These cases would have involved particular hardship to the defendant if an injunction were imposed which, taking into account the preliminary nature of the injunction, led the court to this solution. The mere fact that the injunction would cause substantial damage to the defendant, however, is not enough to refuse or suspend it.⁵¹ The situation is different for *ex parte* procedures, but those are no longer granted by the District Court of the Hague in patent cases,⁵² with an exception for clearly exceptional cases (exhibitions).

Judicial discretion was also already accepted before the adoption of the Enforcement Directive when it comes to claims for recall or destruction of infringing goods. This discretion is explicitly provided for in the DPA.⁵³ Thus, in cases where recall or destruction of infringing goods would be particularly oppressive, for instance where this would incur enormous costs, these claims may be refused. However, such refusals remain relatively rare.⁵⁴ In this respect, there is no real difference between proceedings on the merits and preliminary relief proceedings since in both cases courts are granted discretion, although the preliminary nature of the decision may of course influence the use of this discretion.⁵⁵

⁴⁹ See e.g., *Kirin Amgen/Boehringer Mannheim* (CoA The Hague 1994, para. 36), where the Court of Appeal made enforcement of the injunction subject to payment of a security deposit of EUR 5 million.

⁵⁰ *BT/Plumettaz* (Prel. Rel. DC The Hague 1994, para. 30); and *Huss/Van de Wiel* (Prel. Rel. DC The Hague 1996, para. 9).

⁵¹ See *Vredo/Veenhuis* (HR 1993), as well as *Dutch Mobile/Sisvel* (Prel. Rel. DC The Hague 2005, para. 10) (where the court accepted that allowing the marketing of infringing products would constitute an “unacceptable precedent” vis-à-vis competitors who had concluded licences with the patentee).

⁵² See *Glaxo/Pharmachemie* (Prel. Rel. DC The Hague 2009), where the patent was unopposed before the European Patent Office and not challenged anywhere in Europe, while infringement became apparent from the Summary of Main Product Characteristics (SMPC). Still, the court refused an *ex parte* injunction because the patentee had not offered the infringer a chance to voluntarily remove its product from the market or challenge the infringement claim by sending a summons letter.

⁵³ Article 70, section 7 DPA provides that “when considering the prayer for relief [for recall or destruction, authors], the gravity of the infringement and the requested measures, as well as the interests of third parties, must be balanced”.

⁵⁴ Some examples are *Sharp/Samsung* (DC The Hague 2009, para. 4.45); *Bornemann/Houttuin* (DC The Hague 2003, para. 32); and *Aralco/Prefair* (CoA The Hague 1999, para. 13).

⁵⁵ An amusing example of a refusal in preliminary relief proceedings is *Gouda Holland/Janse* (CoA ‘s-Hertogenbosch 1987, para. 4.13), where a recall of infringing heaters would also have affected the courthouse; the CoA discerned “contra-indications from an economic point of

D. DRAFTING AND ENFORCING INJUNCTIONS

It is up to the patentee's attorneys to state, in the writ of summons, what the court is requested to enjoin. It is customary to ask for a general prohibition on the infringement of the invoked patent, which is justified by the infringing acts discussed and evidenced in the writ of summons (and throughout the rest of the proceedings). If infringement is accepted, a court will normally grant a general injunction, containing a general prohibition not to infringe the relevant patent, subject to a penalty. The following would be a typical formulation of the injunction:

The court ... prohibits [infringer] from infringing [patent number] in the Netherlands, subject to a penalty of EUR 50,000 per violation of this prohibition, or, at the choice of [patentee], of EUR 5,000 per infringing product or per day that [infringer] does not comply with this order, effective 24 hours after service of this order, with a maximum of EUR 1,000,000.

