

How low can you go? Thresholds for access to seized evidence in the Netherlands

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The seizure of evidence is part of every patent litigator's (pre-trial) arsenal. To some extent this measure is harmonised by the Enforcement Directive (art. 6 Directive 2004/48/EC). However, it does not yet have the same fire power in every European state. To get a taste of the Dutch state of play, specifically what the threshold is to get access to seized evidence, two fairly recent Dutch decisions will be discussed. The first is a PI decision of the Court of Appeal of Arnhem-Leeuwarden concerning the grant of access to seized evidence (Court of Appeal of Arnhem-Leeuwarden 16 December 2014, *Econvert v. Voith*). It stands out for two reasons. First, the court appears to set a low threshold for access to seized evidence, i.e. a mere reasoned alleged infringement claim. Second, this is the first decision wherein indirect access to seized evidence is granted, subject to prior review by the defendant to safeguard confidentiality.

The second is a PI decision of the Court of Appeal of The Hague (Court of Appeal of The Hague 24 February 2015, *Synthon v. Astellas*). The CoA considers that there is no uniformity on the threshold for access to seized evidence and proposes questions for referral to the Dutch Supreme court.

Procedural background

These cases both relate to the grant of access to seized evidence pursuant to article 843a Dutch Code of Civil Procedure ('DCCP'). Art. 843a DCCP sets out the conditions which must be fulfilled for a party to get access to evidence. If evidence has been seized *ex parte*, then the seizing party can request access to this evidence in Art. 843a DCCP based proceedings *inter partes*. Art. 843a DCCP requires the following conditions to be fulfilled: (i) there must be a legitimate interest in getting access to, (ii) specific documentation, (iii) regarding a legal relationship wherein the plaintiff or his predecessor is a party (such relationship includes an IP infringement). Even if these requirements are met, access may nevertheless be denied when confidentiality of confidential information is not sufficiently safeguarded.

Prior case law on thresholds

The Dutch courts set a lower threshold for granting *ex parte* evidentiary seizure measures than the plausibility of infringement which is a prerequisite for an injunction in *inter partes* PI proceedings (see PRJ DC Oost-Nederland 1 February 2013, *Astellas/Synthon*, par. 4.3; PRJ DC The Hague 25 July 2007, *Abbott/Teva*, par. 5.2). In principle, this makes sense. The point of such preliminary measures is only to conserve evidence in order to (assess whether one can) substantiate an infringement claim in *inter partes* merits or PI proceedings. An identical threshold would therefore render the evidentiary seizure measures illusive.

The data seized is only disclosed to the party which seized the evidence, if the court has held in *inter partes* proceedings that this party is entitled to the data (or if the respondent agrees to provide access voluntarily). The Dutch courts have not yet come up with a uniform standard for access.

In some cases, appellate courts considered it sufficient to grant access when (i) the claimant furnishes sufficiently concrete facts and circumstances to support a reasonable suspicion of (threatened) infringement with adequate rebuttal of the respondent's counter arguments, and subject to the condition that (ii) the documents for which access is claimed are important for the factual substantiation of an infringement claim (CoA The Hague 29 October 2013, *Real Networks/X*, par. 16; CoA Amsterdam 24 April 2012, *Rhodia/Vat*, par. 3.21).

Econvert v. Voith - lower access threshold?

In the first decision we note that the Arnhem-Leeuwarden CoA considers that to get access, the claimant should make it plausible, based on concrete facts and circumstances known to him, that he has a possible underlying claim (par. 2.23). This appears to be closer in line with the threshold suggested by the CoA The Hague in *Real Networks / X* (29 October 2013, *Real Networks/X*, par. 17) where the CoA notes in an *obiter dictum* that such lower threshold of a reasoned alleged claim may actually be sufficient in view of Art. 6 of the Enforcement Directive and the recent Supreme Court decision on evidentiary seizures which are not based on IP rights (SC 13 September 2013, *X/Molenbeek*).

The PI judges in the specialized patent District Court of the Hague have not adopted this lower threshold suggested by the Hague CoA. It is considered that this threshold (i.e. a reasoned alleged claim being sufficient, not taking counter arguments or plausibility of the infringement in consideration) would result in fishing expeditions (see PRJ DC The Hague 7 April 2014, *Autodesk/ZWCAD*, IEF 13794, par. 4.12; PRJ DC The Hague 11 June 2014, *Zoorobotics/Labelssoft*, par. 4.2). The Supreme Court has indeed stressed that evidentiary seizure measures should not result in fishing expeditions (SC 13 September 2013, *X/Molenbeek*, par. 3.7.1.).

