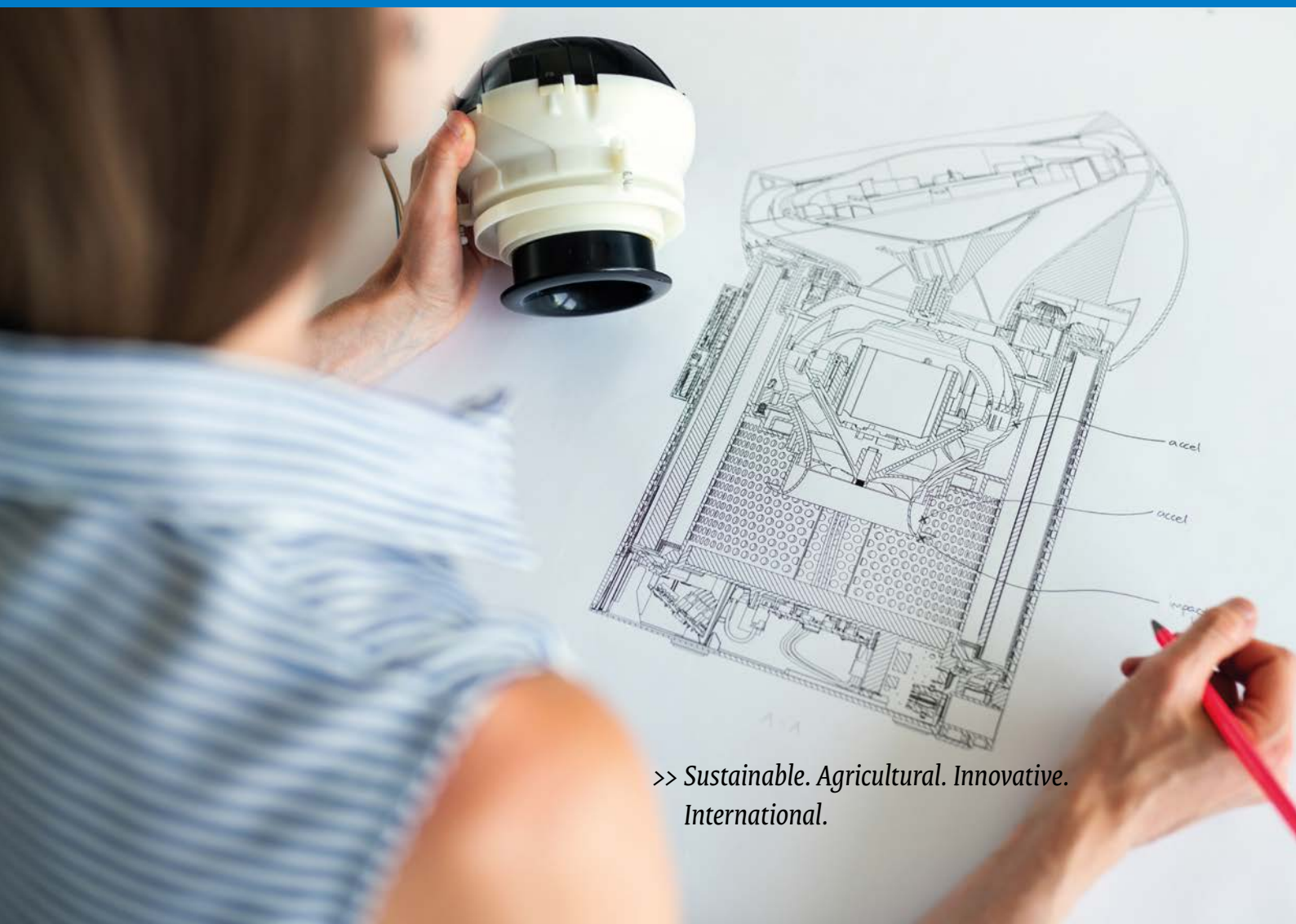
Netherlands Enterprise Agency

Patents for your business

Strategic use of patents to bolster your business plan

A publication by the Netherlands Patent Office for entrepreneurs who are looking for patent information in relation to the Netherlands Patent Law



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Contents

Introduction

Patents help you protect your technological innovation or invention of a product or process. This could be a multifunctional stroller, a bagless vacuum cleaner or a biscuit with an indentation to make it easier to take out of the package. Or it might be chemical inventions such as paints and medicines, or inventions in the fields of computing and gene technology.

A patent is a type of intellectual property right (IP). Other types of intellectual property rights include copyright for creative work, plant breeders rights for plants, and trademark rights for names and logos. The Netherlands Patent Office offers more information on the various forms of protection in a brochure entitled 'The basics of intellectual property'.

A patent is a **right of prohibition**. This means that you can prevent other people from using your protected invention without your permission. You do have to check for infringements yourself. Patents prevent others from taking advantage of your ideas or investments without any benefit to you. With a patent, you can:

- maintain a monopoly or exclusivity, if you are able to detect and stop infringement by others;
- encourage others to use your idea under your own conditions, for example using licences;
- increase the value of your company for investors and potential buyers.

In return for the right of prohibition, all patent applications in which the applicant explains how their invention works are published, so others can acquaint themselves with the information contained therein and build upon that knowledge.

In the case of technological innovations, knowledge of patents can often be useful in the innovation process for three reasons. Firstly, it can help you find out what patents others have applied for. Secondly, you can use this knowledge to assess your own options before applying for patents. And thirdly, it can support value creation with your products and services. To ensure value creation, it is advisable to align your strategy for intellectual property rights with your business strategy. See Figure 1.

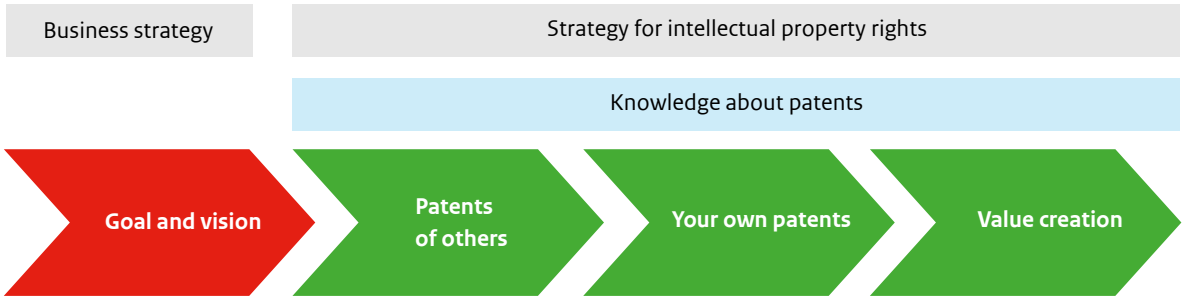


Figure 1: *It is advisable to align your strategy for intellectual property rights with your business strategy (goal and vision). Knowledge of patents is important in value creation with technological innovation.*

The goal of this brochure is to give an introduction to patents in the context of the Netherlands patent law. This information is for small and medium-sized businesses, start-ups and other interested parties. After reading this brochure, you will know:

- what you can and cannot protect with a patent.
- how national and international patent procedures work, and how you can make a rough estimate of the timeframe and costs.
- when to check out patent databases and what to look for.
- how to decide whether or not to apply for a patent.
- how to decide between a patent, trade secret or publication.
- what to do in the event of disputes regarding infringement.

1 The patent

In Dutch, the terms *octrooi* and *patent* are used interchangeably because they mean exactly the same. The Netherlands patent law uses the term *octrooi*.

The patent system promotes technological innovation in two ways.
First, a patent provides exclusive right of ownership to the technological innovation of a product or process. Using a patent, a patent holder can prohibit others from using their technological invention in their business practices in the country where the patent is granted. This covers the production of imitation products as well as using, selling, stocking and importing products. This right of prohibition makes it more appealing for patent holders to invest in innovation. However, the patent holder is responsible for identifying infringements and taking action.
Second, in return for receiving this right, applicants have to agree to having their patent application made public after 18 months. In the patent application, the applicant explains how their invention works. This allows others to become acquainted with the innovation and learn from it. Innovation is promoted through the opportunity to build on knowledge shared in patent documents.
In short: the owner of a patent receives the right to prohibit others from using their invention, but after an 18-month head start, others will be able to familiarise themselves with the innovation.

1.1 Who is the owner of a patent?

In principle, the applicant is the owner of the patent, because patent law assumes that the applicant is also the inventor. If another party (not the inventor) unlawfully applies for the patent, then the inventor can object and still obtain ownership of the patent. But the inventor is required to provide proof that they are in fact the legitimate inventor and that the other party's claim to the patent is unlawful.
Sometimes it can be difficult to determine the rightful inventor, for example if this was not properly documented or in the case of a joint innovation. In a joint technological development, each party is in principle always owner of their own share of the technological contributions. It is important to properly document that the intellectual property that is being created by various parties during an innovation process belongs to the applicant. Any party playing a supporting role, for example by funding or providing facilities, will not automatically have a claim. So make sure that you have clear agreements in place if you commission another party to develop all or part of a technological innovation process for you.
In practice, shared ownership of a patent is often challenging, because the interests of the parties must remain aligned for a long period of time. Popular solutions are to establish a joint private limited liability company or to award ownership of the patent to the party with the most financial resilience. The other parties can then gain access to the technology, for example with a licence.
Patents are sometimes placed in a separate private limited liability company (holding), founded specifically for intellectual property. A risk-bearing operating company can then receive a licence, which may or may not be exclusive. The idea behind this is that it is less likely that a curator will obtain the intellectual property in the event of a bankruptcy.
In the Netherlands, in the case of an employee with a permanent contract, the invention belongs to the employer, unless otherwise agreed. This often also applies to inventions in the context of work performed outside working hours without direct involvement of the employer. However, the invention needs to concern something in the course of the agreed work. If you are in research, it's your job is to invent. However, if you are a secretary inventing is usually outside your job scope. In this case your inventions do not belong to the company.
The most important thing to note is that you can contractually establish who the patent applicant and owner will be. This should ideally be done at an early stage. If you do not make any specific arrangements for this, then the patent will become the property of the applicant, unless another party has a claim to the patent and takes legal action to demand ownership. It is also possible for patents to change hands at a later date. You can formally record this in the patent register.

1.2 What are the requirements for a patent?

A patent allows you to record your technological solution to a technological problem. The technological solution must meet three requirements:

1. **Novelty.** Your invention must not have been made public anywhere in the world before you apply for the patent. Not even by yourself.
2. **Inventiveness.** Your invention may not be too obvious. The invention should be an original idea that could not easily be conceived by other professionals. This is also referred to as the *inventive step* or l*evel of invention*. It is not always easy for developers to establish whether an invention is original.
3. **Industrial applicability.** Your invention should be a product or process that is technologically feasible. Often the application is obvious from the invention or product itself, or from the way it works. If the industrial application is unclear, the patent application must describe how the invention can be used in practice.

1.3 When is there no point in applying for a patent?

You can receive a patent in all technological disciplines, from paper clips to gene technology. Although patent legislation does not provide a direct definition of an invention, it does indicate in which cases a patent cannot be granted. Due to the requirement that all inventions must be of a technological nature, you cannot obtain a patent for:

1. discoveries, scientific theories or mathematical methods;
2. aesthetic designs;
3. methods for the performance of mental labour, games or business operations;
4. information presentation.

Point 3 also includes non-technological software. Still, it is sometimes possible to protect software with a patent in the form of a working method, or in the form of a device that performs this working method. These are called *computer-implemented inventions*.

Finally, inventions that are inconsistent with public order or decency are also excluded. Plant and animal varieties and processes that are in essence biological cannot be patented either, nor can treatment methods for the human body or animal bodies. This includes surgical and therapeutic treatments, as well as diagnostic methods used on humans or animals. However, products used to assist in these situations are patentable. This includes medicines, diagnostic equipment and prosthetics. If in doubt you may consult a patent attorney.

1.4 What does a patent document look like?

A patent document consists of, among other things, a cover page, description, figures and claims (also called *conclusions*). This is often followed by a novelty report with an opinion about the claims of the patent.

