WALKING THE WALK ON CLAIMS OF INFRINGEMENT

Michiel Rijsdijk
Arnold + Siedsma

Actively dealing with infringement is vital when protecting intellectual property. There should be actual rights to enforce, however, and making indiscriminate claims purporting infringement of a patent or other IP right is prohibited.

In the Netherlands, this is called a 'wapperverbod', which can be roughly translated into a 'ban on waving around (with claims)'. Waving in this context has a negative connotation and refers to the way other parties are made aware of the claims. If a party claims that its IP rights are being infringed, there should be valid IP rights and the claim should also be acted upon.

Defendants can claim that the other party is giving false statements about its (lack of) IP rights or infringement of those rights. Defendants can ask a judge for a prohibition which will no longer allow the other party to give any information stating that they are infringing the party's IP rights, especially to potential customers.

This is the so-called wapperverbod. It means that parties claiming infringement should also act on those claims.

In principle, it is not unlawful for an IP owner to give statements, send letters or express in any other way concerns in order to prevent or combat an infringement.

This is different if the IP owner is not acting in good faith. Then, the statements can be unlawful. In interlocutory proceedings, a request for a wapperverbod will be granted only in exceptional cases. In any event the party requesting a wapperverbod should have an interest in the ban. Without any interest the claim will not be granted.

If an IP owner acts in bad faith, it is assumed to be negligent. Therefore it is considered that there's only reason for a wapperverbod if the IP owner is giving statements in bad faith.

How can the question of whether an IP owner is acting in good faith be answered? Over the past few years Dutch courts have given several guidelines which can be used to answer such a question.

Case law guidelines

The question of whether someone is acting in good faith should be answered by weighing all the relevant circumstances involved. Apart from the text and content of a statement, the aim of the statement is also a relevant factor. One of the key factors that should be considered is the impression given to the recipient of the statement. This factor is very important because the impression given is what determines the consequences of a statement.

A look at court rulings shows several circumstances which may lead to unlawful waving of claims and IP rights. First, if the waving party knew that the other party was not infringing any IP right or if the waving party—in all fairness—could not think that the other party was infringing, there's reasonable doubt the waving is unlawful.

Second, if the waving party itself does not think the other party is infringing, it may lead to unlawful waving. Third, waving can be unlawful if the statement suggests more than is actually justified. And finally, if a statement about possible infringements by the other party is given to customers without any motivation for those statements, this can also lead to unlawful waving.

"IF YOU WAVE A CLAIM OR IP RIGHT, YOU SHOULD ACT UPON IT OR RISK BEING CONFRONTED WITH A WAPPERVERBOD BECAUSE OF UNLAWFUL WAVING."

If you wave a claim or IP right, you should act upon it or risk being confronted with a wapperverbod because of unlawful waving. Waving is not unlawful as long as the party is acting in good faith. Whether a party acts in good faith is up to the court to decide. You'd better make sure you have a lawful wave, or the court might make you take the flag down. ■

Michiel Rijsdijk is a partner at Arnold + Siedsma. He can be contacted at: mrijsdijk@arnold-siedsma.com