The wording shows that the injunction is formulated very broadly. There is no difference between injunctions in merits and interim proceedings. Courts generally assume that proven infringement gives rise to a threat of further infringement. Because the way in which the further infringement may occur is uncertain, a generally worded injunction is justified.⁵⁶ It is enough that infringement by a single product is proven: there is no need for the patentee to prove other products also infringe the patent, and the fact that the infringer states it has comparable products that do not infringe the patent is insufficient ground to limit the injunction.⁵⁷ Products that, depending on the consumer, may be used in an infringing manner are also covered by the scope of the injunction.⁵⁸ More generally, the Supreme Court has held that the injunction covers all acts which cannot be reasonably doubted to infringe the patent, in light of the court's reasoning in the decision and the interest that the injunction seeks to protect.⁵⁹

Once the decision granting the injunction is served on the defendant, all infringing acts must be ceased. As becomes clear from the sample formulation shown above, the timeframe to stop infringing acts may be (and usually is) quite short. If the infringement nonetheless continues, the patentee may start collection of forfeited penalty sums by seizing bank accounts or further assets of the patentee by a bailiff. The onus is then on the infringer to challenge the alleged forfeiture of penalty sums in separate enforcement proceedings. The penalty amount varies between proceedings, but must in any case be set at an amount that will effectively deter further

view" to removal of installed heaters. Another example is *Westo/Railtechniek van Herwijnen* (Prel. Rel. DC The Hague 2001, paras. 21–22).

⁵⁶ *Lexington* (HR 1964).

⁵⁷ *Carl Zeiss/VSY* (DC The Hague 2017, para. 6.60).

⁵⁸ *DSM/Novozymes* (Prel. Rel. DC The Hague 2017, para. 4.17).

⁵⁹ *Klokkenspel* (HR 1966).

infringements; if the infringer continues the infringements despite the injunction, the penalty amount may be increased.⁶⁰ If a defendant wants to introduce an altered product and to make sure that penalty sums will not be forfeited, the defendant can file summary proceedings and ask the judge to rule that the product is not covered by the judgment (because the judgment does not make clear that the altered product should be considered infringing). If there is doubt, the patentee can file a conditional cross-complaint asking for a new injunction if the court rules that the altered product is not covered by the original injunction arguing that the altered product is also infringing the patent.

E. A LOOK AHEAD

1. *The Enforcement Directive and the Proportionality Requirement*

Directive 2004/48/EC (the Enforcement Directive), which aims to “approximate legislative systems so as to ensure a high, equivalent and homogeneous level of [IP] protection in the internal market”, was transposed into Dutch law on 29 April 2006.⁶¹ Article 11 of the Enforcement Directive stipulates that member states shall ensure that, when an intellectual property right is found to be infringed, “the judicial authorities *may* issue against the infringer an injunction” (emphasis ours). In addition, Article 3(2) states that all IP enforcement measures shall be “effective, proportionate and dissuasive”. The Enforcement Directive establishes minimum standards with which all member states must comply: thus, the tripartite requirement for IP remedies must be met in all national legal systems.

The open-ended formulation of Article 11, as well as the proportionality requirement in Article 3(2), are suggestive of judicial discretion. Indeed, it has been argued that together these provisions require refusal of an injunction if granting it would be disproportionate.⁶² This appears to have been acknowledged by the Dutch legislator who, in the explanatory memorandum to the implementing legislation of the Enforcement Directive, remarked that “it is at all times up to the judge to assess whether a requested measure is proportional to the established infringement”.⁶³ On the other hand, the legislator did not consider transposition of Article 11 necessary, finding that Article 3:296 DCC empowers the court to grant an injunction in case of

⁶⁰ See, e.g., *Ajinomoto/GBT* (Prel. Rel. DC The Hague 2014).

⁶¹ See recital (10). It led, *inter alia*, to the introduction of a new chapter in the Dutch Code of Civil Procedure, comprising Articles 1019a–1019j DCCP.

⁶² See, e.g., Ohly 2009 (“Article 3 of the Enforcement Directive Requires a flexible approach rather than an all-or-nothing solution”); García Perez 2016, 101 (“the courts may issue an injunction or not, discretionarily”).