Cover page

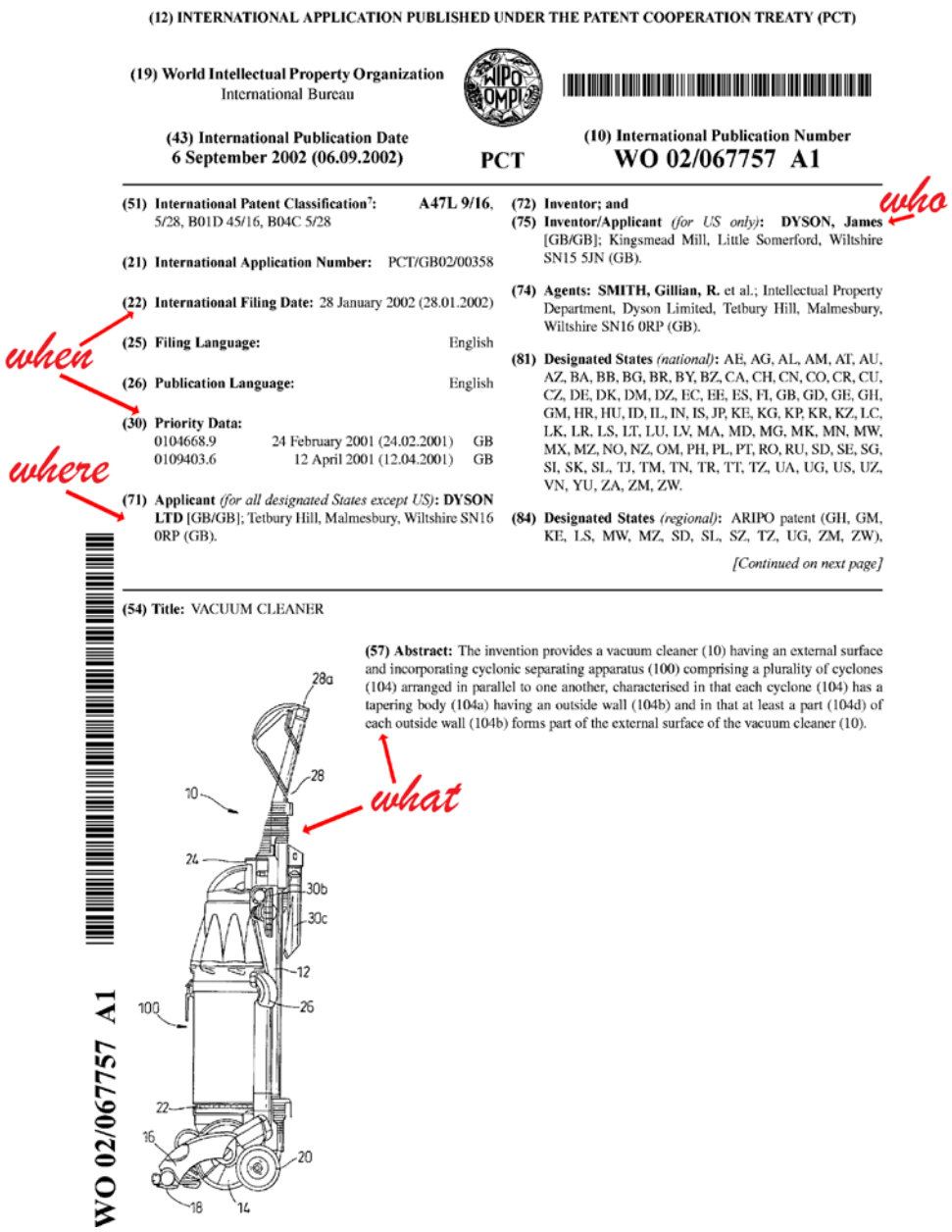
The cover page shows the standardised identification information of the patent document. It provides a quick overview of:

- the country or area to which the patent applies (where);
- details about the applicant and inventor (who);
- the date of submission of the application and any related dates (when).

In addition, the cover page gives a first impression of the content of the patent document through:

- the title of the application (subject);
- a short description that may include a figure (what).

Figure 2 provides an example of a cover page.



(12) INTERNATIONAL APPLICATION PUBLISHED UNDER THE PATENT COOPERATION TREATY (PCT)

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International Bureau

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(81) Designated States *(national)*: AE, AG, AL, AM, AT, AU, AZ, BA, BB, BG, BR, BY, BZ, CA, CH, CN, CO, CR, CU, CZ, DE, DK, DM, DZ, EC, EE, ES, FI, GB, GD, GE, GH, GM, HR, HU, ID, IL, IN, IS, JP, KE, KG, KP, KR, KZ, LC, LK, LR, LS, LT, LU, LV, MA, MD, MG, MK, MN, MW, MX, MZ, NO, NZ, OM, PH, PL, PT, RO, RU, SD, SE, SG, SI, SK, SL, TJ, TM, TN, TR, TT, TZ, UA, UG, US, UZ, VN, YU, ZA, ZM, ZW.

(84) Designated States *(regional)*: ARIPO patent (GH, GM, KE, LS, MW, MZ, SD, SL, SZ, TZ, UG, ZM, ZW),

[Continued on next page]

(54) Title: VACUUM CLEANER

(57) Abstract: The invention provides a vacuum cleaner (10) having an external surface and incorporating cyclonic separating apparatus (100) comprising a plurality of cyclones (104) arranged in parallel to one another, characterised in that each cyclone (104) has a tapering body (104a) having an outside wall (104b) and in that at least a part (104d) of each outside wall (104b) forms part of the external surface of the vacuum cleaner (10).

WO 02/067757 A1

when
where
who
what

Figure 2: *A cover page for a patent application about a vacuum cleaner.*

Description

The description consists of an introduction and a part with at least one complete example of the invention. The introduction gives a short description of the state of the art relevant to the invention, which problems still exists with the current state of the art, and a short description of the solution for this problem. The state of the art encompasses anything that has been made public in writing or verbally before the submission date of the patent. After the introduction, the invention is described in greater detail based on an example or design type of the invention.

Figures

Figures clarify the invention with images or schematic diagrams. In the description and sometimes in the claims, numbers are used to refer to components in the figures. The example in the figures does not limit the patent application: other models than those included in the figures may also be protected.

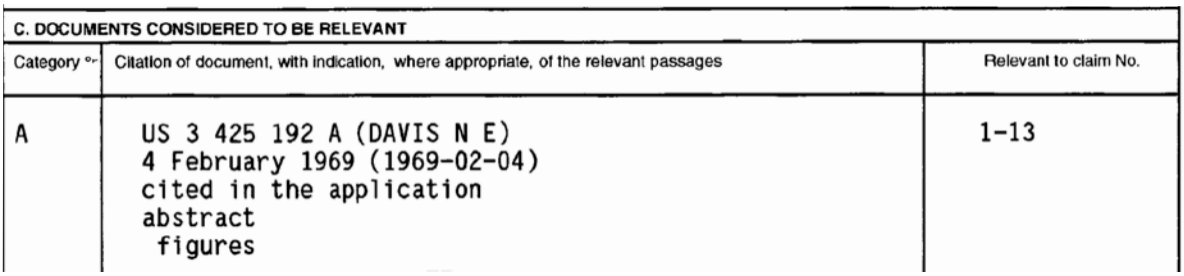
Claims

The claims, sometimes called *conclusies* (conclusions) in Dutch, define the patent protection and are, in this way, the most important part of the patent. The description and the figures merely help explain the claims. This also means that the legal protection of the patent is determined by the claims, which is why the claims must be described in a legal manner. In the main claim, often the first claim of a collection of claims, the protected invention is described as succinctly as possible, allowing for the broadest possible definition. The main claim therefore offers the greatest scope of protection. Multiple claims often follow the main claim, and these are dependent on the main claim. The dependent claims tend to describe more detailed aspects of the invention, protecting more specific and smaller elements.
There are two types of claims: one for products and one for working methods. Generally speaking, claims for products are easier to enforce than claims for working methods. To prove your claim for a product, you (or a third party) can purchase the products of your competitors, but a production method is often used behind closed doors.

Novelty report

A novelty report is also referred to as *search report and written opinion*. This report provides an overview of the research into the state of the art. It consists of a table with relevant publications and a written opinion about the patent application, particularly about the novelty and inventiveness of the claims. Using the novelty report, the applicant and third parties are better able to assess what can be protected. The patent-granting body drafts the report. Please be aware that claims can sometimes be revised later, based on the novelty report and new insights. The complete correspondence with the patent-granting bodies can be found in the patent registers (See Section 3.2).

The first part of the novelty report includes an overview of relevant patents and other documents found by the researcher. Using letter codes, the researcher indicates the category of the document and the claims to which the documents are considered relevant. The most-frequently used letter codes are:
X: document harmful to novelty and inventiveness;
Y: document harmful to inventiveness;
A: document that describes the state of the art, but is not harmful to novelty or inventiveness (see Figure 3).



C. DOCUMENTS CONSIDERED TO BE RELEVANT

Category	Citation of document, with indication, where appropriate, of the relevant passages	Relevant to claim No.
A	US 3 425 192 A (DAVIS N E) 4 February 1969 (1969-02-04) cited in the application abstract figures	1-13

Figure 3: *A table from a novelty report. The first column contains letter codes (categories). The second column lists cited documents that are part of the state of the art. The third column shows the numbers of the patent application claims to which the cited documents apply.*

In the second part of the novelty report, the researcher uses a table to indicate which claims they do and do not deem new, inventive and industrially applicable. The researcher also substantiates and argues (sometimes in a very succinct manner) in the written opinion how they arrived at their judgements with references to the documents mentioned.

1.5 Applying for patents? Beware of these pitfalls!

Are you considering applying for a patent? Then be sure to avoid these common missteps:

✗ 1: You made your invention public before you applied for the patent

A requirement for a valid patent is novelty. So make sure that you keep your invention a secret at least until the day you submit your patent application, or your application could turn out to be worthless! You may not publish your invention in advance, in a corporate brochure, as part of a presentation at a fair, or in an online article, to name a few examples. Do you need to speak about your invention with others? Ask them to sign a confidentiality agreement.

✓ *Tip: Do not make your technological innovation public before your patent application has been submitted.*

✗ 2: Unexpected high or unnecessary costs in badly timed patent procedures

The content of your patents is important, but so is your timing. On the one hand, you want to move fast. After all, patent rights are given to the first party that applies for them. But you should also avoid applying too early. This may be the case if you are still working on finalising your funding at a stage where you need to make large investments to build an international patent portfolio. Or if you are still developing your product, in which case you risk taking out protection for a version that you will not market. Unless you fear that your competitors are developing the same product, or that you might lose out on a partnership opportunity, it is often worth spending some more time on creating a solid business plan or the technological development process.
The countries in which you choose to register your patent will determine the level of investment required. It is important that your choice of countries suits your business plan. Are you applying for a patent in the Netherlands first? Then you have one year to decide if you wish to continue your patent application in other countries, or in the form of an international patent application (PCT application). A year goes by fast, so you should decide as soon as possible in which countries you would like to apply for a patent if you do not intend to submit an international patent application. If you do decide to submit an international patent application, you have two and a half years to decide in which countries you would like to submit your patent application. Your options will be limited to countries that have signed the Patent Cooperation Treaty (PCT).

✓ *Tip: Plan investments for (international) patent procedures. Read Chapter 2 of this brochure.*

✗ 3: Not checking patent databases on time before investing

The patent databases contain more technological information than scientific or professional literature, including about innovations that have not yet been marketed. By checking patent databases on time, you can avoid reinventing the wheel. This may help you spend less on research and development. It also ensures that you can become aware in time if you would end up infringing patents of competitors, and you will avoid applying for a patent with no value. Investors also often require patent research.

✓ *Tip: Check patent databases at an early stage. Read Chapter 3 of this brochure.*

✗ 4: Spending money on patents that your company does not profit from

Patents are a tool in business operations and only make sense if they support your business strategy. For this reason, you should always align the timing, the subject and the choice of country with your plans for the next five to 10 years.

