



# International Opposition Guide

Comparative Practice and Procedures

## BENELUX

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**International Opposition Guide: Comparative Practice and Procedures** is an exclusive service provided to INTA members that offers a searchable database of country profiles on the structure of trademark opposition practice and procedure including:

- general provisions
- alternatives to opposition
- opponent issues
- filing requirements
- post-filing stages and procedures

Each jurisdiction profile follows a standardized format, with topics organized by subject heading. This format makes it easy to search within a jurisdiction profile or to compare how different jurisdictions treat a particular subject.

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# International Opposition Guide

## Comparative Practice and Procedures

### BENELUX

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This material is only intended to provide an introduction to and simplified profile of an area of this jurisdiction's trademark law and practice and has primarily been prepared for practitioners considering the merits of filing an opposition in this jurisdiction. This material does not take the place of professional advice given with full knowledge of the specific circumstances of each case and proficiency in the laws of this jurisdiction such as might be provided by a local trademark attorney.

For more information about particular areas of practice, please see INTA's companion online publications: [Trademark Cancellations](#).

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## I. AVAILABILITY

### A. Pre- or Post-Grant

- Opposition is available.
- Opposition is conducted pre-grant. Opposition must be instituted following the publication of the application for registration and not following registration.
- Opposition is available for either all or part of the goods/services covered by a trademark application or registration.

### B. International Registrations

- This jurisdiction is a member of both the Madrid Agreement and the Madrid Protocol.
- International Registration extensions to this jurisdiction can be opposed on the same opposition grounds as national applications.
- International Registration extensions to this jurisdiction may be used as a basis for an opposition on relative grounds.

### C. Collective and Certification Marks

- Collective marks are registrable. Collective marks can be registered together with rules concerning the use and the supervision. The trademark owner may not use the collective mark for his own goods/services.
- Opposition to an application or registration for a collective mark is available. The law provides that the rules in respect of 'normal' marks apply to collective marks.
- Certification marks are not registrable.

## II. EFFECT ON REGISTRATION RIGHTS

- An opposition (even if unsuccessful or later withdrawn) will delay the grant of full registration rights to the applicant.

## III. GROUNDS

### A. Absolute, Relative and Other Grounds

- The following grounds are admissible for opposition:
  - relative grounds (based on proprietary rights, e.g., conflicting prior application/registration or rights in unregistered marks) (Benelux law has no provisions concerning prior unregistered marks. They therefore cannot be the basis of an opposition.);
  - rights under Art. 6 bis of the Paris Convention or the equivalent thereto (notorious or well-known mark).

### B. First to Use or First to File

- In an opposition involving conflicting trademark registrations or applications, a later filing date prevails over an earlier use date (i.e., this is a first-to-file jurisdiction). A trademark only exists when registered. Prior use is not a ground for opposition.

## IV. FORUM

- The opposition authority is part of the Trade Marks Registry/Office.

## V. COSTS AND FEES

### A. To Initiate

- The government/official fees for filing an opposition based on a single prior registration are: The official fees are EUR 1,000, 40 percent of which has to be paid at the start of the proceedings; the remainder must be paid when the actual proceedings start at the end of the cooling-off period.
- The approximate range of attorney fees for filing an opposition based on a single prior registration is: The attorney fees vary between EUR 1,000 and 3,000.
- A listing of Government/official fees for oppositions can be found online at: <http://www.boip.int>.
- The website listing of Government/official fees for oppositions is presented in the following languages: Dutch, French and English.

### B. Monetary Bonds or Surety from Foreign Opponent

- There are no provisions requiring monetary bonds or other surety from a foreign opponent.

## VI. BURDEN OF PROOF

- The burden of proof is neutral; i.e., both parties must prove any grounds, facts, allegations and defenses on which they rely in the opposition. The grounds for opposition are questions of law that do not depend on evidence.