However, it appears that the outcome of the *Econvert/Voith*-case would have been the same if the CoA explicitly would have applied the more strict approach of reasonable suspicion of infringement, which also takes into account whether the arguments in defense have been sufficiently refuted. The threshold of reasonable suspicion seems fulfilled in this case, because the court follows Voith's allegation that *Econvert* has profited from the breach of contract by its former engineer by misappropriation of confidential information in developing an anaerobic putrefaction reactor virtually at no costs and in no time. According to the CoA, *Econvert* and its engineer-manager have not (sufficiently) refuted Voith's asserted claim.

As regards 'specific documentation' for the factual substantiation of an infringement claim, the CoA only grants access to the specifically alleged misappropriated "RS2-reactor" models and designs and relating correspondence between *Econvert* and the former engineer. The seized documents appear necessary to substantiate the alleged underlying infringement claim (i.e. profiting from breach of contractual confidentiality obligations). In general, such documents may not always be necessary to substantiate infringement. When, for example, the alleged infringing product does not require complex analysis and can be purchased in the market, proper administration of justice may be achieved without granting access to seized evidence.

Turn-based access

This is one of the first times that we see a Dutch court grant access in this turn-based manner: *Econvert* is allowed prior review before Voith obtains access to the seized documents via the bailiff. The court determines this manner of access to guarantee the protection of confidentiality. Such procedure could provide the necessary guarantees of the rights of the defence, including the protection of confidential information (see recital 20, Directive 2004/48/EC). The term of two weeks granted to the defendant for review may however in practice turn out too short to review all seized documents. This also provides limited opportunity for the defendant to initiate proceedings to suspend the judgment granting access via the execution judge if prevention of access to safeguard confidentiality turns out to be necessary upon review.

Balancing of interests?

The measure of evidentiary seizure, and subsequent access proceedings, may also be used to support an infringement suit based on EP patents designated for other states than the Netherlands (CoA Amsterdam 24 April 2012, *Rhodia/Vat*, par. 3.43). In addition, the Supreme Court has established that digital files which fall within the scope of the seizure leave and are stored 'in the cloud' (e.g. on computers located in foreign countries that can be accessed from the Netherlands) should also be made accessible to the bailiff. The concerning seizure leave encompasses an order to provide the necessary cooperation for seizure (SC 13 September 2013, *X/Molenbeek*, par. 3.9.10).

It appears that the position of the party whose data is seized *ex parte* falls relatively short, at least to prevent access by means of lifting the evidentiary seizure or preventing access in defense in *inter partes* proceedings. The burden of proof to lift an evidentiary seizure in *inter partes* preliminary relief proceedings is on the party whose data is seized. He has to assert *prima facie* that the seizure is unjust, also taking into account the balancing of interests (SC 14 June 1996, *De Ruiters/MBO*, par. 3.3). In practice the threshold to lift seizures based on alleged patent infringement is high. Since the grant or lift of seizure measures and the grant of access to seized documents are assessed independently, rights holders appear to get the best of both worlds as regards the standards to furnish facts. The evidentiary seizure and access thresholds for alleged rights holders are low, whereas the threshold for alleged infringers to lift an evidentiary seizure is high. The interests of the rights holder in protection against alleged threatened infringement are often held more compelling than the interests of the other party (cf. PRJ DC The Hague 24 October 2014, *ZTE/Vringo*, par. 4.30 and 4.35; PRJ DC Oost-Nederland 1 February 2013, *Astellas/Synthon*, par. 4.28-4.29). The interests of the other party to keep competition-sensitive information confidential should however not be disregarded by the acceptance of low access conditions (cf. DC The Hague 11 March 2009, *Abbott/Medtronic*, par. 4.24).

Distinction of technical infringement information and referral questions

In the second case (*Synthon/Astellas*), the Court of Appeal of the Hague makes a distinction between information related to (i) infringing acts (whether or not a product or process falls within the patent's scope of protection - put differently: information related to infringement in a technical sense), and (ii) information as to who engages into such infringing activities and where and the extent thereof. The court questions whether the ratio to adopt an access threshold that is lower than the plausibility of infringement in *inter partes* PI proceedings holds true for the second type of information, as such information is not necessary to substantiate infringement in a technical sense.

In light of this differentiation between information related to infringement in a technical sense and otherwise the CoA proposes to refer questions to the Dutch Supreme Court regarding the thresholds for seizure of evidence and access to seized evidence. The CoA allowed the parties the opportunity to respond in relation to these proposed questions and the content thereof. It will be interesting to see how this case develops.