✓ *Tip: Read Chapter 4 for practical considerations and Chapter 5 for possible alternatives.*

✗ 5: Not hiring professional assistance on time

It is highly advisable (and necessary for the quality) to enlist the help of specialists. This will help you to minimise the risk of infringing existing patents or applying for a patent with little or no value, and you will receive the appropriate support in negotiations or disputes. Below you can find a number of options for support:

- You can ask advisors at the Netherlands Patent Office to:
  - discuss with you the technological innovations that may be eligible for a patent;
  - search databases for patent documents that may be relevant to your invention;
  - discuss with you which forms of protection are most suitable for your business plan.

- You can hire an IP lawyer to draw up customised partnership agreements or employment contracts, or for assistance when there are disputes regarding infringement. In the event of disputes, also consider the options offered by mediation.
- You can hire a patent attorney to:
  - write and submit your patent application (see Chapter 2 for procedures);
  - communicate with patent-granting bodies to ensure your patent is granted;
  - investigate whether or not your invention is infringing on the patents of others (also see Section 3.2);
  - represent your interests in the event of disputes, potentially in cooperation with an IP lawyer.

✅ *Tip: Consult a specialist in a timely fashion. You may wish to do so in disputes related to infringement, as referred to in Chapter 6.*

2 National and international patent procedures

There are national and regional patent rights. In this context, regional refers to a continent (or a large part of a continent), such as Europe. Patents are therefore applied for per country or region and are granted per country or region after completing a granting procedure. The various national and international procedures have largely been harmonised, but may deviate from each other to some degree.

In this chapter, you will read more about the national procedures from a Netherlands perspective, and about the international procedures. For the latter, the emphasis will be on the European procedure and the 'worldwide' Patent Cooperation Treaty (PCT) procedure. Applicants may be granted the right to a patent based on the same invention in multiple countries and regions. The collection of patents issued for the same invention is called a patent family. This chapter is about the procedures available to you to build patent families.

2.1 General procedure

The patent grant procedure is generally made up of the following five stages:
1. Application
2. Research and novelty report
3. Publication
4. Granting
5. Maintenance through fees (up to a maximum duration of 20 years or until you wish for the patent to expire)

1 Application

You submit the patent application to the patent-granting body. Your application is then given a submission date. From this date, you may publish the innovation described in the patent application. After the submission date, you will also be able to market your invention. Be careful who you tell what, though. Your patent has not yet been published and others are not aware of what you are doing, or that you have applied for a patent. You may be able to put this 'secret stage', which lasts 18 months, to good use. Consider not to publish until 18 months. If you publish before then, you can impact the patentability of a further invention that is only just novel over the first invention.

2 Research and novelty report

The patent-granting body will perform a novelty search. The novelty report describes the state of the art that is relevant to the patent application and includes an overview of documents that may affect the novelty and inventiveness of a patent. In the novelty report, a written opinion explains why a certain document can, for example, be harmful to the novelty of the patent application. This explanation is valuable to both the applicant and third parties, because it allows them to gain insight into the novelty and inventiveness of the application.
Based on the information in the novelty report, you can improve the patent application by revising or rewriting it. But please note: revisions and rewrites must be precise. You may not add any new information to the application.

3 Publication

In principle, a patent application will be made public 18 months after submission, even when the patent-granting procedure takes more than 18 months. It is possible to withdraw your patent application prior to publication. This means that it will not be published, but you will also lose your right to a patent. This could be useful if the novelty report is negative and you do not want your competitors to have information about your development direction.
At the same time as the patent application, other documents are also published, such as the novelty report, proof of priority, correspondence with the patent-granting body and, potentially, also the patent granted. After publication, third parties will be able to read about the invention as described in the patent application.

4 Granting

If the patent application meets the requirements, perhaps after it has been amended, the patent will be granted. The duration of the granting process can vary considerably between countries and regions.

You can only bring a lawsuit if you believe that someone else is copying your invention after your patent has been granted. The judge can then order the other party to halt their infringement. The judge can also require the infringer to surrender some of their profits or pay damages for the period of time beginning on the date your patent was granted. Before your patent has been granted, you will not be able to stop someone from copying your invention. After your patent has been granted, there are certain conditions under which you can demand a reasonable reimbursement from the person who copied your invention for the period between your patent submission and the granting of your patent. This usually requires early registration of your patent in the patent register.

5. *Maintenance*

To maintain your patent, you are required to pay *maintenance fees*. In the beginning, fees for the patent holder are relatively low, but they will become more expensive as time goes on. For this reason, in due course, it may be more attractive to release the technology if the revenues remain relatively low. Have you hired a patent attorney to pay the maintenance fees? If so, the attorney will charge additional costs for arranging payment of the fees.

Patent-granting bodies charge costs for documenting and maintaining patents. To get an idea of these costs, use the cost calculator for the protection of intellectual property (in Dutch). Type in the countries where you want your patent to be in force, and the cost calculator will give an estimate of the costs involved. Please note: the calculator does not show the exact costs of patent attorneys' services or translations. These extra costs could be considerable. However, we certainly recommend professional help for quality patents.

2.2 Netherlands patents and international expansion

In the Netherlands, you apply for a patent at the Netherlands Patent Office. You can supply the application in Dutch or in English. The claims for the patent must always be supplied in Dutch. The Netherlands Patent Office uses a search report, a novelty search with a written opinion, to assess whether or not the claims of your application comply with the requirements of novelty, inventiveness and industrial applicability. In the Netherlands, the patent is always granted, irrespective of the assessment of these requirements. However, the novelty report does give you (and your competitors, after publication) an idea of how the court might rule on the scope of protection of the conclusions. Figure 4 shows a description of the Netherlands patent procedure.

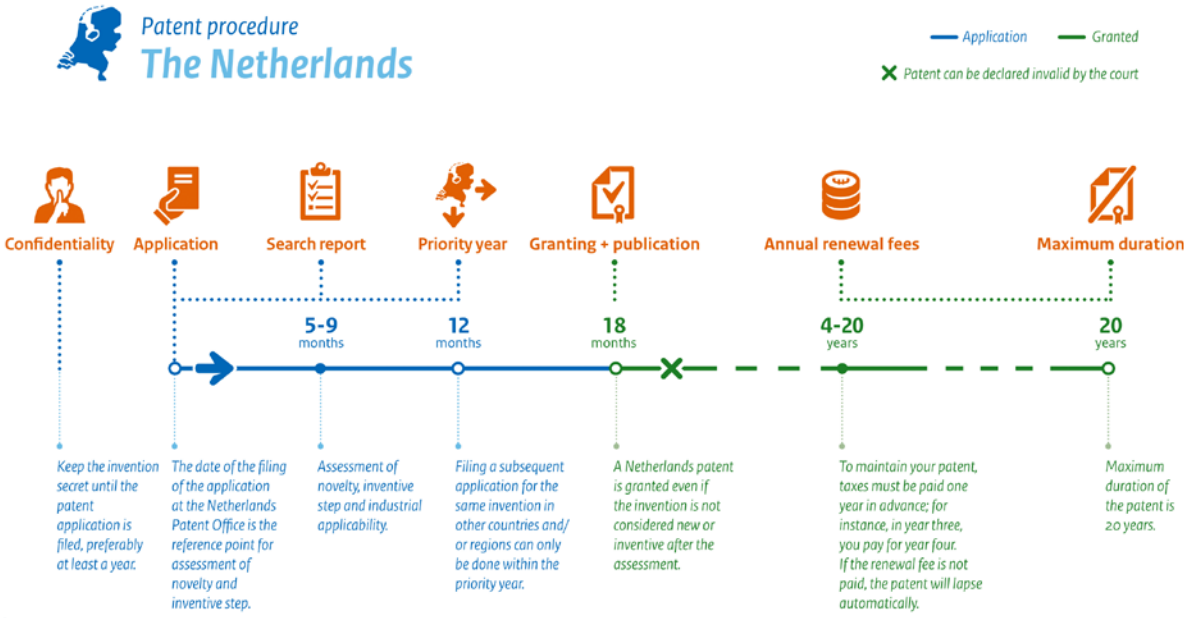


Figure 4 *The Netherlands patent procedure.*

Application period and period of validity

In the Netherlands, after the application has been submitted, it generally takes 18 months before the patent is granted. At the request of the patent applicant, we may be able to expedite this process. The patent is then valid from the grant date. Your patent will remain valid for a maximum of 20 years after the submission date. You will have to pay the Netherlands Patent Office an annual fee to maintain the patent. If you do not pay this fee, the patent will expire and anyone will be free to copy your invention.

Do you have a patent for a medicine or crop protection product? Then you can apply for a supplementary protection certificate. This allows for your invention to be protected for a maximum of five extra years. An additional six months is possible for medicines that have been specifically tested for children. Due to the specialised nature of this protection, it is not a standard part of the patent procedures described here.

Subsequent applications abroad

Would you like to apply for a patent abroad for the same invention? If so, make sure to also arrange that before the end of the *priority year*, which starts on the submission date of your first patent application for an invention. It is only possible to extend the patent family within the priority year. In your application for a patent abroad, the submission date will be that of your original Netherlands patent application. It is also possible to expand to the European or PCT procedure within the priority year, which you can read more about later on in this chapter. If you wish to expand the protection to fewer than five countries, it is often cheaper to do so directly instead of via an international procedure. Figure 5 describes a Netherlands patent procedure with a direct expansion to several countries.

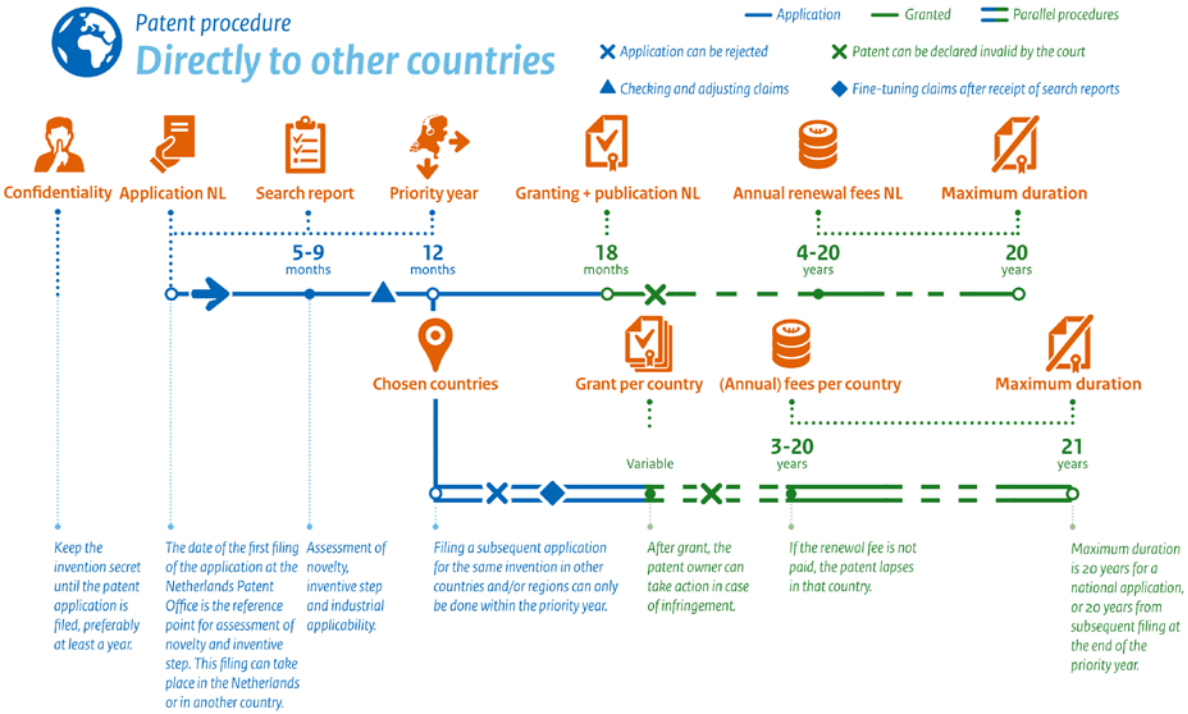


Figure 5 *The Netherlands patent procedure with a direct expansion to several countries within the priority year.*

Timeline for a Netherlands patent application

- You submit your Netherlands patent application to the Netherlands Patent Office. This normally marks the beginning of the priority year: the first year following the first submission date of your patent application for your invention. It is only possible to extend the patent application abroad during this first year.
- The priority year thus takes effect on the date of submission of the patent application, unless you already have priority due to a previously submitted application. This may be the case, for example, if you have applied for the patent in

another country first, after which you have expanded the application to the Netherlands, or if you have come up with an improvement to an invention described in a recently submitted patent application.
- You request a novelty report, preferably as soon as possible following the submission of the application.
- You will usually receive the novelty report within the priority year. This is an opportunity for you to evaluate the quality of your application and make any amendments for an international expansion.
- If you have submitted a Netherlands patent application and you wish to expand it abroad, it is important that you do so within 12 months (the priority year). If you apply for a patent in another country within 12 months of the submission date of a Netherlands patent, you can make use of the so-called *priority right*. The foreign patent will then receive the same official submission date as your Netherlands patent.
- After 18 months, granting and publication in the Netherlands will take place.
- If you have expanded your application to other countries, separate substantive assessment procedures and granting will take place per country. If you have opted for a European or 'worldwide' PCT application, this is subject to a separate procedure.
- You pay the fees separately per country (or per procedure).
- The patent will remain valid for up to 20 years, but may expire sooner if you do not pay the maintenance fees, if you withdraw the patent, or following a court decision to nullify the patent. Patents can be nullified when a competitor feels that your patent was unjustifiably granted and takes you to court. In the international expansion, the patent can be in effect for 21 years, because the 20-year period does not start until the time of submission in those countries. In practice, this submission takes place right before the conclusion of the priority year, which is why there is an 'extra' year. For European and worldwide procedures, the 20-year period only enters effect from the date of the European or worldwide submission.
- Extension by a maximum of five years is only possible with a supplementary protection certificate for a medicine or crop protection product. An additional six months is possible for medicines that have been specifically tested for children. This is not shown in figures 4 and 5.