## **VII. SUBSTANTIVE EXAMINATION**

- The trademark registration process includes an official, substantive examination.
- This system includes an official substantive examination of an application on:
  - absolute grounds but not relative grounds.
- The official, substantive examination of an application is conducted before publication for opposition. The application is published before registration. The period for filing opposition starts to run from that date.
- National applications and applications for International Registrations are examined at the same time in the application process.
- Any official substantive examination report is not open to public inspection before the end of the official opposition term. An official substantive examination report is not available. If the registration is denied, this is based on a motivated decision that is open to public inspection. Registration and opposition are separate and independent proceedings.
- Opposition is not considered as part of the official substantive examination and is decided in a separate proceeding. Opposition concerns only relative grounds.
- An official substantive examination will not be conducted after an opposition proceeding has been concluded or after an opposition proceeding has been withdrawn. Should the opposition be successful, the registration proceedings will not be concluded.

## **VIII. STANDING AND OTHER OPPONENT ISSUES**

### **A. Valid Opponent/"Person" and/or "Interested Person" Defined**

- Standing to oppose extends to:
  - any interested person. Legal interest is required. For the definition of "interested person" see below. (Opposition is available only to the holder of an earlier application or registration for a trademark or service mark that has been entered into the Benelux Register, which includes International and European Community registrations.
- For purposes of standing, "person" is defined as:
  - both natural and juridical persons. Most registrations in Benelux are registered in the name of a legal entity.
- For purposes of standing, an "interested person" is defined as:
  - someone who files an earlier pending application to register a conflicting trademark;
  - someone who owns an earlier conflicting trademark registration;
  - someone who is a licensee of any conflicting trademark or other intellectual property right (If one files an opposition in the capacity of licensee, the license must be recorded in the register. In the absence thereof the opponent gets a period of two weeks to record the license. The licensee must provide a document that proves that the trademark proprietor consents. In the absence thereof the opponent gets a period of two months to submit this evidence.).

## **B. On Basis of Grounds**

- Where opposition is based on relative grounds (i.e. a prior registered or unregistered right) then:
  - a licensee may utilize the prior right as a ground of opposition.
- Relevant prior rights must be locally established rights (e.g., local national registration rights, applicable regional rights or relevant International Registration extensions or local rights in unregistered marks). Unregistered marks do not exist in Benelux. "Locally established" means registered in the Benelux Register.

## **C. Assignees and Licensees**

- An unregistered assignee of a relevant prior right may be a valid opponent. If the name of the opponent is not the same as that of the trademark proprietor, the opponent gets a period of two weeks to prove and record the acquisition of the mark.
- A registered licensee of a relevant prior right may be a valid opponent. The licensee must provide evidence of the consent of the trademark proprietor, failing which the licensee gets a period of two months to provide this.
- An unregistered licensee of a relevant prior right may be a valid opponent, provided the licensor has consented. The license must be registered within a period of two weeks.

## **D. Concealing Identity of Opponent**

- An opposition filed in the name of the legal representative for purposes of concealing the identity of the principal is not considered validly filed even if all other criteria are met by the opponent. The representative must base the opposition on an earlier application or registration and must disclose the identity of the holder of that application or registration.

## **E. Joint Opponents**

- Two or more opponents may not jointly file a single opposition. (The law does not provide for joint opposition; however, it is possible for more than one opposition brief to be filed against the same mark. The Registry may choose the opposition that seems to have the best chance to succeed. Note that it is not possible for an opponent to treat opposition against more than one mark of the same applicant as a joint proceeding.)
- A parent company and its trading subsidiary may not be indicated together as opponents in a single joint opposition. (See above.)
- Two otherwise unrelated companies may not file a single joint opposition.

## **F. Foreign Opponent**

- Oppositions cannot be filed from abroad; they must be filed by a local attorney. Abroad should be defined as outside the European Union or the European Economic Area (EEA). An opponent not established in the EU or the EEA is free to engage an attorney in one of the countries of the EU or the EEA. This is considered to be a "local attorney."

