

Trade Secrets and Patent Litigation

Charles Gielen

1. It is an honour to be invited to write an article on the occasion of the 70th birthday of Joseph Strauss, one of the icons of the intellectual property world. I have had the pleasure of working with Joseph not only in the context of AIPPI, where I succeeded him as chair of the special committee on biotechnology and plant breeders' rights, but also on a number of patent cases. As a token of congratulation, I would like to develop some thoughts on the question of how trade secrets could or should be protected in patent litigation. There are several instances where trade secrets become an issue in patent litigation and in such situations there is clearly a high degree of tension between, on the one hand, the principle that the truth should be revealed as much as possible in litigation and, on the other hand, the desire not to disclose particular information. In the preliminary stages of litigation where the patentee tries to obtain evidence on infringement, particular measures that the patentee can take under national law (discovery-type measures, preliminary witness hearings, orders to provide information on the source of the infringing products or on customers, etc.) may result in the disclosure of trade secrets by the alleged infringer. Furthermore, during the course of litigation, the court may order the disclosure of evidence potentially containing secret information. It is interesting to see whether and how the protection of trade secrets in such a situation is guaranteed.

2. The starting point of the legal *tour d'horizon* is the TRIPS treaty, the international basis for the enforcement of IP rights. This treaty formed the basis for what is known as the EU Enforcement Directive, which is also relevant to the issue of trade secrets in patent cases.¹ Let us first see which provisions of the various international instruments are relevant. In order to try to define what I understand trade secrets to be, it is good to investigate whether there is any international consensus on this issue. The Paris Convention does not explicitly refer to the protection of trade secrets. Of course Article 10*bis* of that convention obliges members of the Union of the Paris Convention to give protection against acts of unfair competition. It is under that umbrella that a number of national laws grant protection against the abuse of trade secrets. Article 39 of TRIPS requires member states to protect undisclosed information in the course of ensuring effective protection against unfair competition as provided for in Article 10*bis* Paris Convention. On the basis of Article 1(2) TRIPS such protection falls under the protection of 'intellectual property' which, to the extent that trade secrets are concerned, is not surprising because protection against unfair competition falls under the definition of the protection of industrial property rights laid down in Article 1(2) Paris Convention. Article 39

¹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157/45.

TRIPS speaks of ‘undisclosed information’, which is not the term generally used.² I am using the term ‘trade secrets’ since it more clearly expresses what is really meant. The TRIPS provision grants protection to secret information (*see* Art. 39(2)(a)) that has commercial value (*see* Art. 39(2)(b)); it therefore pertains to secrecy in trade. In addition, the notion of trade secrets is normally used in the US, where most states have had statutory laws based on the Uniform Trade Secrets Act for many years now.³ Of course the term ‘know-how’ is also often used. However this term encompasses both secret and public information, and is therefore less suitable.⁴

3. Article 39 TRIPS aims at providing a system of protection against the abuse of trade secrets in the course of trade. Under the conditions provided therein, the abuse of trade secrets is unfair and there should be an effective protection against such behaviour. This provision is, of course, only relevant for the assessment of the fairness of the behaviour of market participants. In my opinion, the provision has no direct bearing on what should happen regarding the unauthorized or unwanted disclosure of trade secrets in the context of litigation. However, since the TRIPS provision lays down the conditions for protection of secret information, it can be a helpful tool in applying other provisions where confidential or undisclosed information is mentioned, such as the last sentence of Article 43(1) TRIPS, and, particularly, in defining what should be protected in the context of litigation and what not. Unfortunately, the situation in the EU is a patchwork quilt. Since Article 39 TRIPS does not create rights for individuals and is only directed towards contracting states, this provision must be implemented in national law in order to create such rights. So far, no attempts have been made to implement it at EU-wide level. At national level, some countries have implemented Article 39 in their laws (*e.g.* Articles 98 and 99 of the Industrial Property Code in the case of Italy) or are in the process of doing so (*e.g.* Sweden). In the Netherlands, the government seems to have taken the position that Dutch law is in line with Article 39 TRIPS, a position with which I disagree. Under Dutch law, there are no specific provisions on unfair competition and the rule developed in case law is that a competitor can freely make use of the knowledge and achievements of his competitor unless this would constitute an infringement of IP

² Even in TRIPS itself several different notions are used; see for example Art. 43(1), last sentence, where ‘confidential information’ is used, and Art. 34(3) which refers to ‘manufacturing and business secrets’.

³ *See* MCKOWN, *Discovery of Trade Secrets in Litigation in the United States*, [1993] EIPR 327.

⁴ In Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements, the term ‘know-how’ is used and is defined as: ‘*a package of non-patented practical information, resulting from experience and testing, which is:*

(i) *secret, that is to say, not generally known or easily accessible,*

(ii) *substantial, that is to say, significant and useful for the production of the contract products, and*

(iii) *identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.*’

Of course Regulation 772/2004 is not meant to provide for the protection of trade secrets.

rights or cause an unnecessary likelihood of confusion.⁵ By contrast, however, Article 39 TRIPS lays down a *positive* norm on the basis of which it is forbidden to make use of trade secrets under the conditions provided for in that provision, an approach which cannot easily be fitted into the Dutch doctrine of unfair competition. I think it is necessary to implement Article 39 in a harmonious way and this should, of course, be done through an EU harmonization directive.

4. Let us then turn to the provisions concerning enforcement of IP rights in which specific reference is made to the safeguarding of trade secrets. The major advantage of the TRIPS treaty is that it provides for minimum standards for the effective enforcement of IP rights. A reference to trade secrets can be found in three provisions, namely Articles 34(3), 42 and 43.