Costs associated with a Netherlands patent application

- The costs of a Netherlands patent application consist of the submission costs, costs for the novelty search, and the costs for writing the patent application.
- If you apply for a patent in the Netherlands, you will pay € 80 (digital application) or € 120 (paper application) for the submission of the application itself.
- When you submit a patent application, you must also apply for a novelty search. You can choose who you would like to perform the novelty search. A nationwide novelty search performed by the Netherlands Patent Office costs € 100 and an international novelty search performed by the European Patent Office costs between € 1,000 and € 2,000. Both investigations assess the claims based on the global state of the art. A search performed by the European Patent Office can also be used for your European or worldwide application.
- The amounts mentioned are the fees you pay to the Netherlands Patent Office. If you decide to hire a patent attorney to write your patent application (which is advisable), you will of course have to pay their fee as well. The costs associated with writing an application run from € 5,000 to € 10,000, depending on the patent attorney's rate and the complexity of the invention.

Costs for a Netherlands patent

- To maintain your patent, you will have to pay annual maintenance fees. The first maintenance fee is due three years after you have submitted your patent application. These fees run from € 40 in the fourth year to € 1,400 in the twentieth year. Please pay attention to the payment terms, because direct debit is not possible.
- If you fail to pay the maintenance fee on time, your patent will expire. From this expiration date, you will have a maximum of six months to pay the annual fee, plus an additional 50% on top of the amount owed. If you do not pay within this term, your patent will expire on the expiration date. Expiration can only be reversed (*restoration*) in highly exceptional circumstances. For more information about the payment terms and amounts, go to the Netherlands Enterprise Agency's website.
- You may face additional fees, for example for a deed of transfer or the registration of licensing agreements in the patent registry. Check out our rates for an overview of the various fees and the associated amounts. The web page about payment methods lists the various payment options in Dutch.
- Maintaining a patent with legal actions costs time and money. You are responsible for checking to see if anyone is infringing on your patent, for example by copying your invention or by importing it without your permission.

The amount you need to reserve for this depends on the infringement risk and the legal fees. In the vast majority of infringement cases, both parties resolve the issue through a mutual settlement. If you wish to bring your infringement case to a Netherlands court, you should count on fees between € 20,000 and € 70,000. More information on the subject of disputes regarding infringement can be found in Chapter 6.

Advice on the validity of Netherlands patents

In the Netherlands, the District Court and the Court of Appeal in The Hague have exclusive jurisdiction to issue rulings on the validity of patents. The Netherlands Patent Office plays an advisory role.

- If you have any doubts about the legal validity of a Netherlands patent, and if you would like to know if the patent will hold up in court, you can ask the Netherlands Patent Office for advice.
- Are you looking to have a patent nullified in a Netherlands court? Then you will need to apply for a nullification recommendation from the Netherlands Patent Office first.

2.3 European and unitary patent

With a European patent, you only have to complete one procedure to apply for a patent in all of the countries that have signed the European patent treaty. The European Patent Office only issues patents that comply with the conditions of novelty, inventiveness and industrial applicability. This is called an *examined patent*.

Choosing countries

Once the patent is granted, you should decide in which of the associated European member states the patent should apply (see Figure 6). This is a process known as validation. Which countries you choose depends on your business strategy. For example, you may want to choose export markets that are important for your product or your competitor's product. In practice, it is often unnecessary to validate in many or all countries, and you can choose a number of strategic countries instead. At a certain point, it will no longer be appealing for competitors to invest if they can only be active in the remaining countries.

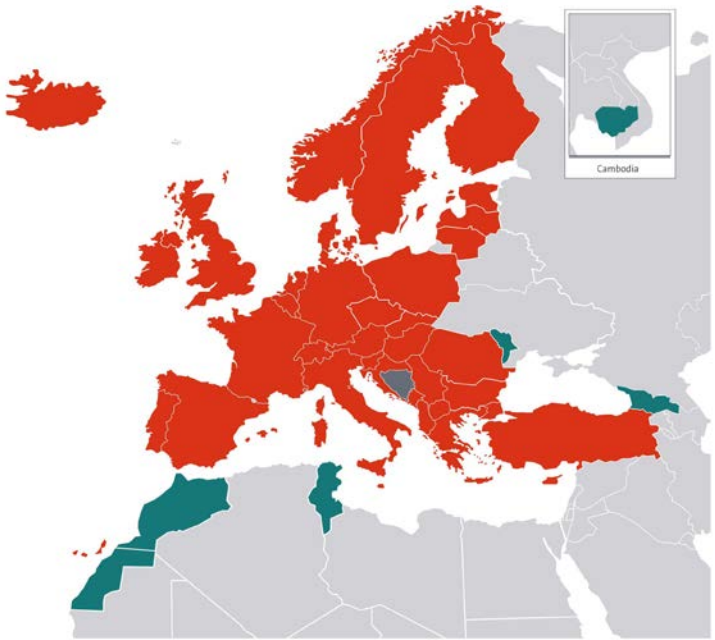


Figure 6 *Countries you can choose with a European patent (source: www.epo.org).*

If you opt for multiple countries, the procedures will run parallel to one another after validation. In each chosen country, the European patent grants almost the same rights as a national patent. For many countries, you will first need to submit a translation in the national language. You will also pay the annual maintenance fees per country. As you now have a bundle

of national patents, this is sometimes called a *European bundle patent*. For a long time, choosing separate countries was only possible after a European patent had been granted. On 1 January 2023, a new option was added: the unitary patent.

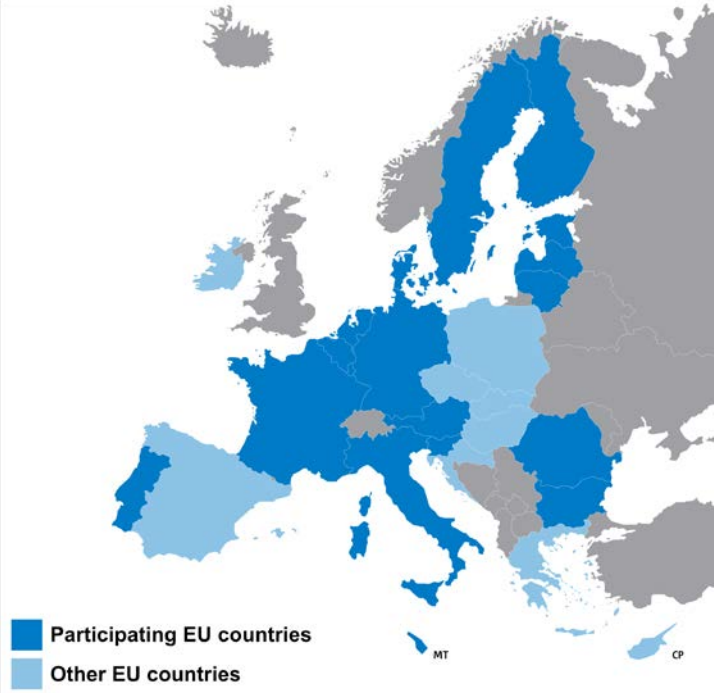


Figure 7 *In the 18 dark-blue coloured EU countries, the unitary patent applies (date per 1 September 2024).*

Unitary patent

The unitary patent is a single patent that applies in all EU countries that have approved the treaty for this purpose (see Figure 7). During the introduction of the unitary patent on 1 June 2023, 17 countries had already joined: Belgium, Bulgaria, Denmark, Germany, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia and Sweden. A unitary patent registered after 1 September 2024 offers protection in 18 countries, because Romania has joined as well.
There is a single procedure for these 18 countries, with an annual fee and one translation. If your patent has been granted in English, then there should also be a complete translation in another European language (for example Dutch). SMEs can request compensation from the European Patent Office in the amount of € 500 for translation costs.
You can only receive a unitary patent in full or have it cancelled for all countries at the same time. The maintenance fees for the unitary patent are roughly equal to those of four European countries together. It could therefore be financially appealing if you are interested in protection in at least five affiliated European countries.

The unitary patent is an option in the 18 affiliated countries, available alongside the European patent with individually chosen countries. In countries that are not (yet) affiliated with the unitary patent, you can only choose the latter. This is the case for the light-blue EU countries in Figure 7. With this in mind, you should consider whether or not to add national validations for non-participating countries (such as Spain or the United Kingdom) to the unitary patent. Figure 8 describes the European patent procedure with the options of the unitary patent and individually chosen countries.

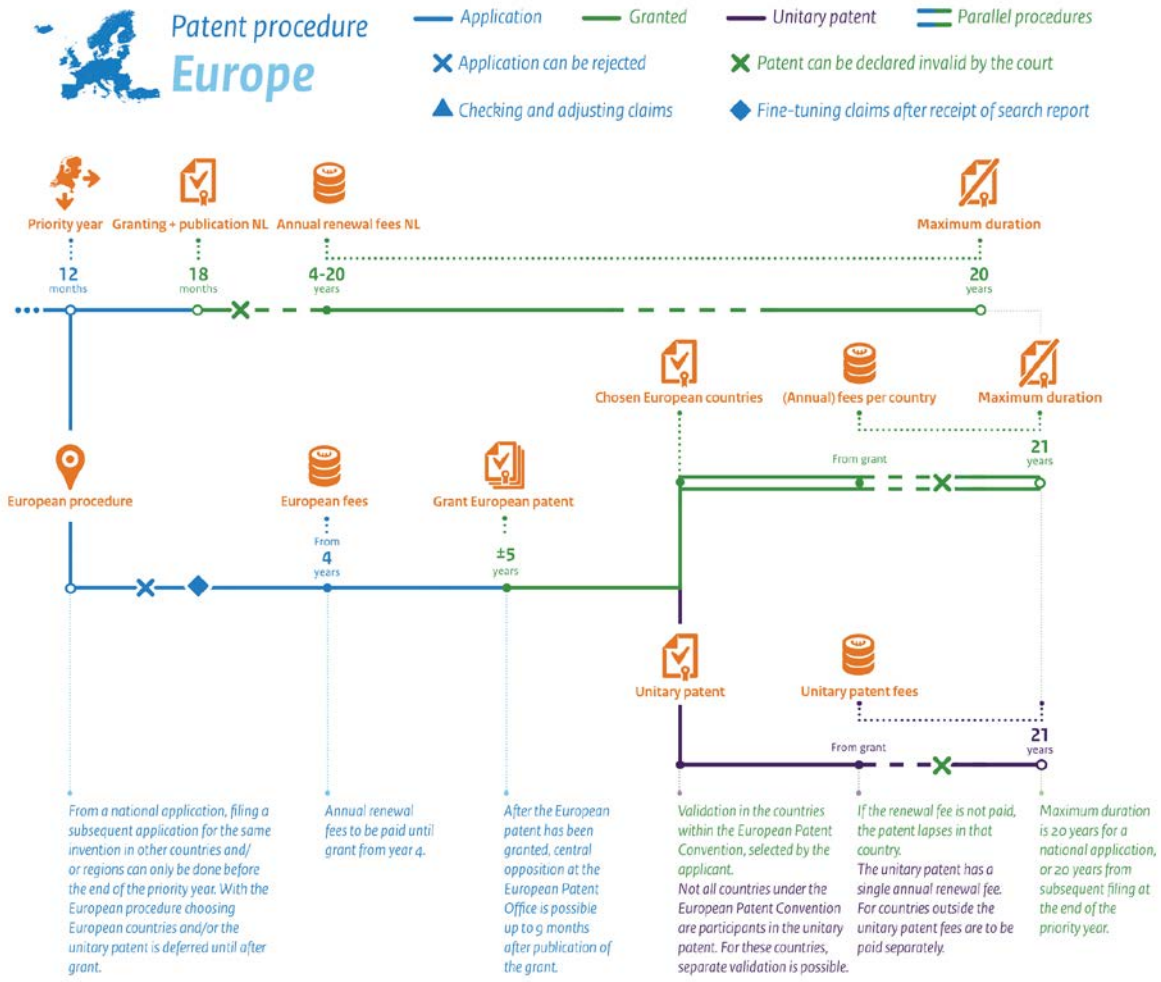


Figure 8: *You can apply directly for a European patent, or within the priority year of a national application. After the European patent has been granted, you can opt for the unitary patent and/or separate countries.*