## **G. Opponent's Prior Rights and Use**

- If an opponent relies on a prior registration, the applicant or opposition authority:
  - can only require proof of use of an earlier registered mark when the following amount of time has passed since its application or registration date: This can only be required by the applicant of the opposed mark. No evidence of use needs to be submitted during the first five years from the grant of the cited registration.
- If the opponent does not produce satisfactory proof of use of its prior mark for relevant goods/services, the result would be that:
  - the opposition would be defeated only in respect of the goods/services relied upon, for which satisfactory proof was not provided. (The evidence must concern the goods/services on which the opposition is based. If the evidence is provided for part of these goods/services only, the opposition will be continued on the basis of those goods and services.)
- Additionally, if the opponent does not produce satisfactory proof of use of its prior mark:
  - the registration of the prior mark is not affected by the opposition proceeding, but a separate non-use cancellation action can be brought. This type of action is called: invalidation proceedings with the competent court, followed by cancellation.

## **IX. TERM AND EXTENSION**

### **A. Opposition Term: National Applications/Registrations**

- The system provides a fixed initial term within which an opposition may be filed.
- With respect to national applications/registrations, the initial opposition term begins:
  - on the date that the details of the application are published for opposition in the local official IP bulletin, journal or gazette. This publication is called: The Trademarks Register, which can be found online at [www.boip.int](http://www.boip.int).
- With respect to national registrations in this jurisdiction, the initial opposition term expires the following number of days or months following the date mentioned above: As of October 1, 2013, the opposition period of two months begins on the date of the publication of the application.

### **B. Opposition Term: International Registrations**

- With respect to International Registrations extended to this jurisdiction, the opposition term begins:
  - on the date that the details of the International Registration are published in the WIPO Gazette.
- With respect to International Registrations extending to this jurisdiction, the initial opposition term expires on the following date: As of October 1, 2013, the opposition period of two months begins on the date of the publication.
- Once opposition to an International Registration extending to this jurisdiction has been filed, there is no difference between the IR opposition process and that for a national application.

### **C. Deadline Not on Normal Business Day**

- An opposition deadline that does not fall on a normal business day or that falls on a local public holiday or other officially excluded days may be met by action on the next business day.

- Normal business days of the week are:
  - Monday through Friday.

#### **D. Extensions**

- The initial opposition term is not extendable.

### **X. FILING REQUIREMENTS**

#### **A. Minimum Filing Requirements**

- The minimum filing requirements to initiate an opposition (i.e., to obtain a filing date) are: Opposition can only be filed by means of a form that is available on the website of the Benelux Registry at [www.boip.int](http://www.boip.int). No additional documents are required.
- The following additional actions or documentation are required to complete the required filing formalities (i.e., to shift the burden of action to the registration applicant) and will be accepted after the opposition term has expired: No additional actions are required apart from paying 40% of the costs of the opposition.

#### **B. Payment of Official Fees**

- Opposition fees can be paid using the following payment modes:
  - money transfer;
  - debit of deposit account/current account.

#### **C. Public Inspection of Documents**

- Documentation submitted in an opposition is not open to public inspection. As in all legal proceedings, the files are not open to inspection. Only the opposition decision is made public. The opponent can demand that certain information that is provided regarding genuine use will be treated as confidential and will not be mentioned in the decision.

#### **D. Additional Grounds**

- Additional grounds of opposition may not be introduced to the proceeding after an opposition has been filed.

#### **E. Representation**

- The opponent is required to act through a locally authorized representative during the entire proceeding. This applies only to those who are not established in a member country of the European Union or the European Economic Area.

#### **F. Language and Translations**

- Opposition documents must be submitted in the following local official language(s): As of October 1, 2013, the Registry has introduced English as the third official language of the Office. This means that oppositions can be submitted in either French, Dutch or English. This language will be the working language of the opposition.

- When opposition documents are submitted in a language or languages other than the local official language(s), translations are required to be submitted at or by the following time: the opponent can demand translation of the arguments in his chosen language. Requests for the use of another language than the official language must be made when filing the opposition and the other party must react within one month if he does not agree. When documents need to be translated, the translation must be submitted at the same time.

