The Netherlands

Marc de Kemp

Wolter Wefers Bettink

HOUTHOFF BURUMA

1. Summary of design protection

Design rights protection in the Netherlands is regulated by a treaty that also applies to Belgium and Luxembourg. Under the treaty, a design is protected if it has been registered in the Benelux (ie, the Netherlands, Belgium, and Luxembourg). Community designs and unregistered designs are protected in accordance with the applicable European regulations and directives. Dutch copyright law provides protection to a design which meets the originality threshold. The manufacturer of products faced with an imitation of its design may face legal action on slavish imitation, a form of tort.

Until 1975 industrial designs were not protected as such in the Netherlands. Although the Netherlands was a party to the Hague Agreement Concerning the International Registration of Industrial Designs 1925[1] (the Hague Agreement), it did not introduce specific legislation to protect industrial designs. Successive Dutch governments felt that the Hague Agreement did not provide for adequate protection in addition to the existing copyright protection. For instance, it did not require publication of applications for designs in a regularly published magazine, so that companies had no way of knowing of designs for which protection was sought. It was felt that this would unnecessarily hamper trade and create legal uncertainty.

However, some protection was available. Under the Copyright Act[2] the appearance of a product could be protected if it met the originality threshold for protected works and the slavish imitation of designs was unlawful under the Civil Code.[3]

On January 1 1975 the Uniform Benelux Act on Designs and Models[4] (the Uniform Act) entered into force. The act was an annex to the 1966 Benelux Treaty on Designs and Models.[5] This treaty governed protection of design rights in Belgium, Luxembourg and the Netherlands.

The Uniform Act was amended several times and finally replaced by the Benelux Treaty on Intellectual Property Rights (the Benelux Treaty),[6] which entered into force on September 1 2006. The treaty concerns the protection of designs and as trademarks in the Benelux region. The material rules of the Uniform Act have not been changed by the treaty.

1 Bulletin of Acts and Decrees 1928, 196.

2 Act of September 23 1912, Bulletin of Acts and Decrees 1912, 308.

3 Bulletin of Acts and Decrees 1991, 600.

4 Bulletin of Acts and Decrees 1966, 292.

5 Bulletin of Acts and Decrees 1974, 66.

6 Bulletin of Acts and Decrees 2005, 96.

The Benelux Treaty also implements Directive 98/71/EC of the European Parliament and the Council of October 13 1998 on the legal protection of designs[7] (the Design Directive) and, to the extent necessary, Council Regulation 6/2002/EC of December 12 2001 on Community designs[8] (the Regulation on Community designs), which entered into force on March 6 2002. The regulation designs introduces the Community design right, which applies to across the European Union and may be obtained with a single registration. The majority of the material rules in the regulation are the same as the rules laid down in the Design Directive. The system of protection of Community designs complements the system of protection provided by the Benelux Treaty.

The Hague Agreement entered into force in the Netherlands on August 1 1984 as a result of the Geneva Act of the Hague Agreement concerning the international registration of industrial designs.[9] Based on the Hague Agreement, Dutch persons and entities are entitled to file an international application for the protection of a design. If and when the Benelux region is designated as an area where protection is required (and if all relevant requirements are met), international designs will be protected in the Netherlands according to the rules and regulations of the Benelux Treaty.

2. Registered design rights

2.1 Nature of rights and qualification

Designs may be registered with the Benelux Office for Intellectual Property in The Hague. The office also has national offices in Belgium and Luxembourg. As of September 1 2011, some 16,000 designs were registered with the office.[10]

A design is defined by the Benelux Treaty as the appearance of the whole or the part of a product resulting from the features of, in particular, the lines, contours, shape, texture and/or materials of the product itself and/or its ornamentation. A product is defined as any industrial or handicraft item, including parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces. The definitions are in line with Article 1 of the Design Directive.

Following the Software Directive,[11] computer programs are not protectable, but their look and feel may be protected by copyright. It may be argued that separate icons used in the graphical user interface of a computer program can be protected as a graphic design, since such protection does not interfere with the Software Directive.