Unified Patent Court (UPC)

From 1 June 2023, the Unified Patent Court (UPC) is the new court for patent lawsuits in the countries that are affiliated with the unitary patent. The UPC rules on infringement and nullification for European patents and unitary patents. Only nationally issued patents still fall under the purview of the country's national court. With the UPC, parallel procedures in the affiliated countries are no longer necessary, as decisions are valid everywhere. The Netherlands has a local UPC division in The Hague.

For European patents with individually chosen countries, there is a transitional period of at least seven years. During this period, you and any third parties can choose between the UPC and the national patent court in the event disputes arise. If you do *not* want the UPC to issue a ruling regarding an infringement or nullification case for your patent, you can request an opt-out from the UPC. In that case, the national courts will preside over your patent lawsuit. This transitional period does not apply to unitary patents. So if you are applying for a unitary patent, all lawsuits relating to infringement and nullification will always run through the UPC. The costs of the UPC strongly depend on the financial interest of the lawsuit.

Patent fees in Europe
The fees depend on the complexity of your invention and the number of countries in which you need protection. A European procedure costs between € 20,000 and € 30,000 for the first five years. You will incur costs for:

- having the application drawn up by a patent attorney;
- submitting the patent and the novelty report;
- having your patent attorney modify the claims in response to notes from European Patent Office during the assessment;
- one or more translations of (a part of) the patent into the national language (a requirement in many countries during validation);
- after granting: annual maintenance fees per country if you have chosen a European patent with individually chosen countries;
- the annual maintenance fee charged by the European Patent Office for a unitary patent.

Central opposition and third party observation
The European patent is an examined patent. Up until nine months after grant, another person can submit a complaint to the European Patent Office if they believe your patent was wrongfully granted. If the opponent is found to be in the right, your European patent will be entirely or partially denied. This applies to all countries affiliated with the European procedure, which is why this form of opposition is also called *central opposition*.
Is the patent in question not a granted patent but rather a patent in application? Then a so-called *third party observation* is possible. A third party can indicate why they feel that the application should be rejected or modified, in which case a patent attorney submits a document to the patent-granting body with an explanation of why the application needs to be changed or rejected.

2.4 International PCT procedure

There is no such thing as a worldwide patent. However, there is a worldwide treaty that offers a single procedure for continuing the patent application in all countries that have signed the Patent Cooperation Treaty (PCT). At the moment, these total 157. This PCT procedure allows you to extend the time before selecting the countries where you want a patent by up to 30 months after your first application. You will then have to decide in which countries or regions you want to continue the patent application procedure. From then on, you will be dealing only with the national or regional patent offices. The European Patent Office is an example of such a regional body. This means that you can also take some time before submitting a European patent application; until the end of the PCT procedure.

During the PCT procedure, only the novelty search will take place, plus a preliminary assessment of your application. The real assessment happens after those 30 months and will be conducted by national or regional patent-granting bodies. You do, however, have the option of applying for a preliminary assessment during the PCT procedure, but this is not mandatory. The advantage of this PCT procedure is that you have more time to investigate the areas where you plan to market your products, before you need to begin paying fees per region.

Costs
The PCT procedure is organised by the World Intellectual Property Organization (WIPO). The costs are somewhere between € 10,000 and € 15,000. This includes the fees that can be charged by the granting bodies (€ 4,000 - € 5,000) and the patent attorney. After the first 30 months, you will also have to pay the costs of the national and regional procedures, and the costs for maintaining your patent. These costs strongly depend on the countries you have selected at the end of the PCT procedure.

For entrepreneurs using the PCT procedure, the decision moment at around 30 months will often be strategically important due to the choice of countries and the associated investments. It is important that your choice of countries aligns with your business plan. Are you applying for a patent in the Netherlands first? Then you should decide within one year whether you want to apply for the same patent in other countries or regions as well. A year goes by fast, so it is wise to decide as soon as possible in which countries or regions you would like to apply for a patent. The global PCT procedure can provide scope to postpone this sometimes challenging decision until 30 months.

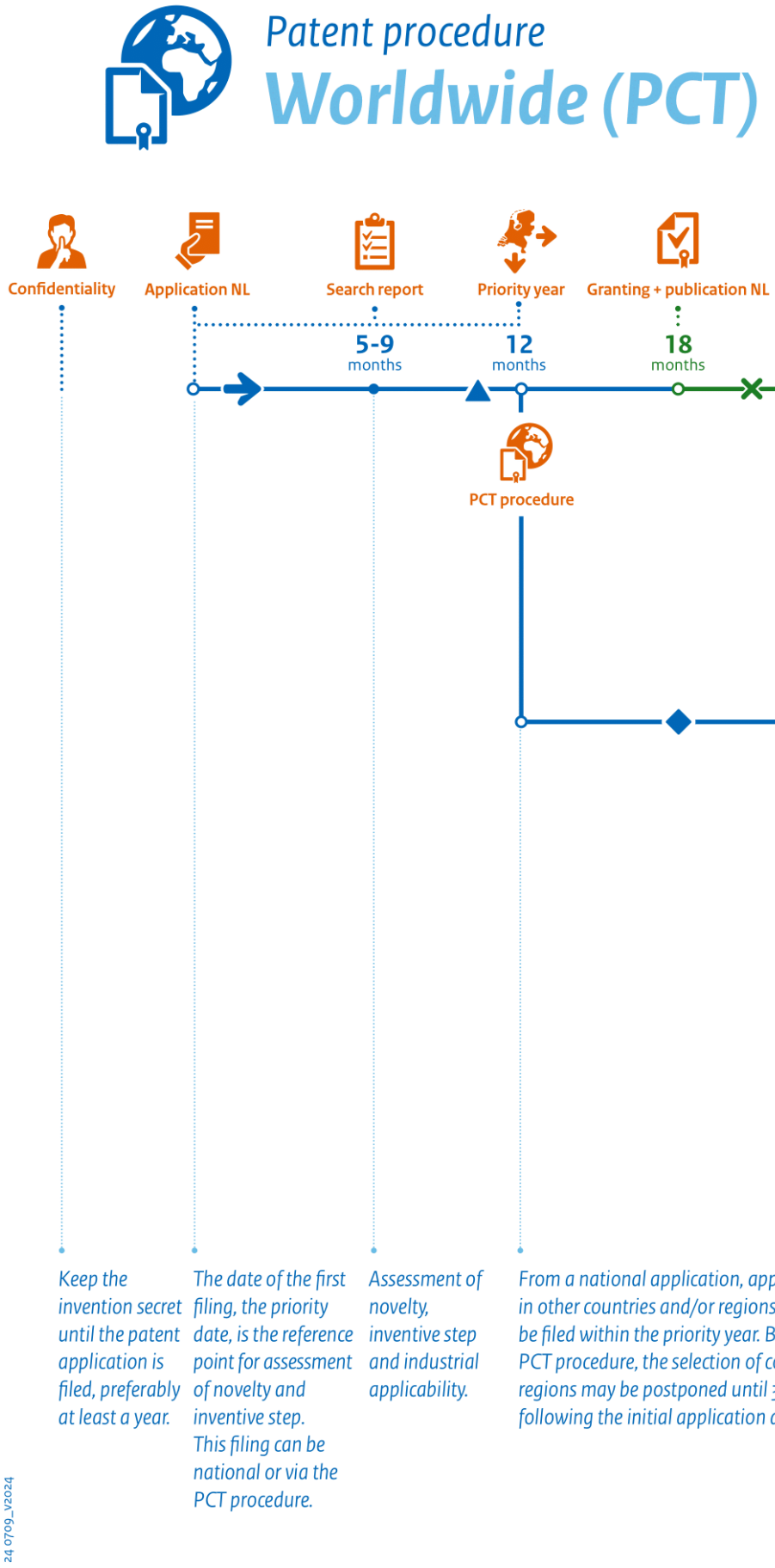
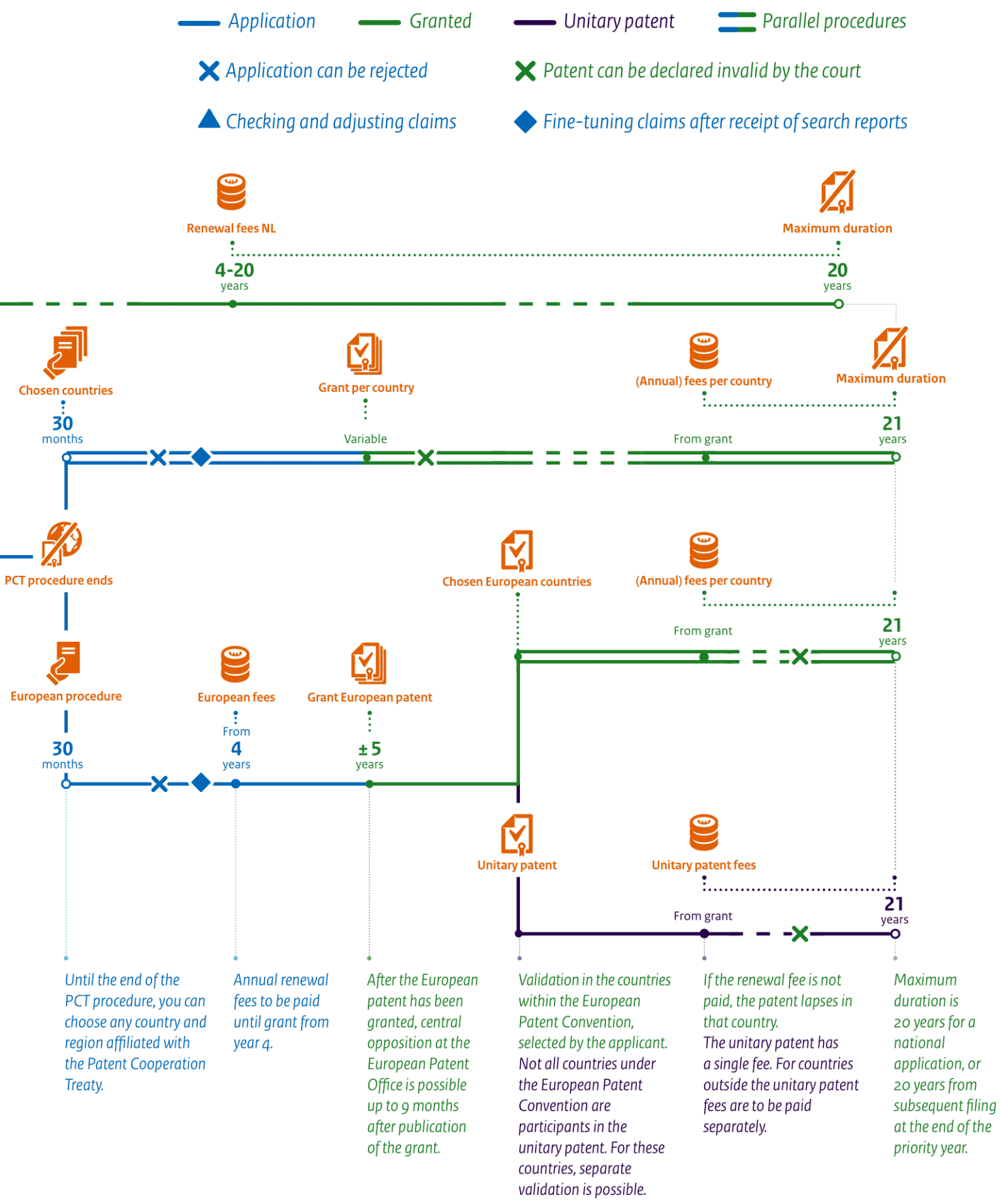