## **XI. POST-FILING STAGES AND PROCEDURES**

### **A. Sequence and General Considerations**

- Depending on the jurisdiction, opposition proceedings generally involve a number of stages between the filing of the opposition and the official decision or judgment. Typically, the post-filing stages will require either that alternating actions be taken by one party after the other in consecutive steps or that actions be taken concurrently by both parties.
  - In this jurisdiction, opposition proceedings require alternating action by one party after the other.

### **B. Length of Opposition Procedure**

- The approximate length of time from the filing of an opposition to an official decision concluding the opposition procedure is: The Benelux Office can take up to two years to render a decision. The Office is doing its best to speed up the decision period, but one must reckon with at least six months.

### **C. Monetary Awards**

- The opposition authority has the power to make a formal monetary award to the successful party. The award includes the following specific costs, official or attorney fees or other compensation: When the opposition is successful, the Office will order the applicant to reimburse the costs of the opposition, i.e., the Office fees of EUR 1,000. No attorney fees, translation costs, etc., are awarded. If the opposition is rejected either in full or partially, no monetary award is given.
- To receive a formal monetary award, the successful party in an opposition does not need to file a separate application. In its decision the Office awards to the winning party the amount of the basic fees (EUR 1,000) to be paid by the losing party. If the opposition is partially successful, no costs will be awarded. No attorney fees are awarded.
- The amount or basis for calculating a typical monetary award is: In its decision the Office awards to the winning opponent the amount of the basic fees (EUR 1,000) to be paid by the losing party. If the opposition is partially successful, no costs will be awarded. No attorney fees are awarded.

### **D. Withdrawal of Oppositions or Applications**

- Withdrawal of an opposition with or without the agreement of the applicant to the terms of the withdrawal automatically terminates the proceedings.
- Withdrawal of an opposition without the agreement of the applicant to the terms of the withdrawal does not have any consequences with regard to the award of costs. For

withdrawal, no agreement of the applicant is required. The opponent who withdraws gets a restitution of 60% of the opposition fee.

- Withdrawal of an opposed application with or without the agreement of the opponent to the terms of the withdrawal automatically terminates the proceedings.
- Withdrawal of an opposed application without the agreement of the opponent to the terms of the withdrawal does not have any consequences with regard to the award of costs.
- Withdrawal of an opposition or of an opposed application outside of this jurisdiction (with or without the agreement of the other party to the terms of the agreement) has no effect on opposition or other proceedings in this jurisdiction.
- If the opponent has withdrawn the opposition, the opposition authority cannot reject the opposed application on any of the opposition grounds.
- A formal basis is not required for withdrawal of an opposition. The law allows withdrawal without any formalities to be fulfilled.
- The limitation or restriction of the applicant's goods/services, with or without a written settlement agreement, is commonly a basis for withdrawal of the opposition.
- The terms of a settlement agreement need not be disclosed to the opposition authority.
- The opposition authority need not approve any settlement reached and/or formal withdrawal of the opposition.

## **XII. APPEALS**

### **A. Availability/Deadline**

- An opposition decision may be appealed.
- The following party or parties may file an appeal: the one who feels that no justice has been done.
- The deadline for filing an appeal is: within two months after the decision of the Registry.

### **B. Forum**

- There is more than one appeal authority, the names of which are: The Courts of Appeal of either The Hague, Brussels or Luxembourg, depending on the place of establishment of the applicant.
- The following appeal authority/authorities is/are independent of the Trademarks Registry/Office: All three courts are independent of the Registry/Office.
- The reasons for choosing one appeal authority over the other are: One has no option.

### **C. Cost/Monetary Bonds or Surety**

- The government/official fees for filing an appeal are: The court fees in the Netherlands are EUR 683 and in Belgium/Luxembourg EUR 180.
- The approximate range of attorney fees for filing an appeal is: The attorneys' fees are subject to agreement with the client. Assistance of an attorney at law is required. The costs vary between EUR 2,000 and EUR 5,000.
- The government/official fees for prosecuting an appeal to conclusion are: No government or official fees are due other than those mentioned (court fees in the Netherlands of EUR 640 and in Belgium/Luxembourg of EUR 180).