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7 Pb L289/28.

8 PbEG 2002, L31.

9 Bulletin of Acts and Decrees 1976, 32.

10 Source: Benelux Office for Intellectual Property, brochure "*Protecting designs in the Benelux region*".

11 Council Directive 91/250/EEC of May 14 1991 on the legal protection of computer programs.

A design can be two- or three-dimensional. An example of a two-dimensional design is the pattern on an item of clothing.[12] Until the implementation of the Design Directive in the Dutch legislation on December 1 2003, the Uniform Act required that a design must have a utility function in order to be granted design rights protection. Since then, products with a decorative function only may also be registered for protection. As a consequence of this strict utility function requirement, design right protection had been limited to a product with a single function. A product with the same design but a different function was considered to be a different design, and could be registered by a third party. For example, a registered design used on towels could not form the basis of an action against wallpaper decorated with the same design, since the two have different utility functions. The Benelux Treaty now offers protection to the appearance of several products which have a different utility function but are based on the same design.

2.2 Registration procedure

Designs can be registered by natural persons, companies and organisations. A design may also be registered in the name of more than one person and/or entity.

The procedure for registering a design right in the Benelux is straightforward. An application form is available on the registry office's website[13] to print out, complete and send to the office by regular post. A Benelux application may be for a single design (single filing) or include several designs (multiple filing).

If the requirements of the implementing regulations of the office are met, it will set the filing date as the date the application was received. The applicant will be informed in writing of the filing date or the grounds for rejection if the application is not successful. The office may allow the applicant to correct its application, for example by filing new or additional documents. The office will not register an application that does not provide sufficient detail of the characteristics of the design.

The filing date determines the ranking order of design right applications and, if the application is accepted, the starting date of the term of protection. Unlike Benelux trademarks, which are also regulated in the Benelux Treaty, there is no opposition procedure for third parties to object to a design application, for example on the basis that it is identical to an older registered design. However, a rights holder may demand nullification of a registered design on that ground.

The office does not judge whether a design meets the requirements of novelty and individual character, but it does examine whether the design is contrary to morality or public policy in any of the Benelux countries.

The office will publish the registration of a Benelux design as soon as it has established that all the relevant application requirements are met. Applicants may ask the office to postpone publication for a not more than 12 months from the filing date or the priority date. The delay allows the applicant to ensure that the design remains unknown to the public while it prepares for the manufacture and launch of the product.

Once the design is registered it may be invoked in legal action against infringing products, as discussed more in detail below.

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12 In the official languages of the office, two-dimensional forms are called drawings and three-dimensional forms are called designs.

13 www.boip.int.

3. Unregistered design rights

Unregistered designs are not protected by the Benelux Treaty. However, unregistered Community design rights are protected in the Netherlands under the Regulation on Community designs. Article 11 (1) of the regulation provides that an unregistered design which meets the requirements under Article 1[14] may be protected as an unregistered Community design for three years as from the date on which the design was first made available to the public within the European Union. This is the date on which it was been published, exhibited, used in trade or otherwise disclosed in the European Union in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the relevant sector operating within the European Union. However, the design will not be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under conditions of confidentiality.

3.1 Copyright protection of designs

As set out above, designs may also be protected under the Copyright Act. This also applies to designs which do not meet all legal requirements and so cannot be considered a design within the meaning of the Benelux Treaty. Protection under both the Copyright Act and the treaty is possible if and when the requirements of both the Copyright Act and the treaty are met.

Article 1 of the Copyright Act defines copyright as: “the exclusive right of the author of a literary, scientific or artistic work or his successors in title to communicate that work to the public and to reproduce it, subject to the limitations laid down by law”. Article 10 of the act provides a non-exhaustive list of works eligible for copyright protection. Article 10, paragraph 1 at 11 specifically mentions “works of applied art and industrial designs and models”. A wide range of products falls within this definition, such as bicycles, shoes, chairs, water drains, clothing, lamps, mobile phones and tablet PCs.

