



Starting from 1 September 2022, the Netherlands Patent Office shall no longer review 'previously submitted' applications, as they constitute abuse of law

Since mid-2021, the Netherlands Patent Office has seen a great increase in the number of applications for national patents that, upon further inspection, turn out to be 're-used' patent applications. A 're-used' patent application is a copy, or a mere literal translation, of a previously published application, whose priority either has not been claimed or cannot be claimed. The current influx mostly concerns applications previously published by the Chinese Patent Office, the China National Intellectual Property Administration (CNIPA). In many cases, the documents are no more than machine translations of applications filed previously. No priority is claimed of the previous application, and in many cases priority cannot actually be claimed, because several years have passed since the previous application was filed. Therefore, the entire content of these applications is deemed to be covered by the state of the art well before the application is filed in the Netherlands. The claims drawn with regard to the application filed in the Netherlands are not novel, and the patent to be granted is evidently void.

In early 2022, the influx of re-used applications was responsible for 50% of all applications filed in the Netherlands, which caused the Patent Registration department to experience practical problems. These problems were further exacerbated by the fact that many of the applicants requested an expedited review or expedited registration, which request the Netherlands Patent Office was unable to honour.

Since December 2021, the Netherlands Patent Office has raised awareness of this issue – among other places, in the *Bijblad bij De Industriële Eigendom*, appeals via the Netherlands Institute of Patent Attorneys and in conversations with the parties involved. Although this has resulted in a reduction of the number of re-used applications, the Patent Office still receives enough of them that the practical problems persist. On top of these practical issues, it is simply not right that the Patent Office should grant dozens of patents each month for inventions that are evidently not novel.

Therefore, the Netherlands Patent Office looked into whether there are ways to reject re-used applications. Under the National Patent Act 1995 (*Rijksoctrooiwet 1995*), there are no possibilities for this, since in principle, all applications are granted within the Dutch registration system, even when they are not novel. However, the purpose of the National Patent Act is to promote innovation, and it is hard to see how re-used applications that are evidently not novel promote innovation in any way. The Netherlands Patent Office feels that when people consciously file previously published applications, they are using the National Patent Act 1995 in a manner for which the law was not designed.

Therefore, the Netherlands Patent Office consulted the State's Attorney on the issue of abuse of law or legal process in Dutch civil law (Articles 3:13 and 3:15 of the Dutch Civil Code). Abuse of law or legal process is a term denoting that law is being used in any manner or for any purpose for which the law was not designed. The Dutch Civil Code refers to abuse of law or legal process as 'misuse of power', which amounts to the same thing.

On the basis of the recommendation issued by the State's Attorney, the Netherlands Patent Office arrived at the conclusion that in cases like these, applications may in principle be rejected on the grounds of misuse of power. This being the case, the Netherlands Patent Office will no longer review applications if they are found to be copies, or mere literal translations, of previously published applications whose priority was not claimed or cannot be claimed.

In line with the State's Attorney's recommendation, once it has been established that an application has been published in its entirety before, the applicant will be offered the opportunity to react to this finding. This will allow the applicant to demonstrate that there are factual differences, or that the application does serve a purpose that is in line with the objectives of the National Patent Act 1995. If an applicant fails to demonstrate this, the application will not be reviewed.

This applies to re-used applications submitted **on or after 1 September 2022**. Although in principle, re-used applications filed prior to 1 September 2022 could be rejected on the grounds of abuse of law or legal process, as well, the Netherlands Patent Office has chosen to review these applications as usual to ensure the legal security of the process.

The re-used applications received by the Netherlands Patent Office so far were all filed by Chinese applicants. However, the Netherlands Patent Office will from now on process re-used applications filed by applicants from other countries in the same way. Just so that we are clear on this: The Netherlands Patent Office does also receive many applications from China that are potentially of great value.

Applicants who are unsure that their inventions are novel need not worry about whether their applications will be reviewed. The new practice about not reviewing certain applications on the grounds of abuse of law or legal process only applies to applications that the Netherlands Patent Office has established are copies, or mere literal translations, of previously published applications, in which priority was not claimed or cannot be claimed.

Are you interested in the advice of the State Attorney? please send an email to Lydia de Vlieger: lydia.devlieger@rvo.nl.