- The approximate range of attorney fees for prosecuting an appeal to conclusion is: The attorneys' fees are subject to agreement with the client. Assistance of an attorney at law is required. The costs vary between EUR 2,000 and EUR 5,000. The extra costs vary between EUR 3,000 and EUR 6,000. The party who loses must pay the other party the costs of legal assistance, in Belgium up to an amount EUR 11,000.
- Monetary bonds or other surety are not required of foreign appellants.

#### **D. Other Circumstances**

- Important circumstances of appeal that are not mentioned above include: none.

#### **E. Higher Appeals: Availability/Monetary Bonds or Surety**

- An appeal decision is not final. Higher appeals are possible and can be made to: the Supreme Court. Higher appeal is possible within three months, but only on the basis of a point of law rather than a dispute on the facts.
- On higher appeal, monetary bonds or other surety are not required of foreign appellants.

### **XIII. OTHER ISSUES**

#### **A. Subsequent Infringement Proceedings**

- In subsequent equivalent infringement proceedings, an opposition decision is not binding on the court.

#### **B. Local Requirements/Perspectives**

- Particular local requirements that are not covered above and that are not common in other jurisdictions or familiar to foreign practitioners include: none.

#### **C. Anticipated Revisions of the Law**

- Important changes in relevant law are not anticipated in the near future.

### **XIV. ALTERNATIVES**

#### **A. Cancellation**

- There are procedures available whereby third parties can apply to cancel or partially cancel a registration (whether or not an opposition has been filed). There are procedures available, but apart from opposition all these are with the civil court.
- These procedures are known (or translate into English) as:
  - cancellation;
  - revocation;
  - invalidation;
  - nullity.
- The grounds to initiate a cancellation are:
  - the mark is descriptive (Descriptiveness can be a ground only if the mark is purely descriptive.);

- the mark is misleading and/or deceptive;
- the mark lacks distinctiveness;
- the mark is generic (When the mark is generic it lacks distinctiveness. When the mark was distinctive but lost it as a result of behavior of the owner, the court can declare that the trademark right lapsed.);
- the mark consists of a geographical indication;
- the mark is functional;
- the mark is against public policy or principles of morality;
- the mark has not been authorized by competent authorities pursuant to Article 6ter of the Paris Convention;
- the mark is used in a misleading and/or deceptive manner (This can be a reason for the court to declare that the trademark right lapsed.);
- the application for or registration of the mark was made in bad faith;
- there is an earlier application or registered mark;
- the application for or registration of the mark was made in bad faith;
- the mark is notorious or well known (Article 6bis of the Paris Convention).
- It is also possible that the court may declare that the trademark right lapsed due to non-genuine use for a period of more than five years.
- General remark: Benelux law does not treat revocation, cancellation, invalidation or nullity separately. All four are synonymous.
- The grounds to initiate a revocation are:
  - the mark is descriptive (Descriptiveness can be a ground only if the mark is purely descriptive.);
  - the mark is misleading and/or deceptive;
  - the mark lacks distinctiveness;
  - the mark is generic (When the mark is generic it lacks distinctiveness. When the mark was distinctive but lost it as a result of behavior of the owner, the court can declare that the trademark right lapsed.);
  - the mark consists of a geographical indication;
  - the mark is against public policy or principles of morality;
  - the mark has not been authorized by competent authorities pursuant to Article 6ter of the Paris Convention;
  - the application for or registration of the mark was made in bad faith;
  - there is an earlier application or registered mark;
  - the mark is covered by a copyright (A copyright or company name can invalidate a registration only on the basis of bad faith. This may change under a forthcoming revision of the Harmonization Directive.);
  - the mark is notorious or well known (Article 6bis of the Paris Convention);
  - the trademark application was filed or the registration was granted in the name of an agent or other person with a business connection to the owner of the mark (Article 6septies of the Paris Convention) (This is an example of a bad faith registration.);
  - It is also possible that the court may declare that the trademark right lapsed due to non-genuine use for a period of more than five years.
  - General remark: Benelux law does not treat revocation, cancellation, invalidation or nullity separately. All four are synonymous.