The basic rule of Dutch copyright law is that ideas are not protectable but the specific expression of an idea is. The threshold for copyright protection is relatively low. In the *Screenoprints* decision,[15] the Supreme Court decided that in order to be protected by copyright, a work should have its own, original character and show the personal choices of the author. The usual question to determine whether a work has its own character is whether it is reasonably possible that two authors have created the same work independently from one another.

In making this assessment a distinction should be made between the subjective and objective characteristics of a work. Existing material (facts, style, usual form) is not protected, but subjective elements (determined by the author’s taste, preference or habit) usually are. However, copyright will only be infringed if the subjective aspects have replicated and have the same character, in themselves or in combination.

The Supreme Court elaborated the notion of the personal choices of the author in its *Van Dale/Romme* decision.[16] The work should be the result of human creation and the personal choices should be apparent from the work itself, not from circumstances outside of the work.

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14 See, amongst others, Article 5 (1) regarding novelty and Article 6 (1) regarding individual character.

15 Dutch Supreme Court, November 29 1985, NJ 1987/880 (*Screenoprints/Citroën*).

16 Dutch Supreme Court, January 4 1991, NJ 1991/608 (*Van Dale/Romme*).

The court clarified these requirements in its *Endstra* decision.[17] For a work to attract copyright protection, two criteria must be distinguished: a work must possess its own original character and bear the personal stamp of its author. According to the court the first requirement implies: "that its form is not copied from another work". The second requirement means: "that there must be a form that is the result of human creativity and of creative choices, and thus is a product of the human mind. This excludes, in any case, all forms that are so banal or trivial as to not demonstrate any creative labour whatsoever". The court said that this feature (personal stamp) should be "cognizable from the product itself". Copyright law does not require: "that the author consciously creates a work and makes deliberate creative choices, because this would burden parties with insurmountable problems of evidence".[18]

These requirements apply one-on-one to works of applied art and industrial designs. Some judgments of the Supreme Court[19] state that the eligibility of an industrial design for copyright protection may be determined by the way in which the technical aspects determine its appearance. If a design is (primarily) shaped in a specific way to obtain certain technical effects, limiting the creative choices of the author, it may be excluded from copyright protection - copyright will not be granted to designs which are (predominantly) created to obtain a technical effect.

In the *Una voce particulare* case, concerning an alleged copyright infringement in a TV format,[20] the Supreme Court ruled that in determining whether a product infringes the copyright in another product, the assessment should be based on whether the allegedly infringing product contains copyrightable elements of the original product to such an extent that the overall impression of the two products differs too little to consider the allegedly infringing product to be an independent work.

3.2 Slavish imitation

The rights holder may take legal action against an alleged infringer on the basis of the general tort provision in the Civil Code (Article 162 of Book 6).

As a rule, in commerce a party is allowed to profit from the achievements of others, even if the party thereby competes with them and creates a disadvantage for them.[21] Therefore, imitating a product is in itself not unlawful unless it constitutes design right or copyright infringement. In the case of an imitation of a product, a tort can only be based on facts which in themselves (ie, apart from the alleged design right or copyright infringement) can be considered unlawful. For instance, if a manufacturer of a certain product deliberately and without need causes confusion among the public by imitating non-copyrightable elements of the (alleged) original product, this may constitute an unlawful act.[22] The imitator has an obligation to do all that is reasonably possible

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17 Dutch Supreme Court, May 30 2008, NJ 2008/556 (*Endstra*).

18 From: P Bernt Hugenholtz, "*Chronicle of the Netherlands Dutch copyright law, 2001-2010*", published at www.ivir.nl.

19 Dutch Supreme Court, January 29 2010, RVDW 2010/223 (*Gavita*) and Dutch Supreme Court, June 16 2006, NJ 2006/585 (*Kecofa/Lancome*).