Figure 9: *The global PCT procedure with country choice at 30 months. See the countries that are affiliated with the WIPO. You can immediately begin the PCT procedure or within the priority year of a national application (shown here).*


Application
Granted
Unitary patent
Parallel procedures
Application can be rejected
Patent can be declared invalid by the court
Checking and adjusting claims
Fine-tuning claims after receipt of search reports
Renewal fees NL
4-20 years
Maximum duration
20 years
Chosen countries
30 months
Grant per country
Variable
(Annual) fees per country
From grant
Maximum duration
21 years
PCT procedure ends
Chosen European countries
(Annual) fees per country
From grant
21 years
European procedure
30 months
European fees
From 4 years
Grant European patent
±5 years
Unitary patent
Unitary patent fees
From grant
21 years
Until the end of the PCT procedure, you can choose any country and region affiliated with the Patent Cooperation Treaty.
Annual renewal fees to be paid until grant from year 4.
After the European patent has been granted, central opposition at the European Patent Office is possible up to 9 months after publication of the grant.
Validation in the countries within the European Patent Convention, selected by the applicant. Not all countries under the European Patent Convention are participants in the unitary patent. For these countries, separate validation is possible.
If the renewal fee is not paid, the patent lapses in that country. The unitary patent has a single fee. For countries outside the unitary patent fees are to be paid separately.
Maximum duration is 20 years for a national application, or 20 years from subsequent filing at the end of the priority year.

2.5 The utility model and the provisional patent application

In some countries, rights exist that are similar to patent rights (or patent application rights), but that differ regardless. For example the *utility model* in English or *Gebrauchsmuster* in German. In the US, there's an option for a *provisional patent application*.

A utility model can be obtained relatively quickly and is often a slightly cheaper intellectual property for technological products. It is not unlike a regular patent. One difference is that the inventiveness and industrial applicability are not necessarily examined during the application procedure. This only happens if there is a dispute between parties. In addition, in Germany, it can be granted even if you already published the invention yourself no more than 6 months prior to the application (the 'grace period'). The maximum protection period is usually 10 years instead of 20.

A *provisional patent application* is a registration in the US, which is valid for one year. This registration provides a priority date for any future patent applications. Please note: this is a provisional *application*. There is no such thing as a 'provisional patent'. If you decide to apply for a patent based on this registration within one year, you can claim the application date of the provisional patent application. But there are also disadvantages to a provisional patent application. What is not clearly described in it is not protected, and you will not receive a novelty report in the first year. It may be better to submit a Netherlands patent application than an American provisional patent application, because the submission fees are roughly the same and here you will receive a novelty report. In addition, the US Patent Office applies a one-year grace period in which an inventor may already have published their invention. But if you use this, you will no longer be able to get protection outside the US.

3 Get knowledge from patent databases

In addition to being a form of legal protection, patents are also a public source of information and inspiration. In the freely accessible patent databases (see Section 3.1) worldwide, there are over 150 million published patent and patent application documents. Those documents show the technologies for which a patent has been applied for or granted. They also include developments that have not (yet) been marketed (see Figure 10). You will find the names of inventors and companies in these documents as well. You can use this to your advantage in the various stages of your R&D process:

- In the idea and concept phases, to gain inspiration. When starting an innovation project, make sure you understand your customer. What is the problem or difficulty that your invention should solve for the customer? How will the customer benefit from your idea? It is useful to search for existing solutions to the same problem. In this way, you can find out what others have already come up with or what your competitors are working on.
- In the development phase, to find potential solutions to technological problems.
- In the engineering or prototype phase, to identify opportunities for a patent. If a development has been completed and relevant technological details are no longer subject to change, you can check if specific technologies can be protected with a patent. This will prevent you from submitting unsuccessful patent applications.
- After the market introduction, to stay up to speed of the developments in the field.

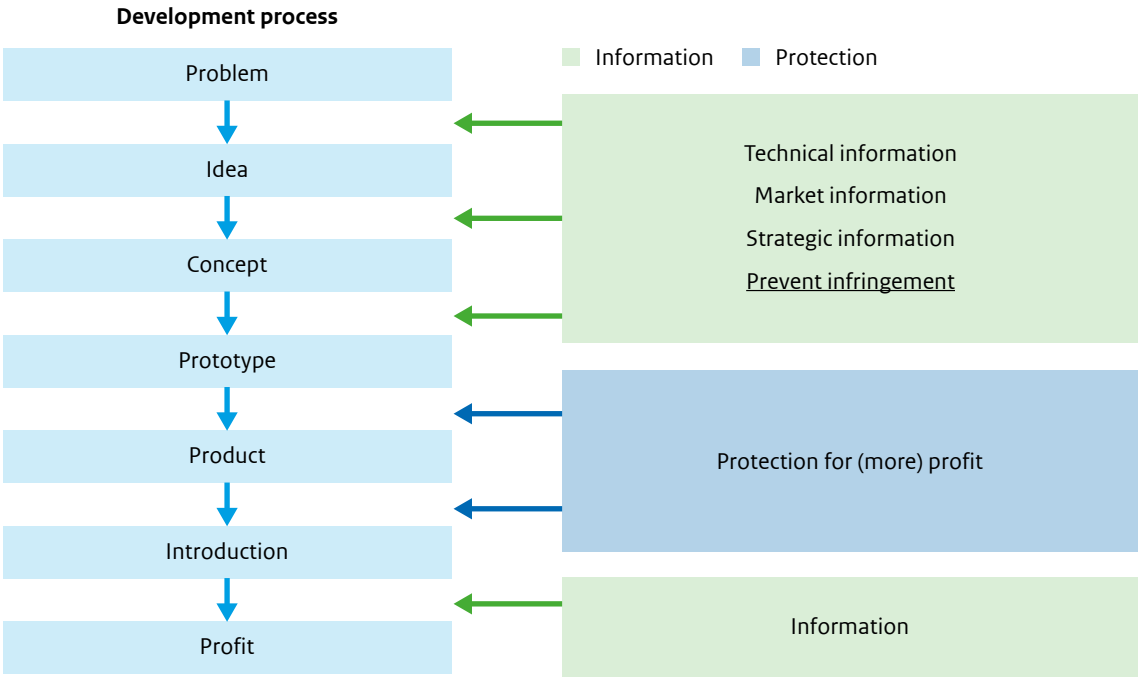


Figure 10: *Goals of patent information in a technological development process.*

There are also other reasons for looking at patent databases:

- It can help you avoid accidental infringements on the patents of others. In Section 3.2, you can read more about Freedom to Operate, which is often required by investors.
- Given that patent publications are listed under a name, it is a good way of finding potential collaborators. You can also get an overview of potential competitors.

Hours spent on patent research to monitor your competition and field are also considered WBSO hours, offering tax advantages.

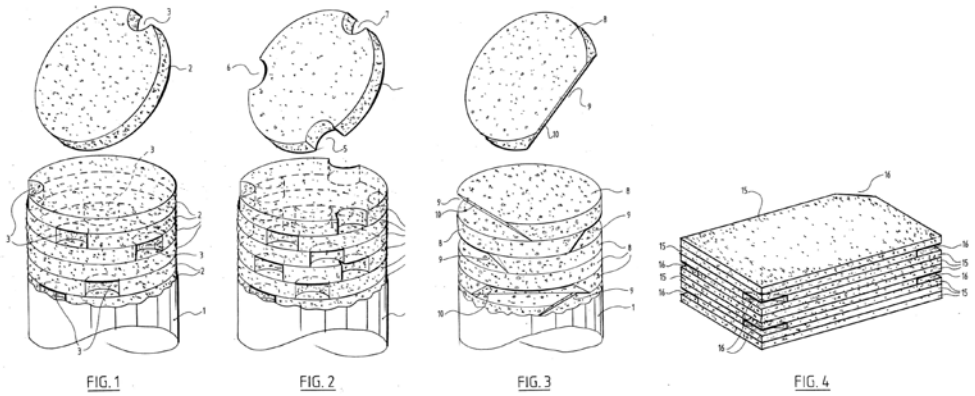


Figure 11: *In patent databases, you will not only find familiar products but also products that have not (yet) been marketed. A patent holder can sometimes protect multiple variants of an invention (such as with patent NL1012379, known for the biscuit with an indentation). This could make a patent more difficult to circumvent by competitors.*

3.1 Patent registers Espacenet and patent registers

Espacenet is a public patent database that contains over 150 million patent documents from more than one hundred countries. You can search Espacenet using names, search terms and the codes classifying patents by subject. The English-language version of Espacenet is freely accessible via worldwide.espacenet.com. Other well-known patent databases are Google Patents and Patentscope.

Patent registers
In a patent register, you can find information about the status of patents. You can use patent registers to check whether a particular patent is still in force, who owns it, whether it has been pledged, and if any licences have been granted. But please note: a patent can be transferred without registration, so patent registers are not always reliable for this type of information. Before relying on this data check with a patent professional. Most patent registers are national (such as the Netherlands patent register), but some are international (such as the European patent register). The Working Group for Patent Information in the Netherlands has a complete overview of public patent information sources.

Are you a patent licensee? In that case, it is useful to register the licence in the national patent register. Your licence agreement will then have *third-party effect* if the patent is transferred, which means that the person to whom the original patent holder transfers the patent is responsible for compliance with the licensing agreements.

Even in the case of a pledge, registration in the patent register is important for third-party effect. This means that the pledge is not only in effect between the holder of the pledge and the pledgor, but also between the holder of the pledge and others who can derive rights from the patent to which the pledge applies. Others who derive rights from the patent include parties who purchase the patent and other pledge holders. Also good to know: pledge rights are predicated on registration of the private deed with the Tax and Customs Administration. Pledge rights often plays a role when investors want to use a patent as collateral in funding an innovative enterprise.

Learning to search patent databases
You can search patent databases with search terms, but this may have some disadvantages. It is often difficult to know beforehand which terms describe a relevant patent. Or which language you need to search in. This is why we have so-called *classification codes*. Using these codes, you can search for a specific technological field more accurately. Every patent document in the database has one or more classification codes that belong to the technological field of the invention. Using these codes, you can find all patent documents relating to a specific technology. Classification systems work according to a tree structure. Technology areas are divided into primary groups A to H, which are further subdivided. Frequently used classification systems are the International Patent Classification (IPC) and the Cooperative Patent Classification (CPC). The CPC is a refinement of the IPC and therefore has more classification codes. This code

is often used in Europe and the US. For example: the vacuum cleaner in Figure 2 has a IPC classification A47L9/16 ('... cyclones or other devices with centrifugal action') and a CPC classification A47L9/1625 (which adds 'for series flow').

The Netherlands Patent Office can show you how to search patent databases. In some cases you can ask a patent advisor for a preliminary patent search free of charge to show you what kind of information on your subject can be found in patent databases. You can also attend our workshops or webinars. They are often in Dutch, but sometimes in English.

If you do not wish to perform searches yourself, or if you have any questions beyond the scope of the Netherlands Patent Office information, you may also contact commercial service providers such as patent attorneys or patent search agencies. Go to the website for patent attorneys in the Netherlands or view the member list of the Working Group for Patent Information in the Netherlands (abbreviated as WON).