- The grounds to initiate an invalidation are:
  - the mark is descriptive (Descriptiveness can be a ground only if the mark is purely descriptive.);
  - the mark is misleading and/or deceptive;
  - the mark lacks distinctiveness;
  - the mark is generic (When the mark is generic it lacks distinctiveness. When the mark was distinctive but lost it as a result of behavior of the owner, the court can declare that the trademark right lapsed.);
  - the mark consists of a geographical indication;
  - the mark is against public policy or principles of morality;
  - the mark has not been authorized by competent authorities pursuant to Article 6ter of the Paris Convention;
  - the application for or registration of the mark was made in bad faith;
  - there is an earlier application or registered mark;
  - the mark is covered by a copyright (A copyright or company name can invalidate a registration only on the basis of bad faith. This may change under a forthcoming revision of the Harmonization Directive.);
  - the mark is notorious or well known (Article 6bis of the Paris Convention);
  - the trademark application was filed or the registration was granted in the name of an agent or other person with a business connection to the owner of the mark (Article 6septies of the Paris Convention) (This is an example of a bad faith registration.);
  - It is also possible that the court may declare that the trademark right lapsed due to non-genuine use for a period of more than five years.
  - General remark: Benelux law does not treat revocation, cancellation, invalidation or nullity separately. All four are synonymous.
- The grounds to initiate a nullity are:
  - the mark is descriptive (Descriptiveness can be a ground only if the mark is purely descriptive.);
  - the mark is misleading and/or deceptive;
  - the mark lacks distinctiveness;
  - the mark is generic (When the mark is generic it lacks distinctiveness. When the mark was distinctive but lost it as a result of behavior of the owner, the court can declare that the trademark right lapsed.);
  - the mark consists of a geographical indication;
  - the mark is against public policy or principles of morality;
  - the mark has not been authorized by competent authorities pursuant to Article 6ter of the Paris Convention;
  - the application for or registration of the mark was made in bad faith;
  - there is an earlier application or registered mark;
  - the mark is covered by a copyright (A copyright or company name can invalidate a registration only on the basis of bad faith. This may change under a forthcoming revision of the Harmonization Directive.);
  - the mark is notorious or well known (Article 6bis of the Paris Convention);
  - the trademark application was filed or the registration was granted in the name of an agent or other person with a business connection to the owner of the mark

(Article 6septies of the Paris Convention) (This is an example of a bad faith registration.).

- It is also possible that the court may declare that the trademark right lapsed due to non-genuine use for a period of more than five years.
- General remark: Benelux law does not treat revocation, cancellation, invalidation or nullity separately. All four are synonymous.
- To compare the grounds for the above procedures to the grounds for opposition, please see [Section III. Grounds: A. Absolute, Relative and Other Grounds](#)
- The burden of proof is on both parties to prove the allegations and defenses upon which they rely in the cancellation. The claimant must state and argue why the mark should be invalidated. He also bears the burden of proof of non-use, but the court can reverse that burden if the claimant states facts that make it likely that the mark was not used genuinely. The defendant must deny and argue why the mark should not be invalidated.
- The burden of proof in an opposition differs from the burden of proof in a cancellation in that in an opposition:
  - the burden of proof is on the applicant. In principle the burden of proof is the same, but for the burden of proof of genuine use. In opposition proceedings this burden rests with the owner of the opposing mark.
- Cancellation or equivalent proceedings can in some circumstances be preferable to opposition proceedings because:
  - the opposition term has lapsed;
  - there are more grounds for cancellation than for opposition;
  - the court is more adequate in deciding questions of law.

## B. Observations and Letters of Protest

- There are no procedures for official consideration of informal protests raising objections to grant (e.g., observations, letters of protest, etc.).

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