20 Dutch Supreme Court, November 29 2002, NJ 2003/17 (*Una voce particolare*).

21 Dutch Supreme Court, June 23 1961, NJ 1961/423 (*Bolhoeve*).

22 Dutch Supreme Court, June 26 1953, NJ 1954/90 (*Hyster Krane*).

and necessary to prevent the likelihood of confusion arising because the appearance of its product is similar to the original product. The imitator must change the similar appearance of its product if this is possible without interfering with its reliability and usefulness. The public preference for standardisation of products is an element which needs to be taken into consideration when judging whether an imitation is a slavish imitation of the original product.[23] If the imitating product resembles the original on standardisation elements, it is less likely that it will be considered to be unlawful.

4. Qualification for protection

4.1 Registration requirements

Article 3.1 of the Benelux Treaty stipulates that a design will be granted protection only insofar as it is novel and has individual character. Article 3.3 of the treaty further elaborates these requirements.

A design will be regarded as novel if, on the filing date (or the priority date, if the priority of an earlier registration is invoked), no identical design has been disclosed to the public. Designs are considered to be identical when their characteristics differ only in insignificant details. A design is regarded as disclosed to the public if before the filing date or priority date a similar design was made publicly available. This applies if the design was shown in a publication such as a magazine or on the internet, in an exhibition or in any other media or location open to the public. Under the Uniform Act, the novelty requirement had a time limit of 50 years before registration of the design. The time limit was dropped in the Benelux Treaty: each and every design that has ever been disclosed to the public will harm the novelty of a design.

A design will have individual character if its overall impression on the informed user differs from that of all other designs disclosed to the public before the filing or priority date. The informed user is not an expert, but has more knowledge than the average user. He is deemed to have some knowledge of the relevant market and to be able to detect differences between two designs which the average user would not detect. It is possible that the informed user recognises individual character where the average user would not. The creator's degree of freedom in preparing the design is taken into account during the evaluation.

If and when the characteristics of the appearance of a product are exclusively imposed by its technical function, the design will not be granted design rights protection.[24] In general it is assumed that a technical function exists if and when the specific appearance of a product makes it better qualified for its function.[25]

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23 See also Dutch Supreme Court, January 8 1960, NJ 1960/415 (*Scrabble*), Dutch Supreme Court, June 12 1970, NJ 1970/434 (*Klerenhanger*), Dutch Supreme Court, May 31 1991, NJ 1992/391 (*Borsumij/Stenman*), Dutch Supreme Court, June 7 1991, NJ 1992/392 (*Rummikub*) and Dutch Supreme Court, April 2 2004, NJ 2004/388 (*Caravanvoortenten*).

24 Article 3.2, paragraph 1 under part a of the treaty.

25 See eg, Court of Appeal Hertogenbosch, November 4 2003, *Intellectual Property Supplement* (BIE*)* 2004/267 (*Synergis/Geba*), Court of Appeal Arnhem, August 17 2004, *Intellectual Property Supplement* (BIE) 2005/263 (*Foodcontainers*) and president of The Hague district court, April 26 2011, published at www.iept.nl, 2011/0426.

Article 7 of the Design Directive left it to Member States whether to protect component parts of complex products, such as spare parts for cars. The Benelux Treaty excludes from protection the appearance of components which must necessarily be reproduced in their exact form and dimensions to be connected with and form a part of the product in which the design is incorporated. The exclusion of these connection pieces or coupling units encourages the standardisation of such products, which is beneficial for consumers: they are not forced to buy spare parts from the original manufacturer as other manufacturers may market an identical part; and the competition may result in a lower price.

4.2 Term of protection and rights granted

The registration of a design is valid for five years, and it may be renewed up to four times, providing protection for up to 25 years. The registry office sends a notice of the expiry date to the rights holder six months before a five-year period expires and, if applicable, informs it of the possibility to renew the registration for another five years.

The scope of protection is determined by Article 3.16 of the Benelux Treaty. The exclusive right in a design allows the rights holder to challenge the use of a product in which the design is incorporated or to which the design is applied, if the product has an identical appearance to the design as filed, or does not produce a different overall impression on an informed user, having regard to the creator's degree of freedom in preparing the design. The use includes in particular the making, offering, putting on the market, importing, exporting or using of a product or stocking the product for any of those purposes.