⁶³ Kamerstukken II 2005/06, 30392, 3, 7 (“Het is overigens te allen tijde aan de rechter om te beoordelen of een gevorderde maatregel proportioneel is ten opzichte van de geconstateerde inbreuk”).

infringement.⁶⁴ As we have seen, this is correct but not the end of the story. After all, Article 3:296 DCC and the interpretation given to it by the Supreme Court do not allow precisely that which the legislator believes a court should “at all times” do, i.e. assess whether an injunction might be disproportional in relation to the infringement. This is reflected in the difference in wording: whereas Article 3 Enforcement Directive states that judicial authorities “may” issue an injunction, Article 3:296 DCC states that the injunction “shall” be issued. In light of the legislator’s explicit acknowledgement that courts must assess the proportionality of requested measures, it would appear that the failure to introduce a corresponding exception to Article 3:296 DCC might be an omission.

2. *The CJEU’s Case Law on Proportionality as Interpreted by the Dutch Supreme Court*

As is well known to IP scholars and practitioners alike, the CJEU has revolutionized European IP through a series of decisions in which it interprets and weaponizes the proportionality requirement in Article 3(2) Enforcement Directive, primarily through its developing jurisprudence of balancing fundamental rights in the context of IP cases. A comprehensive analysis of this case law and how the proportionality doctrine emerges from it will not be undertaken here.⁶⁵ It is merely observed that Article 17(2) Charter of Fundamental Rights makes clear that intellectual property is considered a fundamental right. However, when a conflict arises with other fundamental rights (such as the freedom of information, the freedom of carrying out a business) such protection of IP rights is not (and cannot be) absolute. This means that when IP rights are enforced, they must be weighed against other fundamental rights at stake in the case at hand, as provided for in Article 52 of the Charter.⁶⁶ The goal of this exercise is to ensure a fair balance is struck between, on the one hand, IP rights holders and, on the other, the rights of users of protected subject matter.⁶⁷ This means that in certain circumstances an injunction will have to be refused because granting it would constitute a disproportional interference with the rights of others.⁶⁸

⁶⁴ *Id.* at 15.

⁶⁵ See esp. *Husovec* 2016, 250 (“After *Promusicae*, the proportionality exercise grew into a firm part of the IP case law”; the author proceeds to analyse this case law and the proportionality requirement that emerges from it).

⁶⁶ *Sky Österreich* (CJEU 2013, para. 60) (“Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them”); *Promusicae* (CJEU 2008, para. 68) confirmed that enforcement of fundamental rights must also not be in conflict “with the other general principles of Community law, such as the principle of proportionality”).

⁶⁷ *Telekabel Wien* (CJEU 2014, para. 47).

⁶⁸ See, e.g., *Scarlet Extended* (CJEU 2011). The case concerned enforcement measures against an intermediary which was an important consideration for the CJEU, but nothing in the CJEU’s

This interpretation of the CJEU's case law (generally in the field of copyright law and more especially in regard to providers of access to the internet) has been explicitly embraced by the Dutch Supreme Court in its landmark *GeenStijl/Sanoma* decision.⁶⁹ In those proceedings, the Court of Appeal had ruled that it is inappropriate to weigh copyright protection against the fundamental right to freedom of speech, because the balance between these two rights is already reflected in the Dutch Copyright Act and its exceptions.⁷⁰ The Supreme Court reversed and held that, if the defendant invokes fundamental rights, these should always be weighed against the intellectual property right invoked:

5.2.5. Part II.4 of the cassation complaint correctly takes as its point of departure that the court, if this defence is raised, must investigate whether in the case at hand the enforcement of an intellectual property right is restrained by another fundamental right. It is true that in the enactment of intellectual property laws a correct balance between the various fundamental rights must already be guaranteed, but that does not alter the fact that also the court in a case brought before it must investigate whether, in the circumstances of the case, granting the requested measure, in light of the principle of proportionality, does not detract too much from the fundamental right invoked by the accused party. [translation ours]