3.2 Freedom to Operate research

If you have invented something and plan to market it, you should avoid infringing on the rights of others. Prevent any issues by investigating whether or not you have Freedom to Operate (FTO). An FTO analysis will reveal whether or not you would be infringing on the rights of others if you decide to market your product. This is important, because someone else may already have intellectual property rights to the same innovation, limiting your freedom to operate. Potential investors will often enquire about FTO.
FTO is broader than just patents. In addition to the rights to the technology used in a product or process, there are also other intellectual property rights that you could infringe upon. This risk also exist for intellectual property rights to software, trademark rights for names and logos, and design rights. There is never a guarantee for FTO, because an analysis can never be exhaustive. In the case of patents, there are various reasons for this, for example because patent applications remain a secret for 18 months and cannot be found during this period.

An FTO analysis is not a novelty search
FTO analyses are different from novelty searches. A novelty search is mandatory in a patent application and compares the invention to the 'state of the art'. A novelty search is conducted to find out if you would be eligible for a patent for a technological innovation (see Section 2.1). With an FTO analysis, you intend to make sure that your product does not infringe on the rights of others. This means that an FTO analysis covers more than a technological invention; it covers the complete product.

What to look for in FTO analyses for patents
FTO analyses for patents are a recurring task. But it is impossible to constantly comb through all those thousands of new patents. So it is important to create focus in the topics you monitor to limit the biggest risks:
Divide your product into various technologies that each require their own FTO approach.
Focus mainly on subjects that yield the best competitive advantage and the highest infringement risk.

Many companies outsource FTO analyses to specialised commercial parties, such as patent attorneys or patent search agencies. In order to ensure a solid risk analysis, it is important to know exactly which steps have led to the research result. In our Freedom to Operate brochure you will find more information about what to pay attention to when outsourcing this type of research. The brochure is in our overview brochures at www.rvo.nl/octrooibrochures.

4 Intellectual property: a company asset

Having intellectual property is not a goal in itself, but a means to reach your business objectives and benefit from your investments. You can use it to block others for exclusivity, but also to find partnerships. Patents are often combined with other forms of protection. Ways in which intellectual property can help you create value are:

- Force exclusivity. You can take action against someone who is copying your protected invention and is infringing on your rights.
- Grant licences for the protected technology. You can provide a licence for a fee or in return for access to patents of another company. This may be a company operating in a niche market or a geographic market that you do not operate in.
- Sell patents. You can sell your patent, for example if marketing your invention requires a big investment or if the invention falls outside the scope of your core activities.
- Use patents to promote cooperation or open innovation under your conditions. If you hold a patent to your invention, you can determine the conditions under which the patent may be used.
- Increase the value of your company, for example in connection with a takeover or exit strategy. A patent makes you the owner of your invention, which can increase the value of your enterprise.
- Attract investor capital, for example for a start-up. When an investor invests in a company, they often require some degree of certainty. Patents can provide this certainty, because it makes you the owner of your invention.
- Improve your negotiating position. For example: in entering into partnerships, the various partners contribute capital, work or knowledge. If you contribute patents, then this could improve your negotiating position in the partnership.
- Strengthen an innovative image. You can use your patent in your marketing and communication, allowing you to market yourself as an innovative company.

4.1 Score card and timing of patent application

On the next page you will find a score card (figure 12) with various considerations regarding the decision to apply for a patent. You can complete the score card per invention and per country. In addition to these considerations, the timing of your patents should also play a considerable role in your business plan. Please keep the following in mind:

- Has the development progressed far enough? If you are not yet sure if the invention will work as you hope it will, then it may be better to postpone the application until you know your invention works as it should. However, there is a risk that someone else will invent the same thing in the meantime and submits an application before you do.
- Could publication of the invention after 18 months be harmful to your business plan? The benefits of the patent may be too small compared to the damage that publication of your patent application will cause. Examples include publishing recipes or production methods.
- What is the right timing for attracting investments?
- Is the market ready for your investment and is your investment ready for the market? Have you tested the product-market fit among your target group(s), so you have the validation that your product aligns with what the market needs?
- When are you able to make the (large) investments necessary for international patent procedures? What is the time to market and what is the timeline for expecting income? Submitting a national patent application now means that, one year from now, you will have to decide if you want to take your application abroad. If you are applying for an international patent using the PCT procedure, you have to make your choice of country within 30 months. If you choose to enter the European procedure during that time, it is often possible to postpone the choice of country for European countries by several years. If you have not made a decision regarding the choice of country within two and a half years and you are able to keep your invention a secret until then, it may be worth considering postponing the application.
- Which considerations are relevant to what degree depends on the company, business unit or product group.

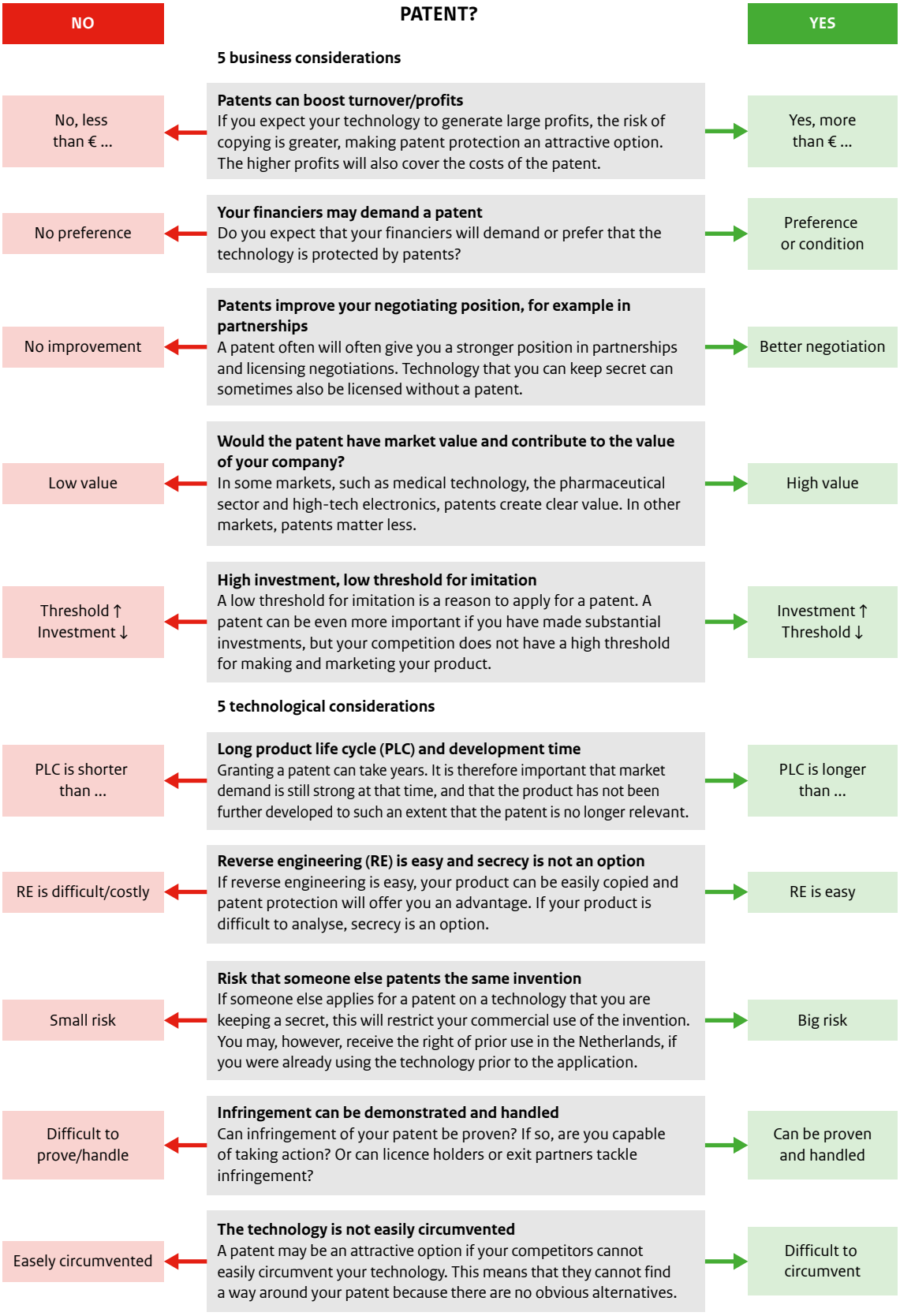


Figure 12: *Score card with considerations per invention and per country. Is your invention leaning more towards a yes or a no?*

5 Patent, trade secret or publication?

For technological developments, you can consider various protection strategies, such as a patent application, a trade secret or a defensive publication. In addition, it is sometimes possible to achieve a competitive advantage thanks to smart partnerships, for example with exclusive licences. This chapter discusses what you need to consider with regard to patents, trade secrets and/or publications.

5.1 Patent, trade secret or both?

You can apply for a patent for technological innovations. But you can sometimes also shield an invention and only share it in secret. Or you might be able to combine a patent with a trade secret. By hiding specialist expertise, other parties will remain dependent on your knowledge despite the fact that certain technologies are published in a patent document after 18 months. For trade secrets, you are required to take proper protection measures to prevent the information from being shared. This way, if there is a lawsuit, you will be able to show that you took appropriate measures. If you do share the information, a confidentiality agreement (also called a non-disclosure agreement or NDA) is advisable. In Table 1, we have listed several aspects of patents and trade secrets.

Table 1: *Patent or trade secret for a technological invention? Combinations are sometimes also possible.*

	Patent	Trade secrets
In which countries does it apply?	You apply for patent rights **for an individual country or region** by means of national or international procedures.	**Worldwide**. Laws vary per country. The EU endeavours to ensure alignment between Member States.
How much does this kind of protection cost?	A rough indication is **€ 5,000 to € 10,000 for a Netherlands application**, including a patent attorney, submission and research fees. The costs of international protection can rise to thousands of euros per country. Maintenance fees (per country or region) increase over time.	While trade secrets themselves **cost nothing** and are not registered, trade secret protection measures do cost time and money. This could include ICT security, documentation, training of staff, employment contracts and agreements with business partners.
From which date does it apply?	Patent rights are only valid after the patent **has been granted**. In the Netherlands, this is usually 18 months after application. You are, however, allowed to make the invention public at the time of the submission of the application. You can then use the term 'patent pending'.	**Immediately** when the information has been created, if it meets the conditions. Documentation including the date is important as **evidence** to prove what confidential information you possessed at any given moment.
How long does protection last?	**A maximum of 20 years**, on the condition that the fees have been paid (per country or region).	There is **no time limit**. It expires when the information is made public.
How do you prove infringement?	Infringement is assessed based on the **claims of the patent**. Your chance of success depends on the quality of the patent, and of course on your financial means. Negotiations, arbitration and mediation are options before going to court. In lawsuits, lawyers and/or patent lawyers often assist.	For alleged infringements, you have to be able **to prove that the other person has committed an unlawful act**. You also have to prove that you have taken the proper measures to keep the information secret, for instance through security measures and contracts. It may be a good idea to hire a lawyer.
What happens if it is made public?	If the technology of the invention is made public before the patent application date, patent protection is no longer possible, because the technology is no longer new. **The only time publication is not damaging is after the patent application has been submitted and ideally has been published.**	When the trade secret information is made public, **it is no longer a trade secret.** You will only be able to take legal action if you can prove that an unlawful act was committed which resulted in the publication.
What happens if another person invents the same thing later on?	**Whoever submits a patent application first, will, in principle, be the first to acquire the rights.** Even if the patent applicant is not the first inventor.	Imagine that another person comes up with your trade secret, not by stealing it, but by developing the same invention, and then receives a patent for it. You may then keep using the invention in the Netherlands, if you can prove that you were already using it before the date of the patent application. The commercial exploitation and further development of the invention may be restricted, however. This is called right of prior use.