When deciding whether a certain product produces a different overall impression on an informed user, the courts must compare the design as it is registered with the office with the actual appearance of the product of the alleged infringer. Neither the Design Directive, the Regulation on Community designs nor the Benelux Treaty provide guidance on how to assess the overall impression, which has resulted in different approaches by the courts. The Supreme Court has ruled that the same overall impression is created if and when the alleged infringing product "only shows minor differences" from the protected design. Minor differences are present if when looking at both products "there is a likelihood of confusion on the part of the public".[26] It may be questioned whether this criterion of likelihood of confusion, which appears to have been derived from trademark law, is entirely correct. It would appear to broaden the protection since it does not require evidence of actual confusion, leaving it to the court to determine in an abstract manner whether there is a *likelihood* of confusion.

4.3 Validity issues

The exclusive right in a design may end in two ways: because the right is nullified or because the right lapses. Nullification has retroactive effect (the design right never existed), whereas when the right has lapsed the right no longer exists.

Since the office checks only whether a design is contrary to morality or public policy in one of the Benelux countries when it receives an application and does not assess the validity in relation to other designs, it is possible for a design that does not meet the legal requirements to be registered. The Benelux Treaty provides a right for interested parties (including the public

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[26] Hoge Raad, December 29 1995, NJ 1996, 546 (*Decaux/Mediamax*).

prosecutor) to invoke the nullity of such designs after their registration. Article 3.23 of the Benelux Treaty contains a limited list of grounds to invoke the nullity:

- the design does not comply with the definition given under Article 3.1 (2) and (3) - that is, the appearance of the whole or a part of a product is not regarded as a design;
- the design is not novel or does not have individual character(Articles 3.1 (1), 3.3 and 3.4);
- the characteristics of the appearance of the product are exclusively imposed by its technical function (Article 3.2); and
- the design is contrary to morality or public policy or the filing does not sufficiently reveal the characteristics of the design (Article 3.6 under (e) or (f)).

A claim to invoke the nullity of a registered design is often filed as a counterclaim by the counterparty in infringement proceedings. The Benelux Treaty does not provide a time limit for invoking the nullity of a registered design.

The exclusive right in a design may lapse as a result of:

- voluntary cancellation or expiry of the registration of a Benelux filing;
- expiry of the registration of the international filing;
- renunciation of the rights for Benelux territory deriving from an international filing; or
- through *ex officio* cancellation of an international filing when the registration fees have not been paid in time.

Annulment, voluntary cancellation and renunciation apply to a design in its entirety and to the entire Benelux region and can therefore not be limited to one of the filings (in the case of multiple filings) or to the Netherlands or another Benelux country only.

5. Infringement, damages and other relief

A rights holder can only invoke its design right against products which are marketed, sold, imported, stocked, etc in the Benelux region. Acts done privately for non-commercial purposes do not constitute infringement.

If an alleged infringing product is offered on a website, it must be determined whether the website is directed at the Benelux - by examining the language used on the website, the currency in which payments can be made, provision of telephone numbers with an international code, the top level domain name used for the website, whether an advertisement with a link to the website features in a Google search conducted from the Benelux, and, of course, whether products can be ordered by and are delivered to customers in the Benelux.[27]

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[27] See the Decision of the European Court of Justice of December 7 2010 in cases C-585/08 and C-144/09 (*Pammer* and *Hotel Alpenhof*). Although the cases concerned the question of a website directed at a consumer's country of residence in the context of the interpretation of Article 15 (1) (c) and (3) of the Brussels I Regulation (Council Regulation 44/2001/EC of December 22 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) in order to determine jurisdiction over a consumer contract, the criteria are similar to the ones applied by Dutch courts when determining whether, in the context of an infringement action, a website is directed at the Benelux.