The decision has since been followed by lower courts; recently, the Amsterdam Court of Appeal held that when an injunction is requested, “a specific balancing of interests, taking into account the circumstances of the case” must be performed.⁷¹ None of these cases were patent cases, but the Supreme Court's holding in *GeenStijl* is not limited to copyright, instead expressly referring to “an intellectual property right”. Thus, the authors of this chapter assume that it applies fully to patent cases. Recent decisions in preliminary relief proceedings that devote much attention to the entitlement to injunctive relief may be a sign of things to come also in proceedings on the merits; in Section B, the Court of Appeal's important decision in *Sisvel/Xiaomi* was already mentioned. Another notable example is *Douwe Egberts/Belmoca*, a preliminary relief case before the District Court.⁷² The decision contains a lengthy paragraph discussing the circumstances of the case and concluding that, in light of them, the threshold for granting injunctive relief should be set “relatively high”.⁷³ Even if in the context of a preliminary injunction, it is nonetheless

reasoning suggests its holding is limited to intermediaries. See also *McFadden/Sony* (CJEU 2016, para. 90).

⁶⁹ *GS Media/Sanoma* (HR 2015).

⁷⁰ *GeenStijl/Sanoma* (CoA Amsterdam 2013, para. 2.5.5).

⁷¹ *Anne Frank Stichting* (CoA Amsterdam 2018, para. 3.11.2); see also *Gemeente Rotterdam/Stichting Pictoright* (CoA Amsterdam 2017, para. 3.4.3). A weighing of fundamental rights with reference to the proportionality principle was also undertaken in *Moulimsart/Hergé Genootschap* (CoA The Hague 2015, para. 37).

⁷² *Douwe Egberts/Belmoca* (Prel. Rel. District Court The Hague 2018).

⁷³ *Id.*, para. 6.3. The circumstances were that the defendant had already been on the market for two years before the grant date of the patent without having been informed of the application

interesting that the court is so explicit about how the circumstances of the case influence the use of its discretion to impose an injunction, particularly because it found the patent to be invalid so that the paragraph on the threshold for injunctive relief is technically *obiter dictum*.

3. Implications for Dutch Patent Law

What are the implications of these developments for the Dutch approach to patent injunctions? It seems that the importance of the Supreme Court's landmark decisions in *Claas/Van Tongeren* and *Kirin Amgen/Boehringer* is substantially diminished. *Claas/Van Tongeren*'s rule that the grant of an injunction is not subject to a balance of interests once the illegality of an act is established appears to be strongly nuanced by the Supreme Court's decision in *GeenStijl/Sanoma*. The holding in *Kirin Amgen/Boehringer* states that third-party interests cannot be protected by allowing patent infringement to continue as it is at odds with the CJEU's case law in which the fundamental rights of all parties that are affected by an enforcement measure are considered.⁷⁴ The waning of these two foundational principles of Dutch patent law opens up new avenues to courts not just to assess whether injunctions constitute proportional measures, but also to tailor them to ensure that they do.

Although the argument has been that Dutch courts ought to assume discretion to refuse an injunction in patent cases more freely, it is not suggested here that they should use this discretion without restraint. To the contrary: a successful patentee ought normally to be entitled to injunctive relief in the vast majority of cases. But it stands to reason that as innovation changes from nineteenth-century inventions to twenty-first-century technology, the role patents should play to foster this innovation also changes. We believe that increased discretion for patent courts when considering remedies is a key development, mandated by the CJEU's case law, to ensure patent law stays in tune with modern innovation.

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by the patentee; that the case was a "bet-the-company" case for the defendant on which its future was staked because an injunction would mean its end; that the defendant was a much smaller company than the patentee; and that damages as a result of an unjustified denial of an injunction could more easily be calculated than damages as a result of an unjustified grant of an injunction.

⁷⁴ See the explicit reference to third-party interests in *Scarlet Extended* (CJEU 2011, para. 50), and *McFadden* (CJEU 2016, para. 90).

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