5.2 Trade secrets and the right of prior use

As long as you keep your innovations secret, they could still be patented by others who have come up with the same invention. If you submit another patent application for an invention you are already protecting as a trade secret, your competition will be granted the patent, even if this invention was already being applied within your company before you submitted the patent application. In some cases, you will still be able to use the *right of prior use*, but there are a number of issues with this. It is important that your working method or invention has been properly documented: what is the working method or invention, when did you start making it and how do you make it (the technology)? To be entitled to the right of prior use, it is important that you can prove at which time you possessed this knowledge and that you actually applied it in your products at the time. A date registration, for instance using an i-DEPOT, may be helpful. But for complex records, it can be useful to engage professionals, such as patent attorneys. You cannot sell your right of prior use, license it or transfer it. The right will only transfer to another party if you sell your company. With the right of prior use, you can apply, produce and sell the technology patented by another party, but this only applies in the Netherlands. There may be differences in legislation per country with regard to the right of prior use.

If you opt for trade secrets with the option for the right of prior use, solid documentation is needed to substantiate your case. Retain the services of professionals where necessary, such as patent attorneys and lawyers.

5.3 Defensive publication

If you do not want a patent, but you wish to stop others from being granted patent protection for the same invention, then you can opt for 'defensive publication'. From the date of publication, the invention will no longer be new and nobody else will be granted a valid patent for the published technology. If you opt for this, you will not have a trade secret and you will also lose the opportunity to apply for a patent yourself. If another party is granted a patent for the published technology and your publication predates the patent application, you will be able to prove that the patent was unlawfully granted. You can then have the patent nullified if you have correctly documented the date and technology of your invention in your publication. Another option is to submit a patent application and have it published. Granted or not, the patent publication will remain publicly accessible.
In addition to these options for defensive publication, there is of course also the option of marketing your product and making your technology public in this way.

If you opt for a defensive publication, make sure that your documentation is solid so you can substantiate your case. A professional, for example a patent attorney or a lawyer, can help with this.

6 Disputes regarding infringement

A valid patent is a legal document that entitles you to prohibit others from using the invention described in the patent. What you need to do in practice is identify when others are using your patented invention in their business practices without your permission, and take legal action. On the other hand, a patent holder can also approach you if they believe that you are infringing on their patent. In this chapter, we describe both scenarios. We will also discuss how you can defend yourself against accusations of infringement.

6.1 You are accusing someone else of infringing on your patent

It is important to realise that it is your job to keep an eye out for possible patent infringements. If you believe someone is infringing on your patent, you can take action yourself. Of course, you can also choose not to take action, for example if the damages are smaller than the costs for taking action. In this section, you will read more about the possible steps you can take if you have reason to believe someone is infringing on your patent. In some countries if you know there is infringement, but you don't take action within a specified number of years, you are barred from taking any action.

Step 1: Collect evidence of the infringement

If you suspect that someone is infringing your patent, you will have to prove this. It is advisable to document evidence and build up a file. Who is the infringer, what has been used to commit the infringement, and when was it committed? You could, for instance, collect documents, invoices, brochures, etc. related to the alleged infringement. You can also purchase infringing products, but for reliability it may be better to get a certified third party to do this.

Step 2: Enlist experts

Get advice from a patent attorney or a specialised IP lawyer. Based on their expertise, you can then determine whether your costs would outweigh the benefits, for example by asking these questions:

- What is the nature and extent of the infringement? Is the infringer a small independent entrepreneur who has been inspired by your invention? Or is it a company that is intentionally infringing on a large scale?
- How does the infringement relate to your patent? Does it relate to a small component or to all characteristics of your invention?
- Which rights with regard to intellectual property does the infringer have, and how do they relate to your rights? For example, does the infringer have patents in the same field as you?
- Which steps can you expect and what are the expected associated costs? Do you have the required financial buffer?

Step 3: Inform the infringer of the alleged infringement

Infringers may be liable to pay damages, from the moment they are aware (or should be able to suspect) that they are infringing.
Getting in touch with the alleged infringer at an early stage may be enough to make an alleged infringer stop.
It is advisable though to communicate with the alleged infringer via your lawyer or patent attorney so that this is documented properly in case it ends up in a lawsuit. Your lawyer or patent attorney may draw the attention of the alleged infringers to your patent in relation to a specific product or process and ask them to comment. The alleged infringers will then have been made aware of your patent and that they should be taking steps to avoid infringement.
But be careful, because this may be seen as a threat, especially if you refer to consequences. If you threaten and they are not infringing, you may have to pay damages instead. Also, if you are letting alleged infringers know you are watching, they could make sure that evidence disappears before you have built up your case.
Again: it's advisable to consult your lawyer or patent attorney before taking any action.

Stage 4: Find a solution together

Before you take someone to court, you can first try and reach an agreement with the alleged infringer. The vast majority of infringement cases are resolved by mutual agreement or via a settlement, sometimes through mediation. This helps you avoid high legal fees. For example, you could opt for a licensing agreement or choose to enter into a partnership.

Step 5: Bring a lawsuit

If you are unable to resolve the matter together, the only remaining option is going to court. It's worth getting an validity opinion before going down this route, and carefully checking your search report. When someone infringes on your granted patent, you can take action against them by bringing an infringement procedure. This procedure begins with summoning the infringer to court. You can ask the judge to summon the infringer to stop their infringement, to have their stock destroyed, remove their products from the market, or all of the above.

Be aware that you can expect a defence from your counterparty. The accused party may argue that your patent should not have been granted and may ask for nullification (see Section 6.3).

Step 6: Potential compensation for damages

As a patent holder, you can also receive compensation for damages from the infringer. If the judge agrees with your claim, they can sentence the infringer to pay compensation. You must substantiate your claim with a calculation of the damages suffered. The losing party may also have to reimburse the fees of your lawyer and patent attorney.

Practical example: how does Secrid tackle infringement?

The company Secrid designs, produces, and sells innovative card holders. The first patent application from the portfolio is from 1995 and, in addition, the company also has other intellectual property rights, such as trademark rights and design rights. Five of the company's 140 staff members spend at least part of their working day on identifying and tackling infringements.

They search for product imitations themselves on large platforms such as Amazon. Or they receive notifications from colleagues, shop owners or even consumers who spot infringements and report them of their own accord. Secrid also frequently trains customs workers to intercept imitation products, especially as they relate to patent infringements.

What do they do once an infringement has been reported? Sascha Schalkwijk, IP lawyer at Secrid, says her first step is to try and reach out to the other party. 'A considerable part of our efforts to tackle infringement are automated digitally, for example because they run via an online platform. However, Secrid values its personal and educational approach in tackling infringement, and, in a large number of cases, we send letters or emails to the infringers. In the vast majority of situations, the exchange of letters provides the solution. Our explanation tends to be enough to stop the other party, because our intellectual property rights put us in a strong position. In some cases, we have to bring a lawsuit. Our strategic long-term vision for intellectual property plays a key role in our considerations when it comes to tackling infringement.'

6.2 Someone else accuses you of patent infringement

It is also possible that someone else accuses you of patent infringement. For instance, you can accidentally infringe on someone else's patent because you have invented something that another party has already patented without your knowledge. Prevent infringement at an early stage by conducting research into the patent rights of others in patent databases, as described in Chapter 3. For unpublished patent applications, so in the first 18 months after the application date, this research is not yet possible.

The steps in this section are somewhat similar to those outlined in Section 6.1, but in this case they apply to the counterparty. You will probably first try to reach a mutual agreement before suggesting a lawsuit. If you are suspected of infringing a patent, the patent holder will likely send you a registered letter first. You should then try to find out whether you are actually at fault. The questions below can help you start your investigation.

Question 1: Where is the patent in force?

A first step in the investigation is to determine if the patent you are potentially infringing is in force. You can also ask for more information, for example which patent this is in regard to and which of your activities allegedly infringe the patent. Sometimes the accusing party will assume that you have limited knowledge of intellectual property and that they can deter you using a threatening letter.

Patents are valid in specific countries or regions. For this reason, check out the patent family (see Chapter 2). Check per country and region to see where the patent is in force or could enter into force. Also be sure to check the status of the patent in the relevant patent registers. It is possible that the patent has not (yet) been granted or that it has expired. The scope of your research will also depend on the countries you are active in as an alleged infringer. The Netherlands Patent Office gives information about patent families. However, you should always consult a patent attorney for your case.

Question 2: Are you actually infringing the patent?

The next step is to investigate if you are actually infringing the invention described in the patent. You must do this per country or region where the patent is in force. During the patent-granting procedures in the various countries or regions, differences can arise in what is ultimately protected.

In order to determine if you are infringing, you have to compare what is described in the claims of the patent granted for your product or working method. If your product has almost all of the same elements as the product described in the independent conclusions, or if your working method has almost all of the same steps, you may be infringing the patent. Please note that a patent is a legal document and that it often contains specific terms and language, particularly in the claims. Interpreting the claims requires specific knowledge. Involving a patent attorney is therefore strongly advised in determining if something could be deemed infringement in a court of law.

Question 3: Should this patent have been granted?

If you conclude that you may be or are infringing the patent, you can submit the defences outlined in the next section. It could be especially interesting to investigate if the patent in question should even have been granted. This may be the case, for example, if you know from your experience in your field that the technology described in the patent was already known prior to the patent's submission date. If you can prove this, the novelty of the invention no longer applies and you can submit nullification of the patent as a defence.

6.3 Defence against accusations of infringement

If you are accusing someone of infringing your patent, then you can expect a defence. Or you can bring your own defences, if another person accuses you of infringement. The following four defences occur frequently in lawsuits about infringement:

Defence 1: What I am doing does not fall under the patent
The alleged infringer will argue that what they are doing does not fall under the patent. The technology the infringer is applying is not the same as the invention described in the claims of the granted patent. They may possibly have circumvented the patent in this way.

Defence 2: This patent should not have been granted
The alleged infringer brings the invalidity of the patent as a defence and brings a so-called *nullification (also called invalidation) procedure* against it. The infringer provides publicly available evidence in the form of, for example, patents, magazines, brochures, pictures, symposium reports or manuals, which show that the claimed invention was not new or inventive at all at the time the patent application was submitted.

Defence 3: I have the right of prior use
The alleged infringer can argue that they are not infringing because they have the right of prior use. Prior use occurs when the invention was already being applied prior to the date of application of the patent by the alleged infringer, and only if they have proof of this (see Section 5.2). But this application was not publicly accessible, otherwise the invention could not have been new. The patent remains in force, but the 'prior user' is permitted to continue using it under the patented invention in the Netherlands.

Defence 4: I have improved the invention and am willing to pay for a licence
The alleged infringer can argue that they have developed an improvement to the patented invention. They can also suggest that they pay to receive a licence for the patent.
If a patent application has been submitted for the improvement of the invention, this does not rule out that someone is infringing on the original patent, also known as the *basic patent*. In these cases, the patent on the improvement is called a *dependent or selection patent*. The holder of the older basic patent can then provide a licence to enable the application of the younger dependent patent. The alleged infringer and the holder of the older basic patent may also negotiate a cross-licence.

Contact the Netherlands Patent Office

Would you like to find out more about patents or other forms of intellectual property? The Netherlands Patent Office is happy to help you identify the options available to you. We not only register patents in the Netherlands, but we also provide information about intellectual property free of charge. The Netherlands Patent Office is the go-to independent information agency for innovative SMEs when it comes to intellectual property. Table 2 lists some of the free information and services offered by the Netherlands Patent Office.

Table 2: *Free information and services provided by the Netherlands Patent Office.*

Online version of this brochure and other patent publications	Do you already have a paper version of this brochure? Please see our website for a digital version with links. You can also find our other patent publications there.	Go to our overview of brochures on www.rvo.nl/octrooibrochures.
Workshops and webinars	Sign up for our free workshops, webinars and presentations, such as the Patents Masterclass.	Take a look at our events calendar for a complete overview.
Help in searching patent databases	The Netherlands Patent Office can provide support in searching patent databases. This can help you gain insight, for example, into technological developments in the field of your innovation.	Contact our office for a free personalised patent search.
Talk to a patent consultant	Our patent advisors can answer your questions about intellectual property rights, both digitally and on location in your region. Everything we do is confidential and independent.	You can request a free meeting (in English) with one of our patent advisors on our Dutch webpage: www.rvo.nl/octrooigesprek.
Public Information	Our Public Information staff are available to answer your questions on working days between 8.30 AM and 5.00 PM.	Call +31 88 042 4002, send an email to octrooicentrum@rvo.nl or visit our website.

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