Generally, if a design right is infringed the rights holder will ask the court to prohibit the infringing party from making further use of its design. If granted, the injunction is usually combined with a penalty, which the infringer will forfeit for each day the infringement continues or for each infringing product which is marketed, sold, imported etc in the Benelux.

The rights holder may request compensation for damage sustained as a consequence of the infringement. Article 3.17 (1) of the Benelux Treaty provides that the rights holder may claim compensation only for infringing acts[28] which have taken place after the publication of the design by the registry office. This is a logical consequence of the requirement that the characteristics of a design must be adequately disclosed and known to the public, so that others may be aware of the rights in the design.

In setting the compensation, the court must take into account the negative economic consequences, including lost profits, which the injured party has suffered, any profits unlawfully made by the infringer and, in appropriate cases, elements other than economic factors such as the moral prejudice caused to the rights holder as a result of the infringement. In appropriate cases, the court may set the damages at a lump sum of at least the amount of royalties which would have been due if the infringer had requested (and received) prior authorisation to use the design.

An infringer deliberately or knowingly using a design without the rights holder's consent will constitute bad faith infringement. Article 3.17 (4) of the Benelux Treaty provides that in cases of bad faith infringement, in addition to or instead of the action for compensation, the rights holder may ask for the transfer of the profits made from the infringing use of its design, to be accounted for by the infringer in the manner established by the court (eg, through an auditor's certificate).

Although the text of this provision appears to suggest that the rights holder may demand both compensation and the transfer of profits, it is likely that the courts will award only one of the claims. Article 27a of the Copyright Act contains a similar provision and the Supreme Court[29] has ruled that a reasonable explanation of that provision does not allow a cumulative award of both compensation of damage and transfer of profits.

A licensee of a design right may intervene in proceedings instituted by the rights holder in order to obtain compensation for damage it has incurred or to receive a proportion of the profit made by the infringer (see Article 3.26 (4) of the Benelux Treaty). The licensee may institute independent action only with authorisation from the rights holder.

Article 3.17 (3) of the Benelux Treaty provides that, at the request of the rights holder, the court may order that ownership of infringing products and the materials and implements principally used to manufacture them be transferred to the rights holder. The rationale behind this option is to prevent further damage to the interests of the rights holder. The court may make the order conditional upon payment by the claimant of compensation fixed by the court.

Article 3.18 of the Benelux Treaty specifies additional claims available to the rights holder. Paragraph 1 stipulates that, without prejudice to any damages due to the rights holder by reason of the infringement, the court may, at the request of the rights holder, order the recall or the definitive removal of the infringing goods from the channels of commerce, or their destruction. These measures implement Article 10 of the Enforcement Directive, which harmonises the way

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28 That is, manufacturing, offering, marketing, sale, delivery, hire, importing, exporting, exhibiting, use or holding for one of those purposes.

29 Dutch Supreme Court, April 14 2000, NJ 2000/489 (*HBS/Danestyle*).

intellectual property rights are enforced in the European Union.[30] In addition, under the Benelux Treaty the rights holder may demand the destruction of materials and implements principally used in the manufacture of the infringing products. As a rule, the costs of these measures are borne by the infringer. In considering a request for any of these measures, the court will take into account whether the remedy requested is proportional to the seriousness of the infringement and whether the interests of third parties are affected.

Article 3.18 of the Benelux Treaty further provides for the possibility for rights holders to take provisional measures to preserve their rights, such as seizing infringing products or the means used to produce the infringing products. In addition, the rights holder may request the court to order the infringer to provide all available information on the origin and distribution of the infringing products, supported by documentary evidence such as copies of invoices and orders.

6. Design infringement litigation

If a product protected by a design right is infringed, it is common for the rights holder to initiate legal action primarily on the basis of its design right. Alternatively the action may be based on copyright protection or, as a final alternative, on tort (slavish imitation, see section 3.2 above). Each year, there are about twenty or thirty (published) cases in the Netherlands where a claim is based on a (registered) design right. The majority of the cases concerning the imitation of products are based on copyright law (due to the relatively low threshold for protection), invariably with tort (slavish imitation) as the alternative legal basis. However, claiming parties regularly use an unregistered Community design right as an alternative basis for their claims.

6.1 Remedies

A rights holder intending to take legal action against an infringing party has two main options: proceedings on the merits or interim injunction (summary) proceedings.

Proceedings on the merits usually take between eight and 18 months from the date of serving the writ on the (alleged) infringing party to the court rendering its decision. Interim injunction proceedings are much quicker, and a decision is usually available within six weeks of serving the writ of summons. The vast majority of intellectual property related court proceedings are dealt with in interim injunction proceedings.

The Enforcement Directive was implemented in Dutch law on May 1 2007. Since that date it is also possible for rights holders to initiate *ex parte* provisional and precautionary measures where the defendant is not being heard (as mentioned in Article 9, paragraphs 1, 2 and 4 of the directive).[31] The defendant may then initiate summary proceedings to have the order lifted.

With respect to these legal remedies, the competent court is the court of the place of residence of the defendant. If the rights holder is able to prove that the infringement is also taking place within the jurisdictions of other courts, it may also choose to file its claims with such other courts.[32]

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30 Directive 2004/48/EC of the European Parliament and of the Council of April 29 2004 on the enforcement of intellectual property rights, PB L 195/16 of June 2 2004.

31 The other remedies provided by the Enforcement Directive are also implemented in Dutch law, but are not discussed here.

32 Dutch Supreme Court, November 23 1917, NJ 1917, page 6 (*Oudenhoven/Brass*).

Proceedings in first instance must always be started in the district court.[33] Each party has the right to appeal a judgment in first instance with the Court of Appeal. The Court of Appeal decision may be appealed before the Supreme Court.

Since the implementation of the Enforcement Directive, in conformity with Article 14 of the directive, the courts have the right to award reasonable and proportionate legal costs and other expenses incurred by the successful party. As a general rule these are borne by the unsuccessful party, unless equity does not allow this. The courts have published a guideline[34] on the amounts the courts deem reasonable and proportionate. For relatively simple injunction proceedings, legal costs amounting to €6,000 are deemed reasonable and proportionate. In more complex injunction proceedings an amount of €15,000 is deemed reasonable and proportionate. In proceedings to the merits the amounts are €8,000 (simple proceedings to the merits) and €20,000 (more complex proceedings to the merits).

7. Licensing and exploitation

The exclusive right in a design may be licensed to a third party (Article 3.26 (1) of the Benelux Treaty). The treaty does not contain any formal requirements with respect to licences. Consequently oral licences are valid, although nearly all licences will, for obvious reasons, be in the written form.

Licences can be exclusive or non-exclusive. Usually licences will contain certain limitations, which are also common in trademark and copyright licences, such as the term of the licence, the territory, the goods which the licensee is allowed to produce and the distribution channel.

Using a design beyond the restrictions of the licence agreement constitutes not only breach of contract but also design right infringement. Under Article 3.26 (2) the rights holder may invoke this exclusive right against a licensee that infringes provisions on the term of the licence agreement, the form in which the design may be used, the goods for which the licence has been granted and/or the quality of the goods marketed by the licensee. This provision implies that the rights of the rights holder with respect to products sold in violation of the restrictions have not yet been exhausted. The rights holder can still take action against third parties who bought the products from the infringing licensee in order to market those products further.

Under Article 3.26, paragraph 3 of the Benelux Treaty, entry of a licence in the registry office may be cancelled only at the joint request of the rights holder and the licensee.

The assignment, transfer or licence of a design can be invoked against third parties only after the parties involved have filed a copy of the document establishing the assignment, transfer or licence with the office (Article 3.27 of the Benelux Treaty).

The Benelux Treaty does not provide for compulsory licences.

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33 Interim injunction proceedings must be initiated with the president of the district court and proceedings on the merits with the regular chambers of the district court.

34 The guideline does not apply to legal proceedings regarding patent infringement.