5. Article 34 can be found in the section of the treaty dealing with patents and it provides for a shift of the burden of proof in cases involving an alleged infringement of a process patent resulting in a new product. In such a case, the alleged infringer will have to prove that he is not applying the process. The question is how to deal with subsection (3) of Article 34, which provides that in the adduction of such proof, the legitimate interests of defendants in protecting their manufacturing and business secrets must be taken into account.⁶ The principle should be that where there is a shift of the burden of proof, the patentee's legitimate interest in being able to enforce his process patent is stronger than the defendant's interest in keeping his process secret; denying this principle would in fact take away the essence of the shift of the burden of proof. However, it is possible that the process used by the defendant contains steps that do not fall under the patented process and that are even innovative. If the defendant can convince the court that there is an interest in not disclosing steps that are not relevant to the patent, the court can appoint an expert who is put under a secrecy obligation and, after having studied the defendant's process, reports whether the step(s) crucial to the patent is (or are) followed. This system has also been applied in the Netherlands in a case where the burden of proof did not shift to the defendant because the product obtained on the basis of the patent was not new. Under Dutch law, a party who wishes to obtain proof of a particular fact in order to assess the chances of success in a claim can request the court to organize a provisional witness hearing. In a case concerning a process patent, the patentee requested a provisional witness hearing for the purpose of hearing the individuals at the alleged infringer's company who were responsible for the manufacturing process in question. The alleged infringer claimed that such a hearing would necessarily result in these people disclosing trade secrets. The court's solution was, firstly, to decide that it would see the questions to be put to the witnesses beforehand, in order to avoid the operation becoming a fishing expedition and, secondly, to order that particular steps be reported only to an expert under an obligation of secrecy, in order

⁵ Hoge Raad, June 26, 1953, 1954 Nederlandse Jurisprudentie 90 with annotation HOUWING – *Hyster Karry Crane*.

⁶ It is striking that TRIPS speaks of 'manufacturing and business secrets.' I take it that this means no more and no less than trade secrets.

to avoid any unnecessary disclosure.⁷ If it appeared that no satisfactory protective measures could be taken and that the preliminary witness hearing would amount to a fishing expedition the court would have the possibility to deny the request for the hearing on the grounds of abuse by the patentee of his right to request such a hearing.⁸

6. Let us then turn to Article 42, which represents a sort of constitutional rule valid for all IP litigation (and which, as far as I am concerned, should be valid for all types of litigation) with the aim of ensuring that the proceedings are fair and equitable. For our purposes, the last sentence of the provision is relevant, namely that the procedure must provide a means of identifying and protecting confidential information.⁹ Under Dutch law, the safeguard for protecting trade secrets is spread out over a number of provisions without a clear structure, or at least without a specific general provision on which a party who wishes to invoke the protection of trade secrets can rely. However, in an administrative law case, the Dutch Supreme Court laid down rules on what should happen if a party that is under an obligation to disclose particular information requests protection of the confidential character of such information.¹⁰ The Supreme Court held that in order to rule on such a request, the court first of all needs to inspect the information in order to be able to assess whether keeping the information confidential is justified. If the answer is yes, the party invoking the confidentiality of the information (party A) may inform the court that the information is to be revealed only to the court. The other party (party B) must then inform the court whether it consents to the rendering by the court of its decision based on such information. If party B does not consent to this, the composition of the court that took cognizance of the information must be changed. By refusing to grant its consent, party B runs the risk that this will result in the court concluding that the confidential information confirms the correctness of the facts relied upon by party A.¹¹ If the newly composed court concludes that it cannot properly decide the case without taking cognizance of all or part of the confidential information, it can request the parties to provide it with such information. The relevance of this decision is that the Supreme Court gave at least some general rules on what to do in situations where confidential information is at stake. The fact that this case pertained to administrative law should not, in my opinion, preclude the application by the courts of similar rules in civil cases.

⁷ District Court of The Hague, September 27, 1996, docket no. 96.310 and 3 June 1998 docket nos. 96/1455 and 96/1471 – *Allied Signal/DSM* (unpublished).

⁸ See for the basic rule: Hoge Raad 19 February 1993, 1994 *Nederlandse Jurisprudentie* 345 – *Van de Ven/Pierik c.s.*. See for application of this rule in a patent case: District Court of Arnhem (rechter-commissaris) April 19, 1984, 1986 *Bijblad bij de Industriële Eigendom* 71 – *Dupont/Enka*.

⁹ The exception ‘unless this would be contrary to existing constitutional requirements’ may seem odd, but it refers to those jurisdictions where, under the constitution, secrecy in civil litigation is forbidden, e.g. South Africa and some Asian countries; see GERVAIS, *The TRIPS Agreement: Drafting History and Analysis* 291, note 90 (2nd ed. 2003).

¹⁰ Hoge Raad, December 20, 2002, 2004 *Nederlandse Jurisprudentie* 4 with annotation by VRANKEN; see also VAN DER KORST, *Bedrijfsgeheimen en transparantieplichten* 130 (2007).

¹¹ This is more or less in line with Art. 43(2) TRIPS.

7. As I see it, the safeguarding of trade secrets as provided for in general terms in Article 42 TRIPS can be achieved in three different ways. The first is the legal right of certain persons (*e.g.* lawyers, medical doctors and patent agents) to refuse to answer questions in a witness hearing or to otherwise disclose certain information in court proceedings. I will not discuss this legal right, which more or less speaks for itself, any further. The second consists of a series of possibilities to prevent confidential information disclosed in documents filed with the court or during a hearing from becoming publicly known. Here I am thinking of the possibility for courts to hold *in camera* hearings, a possibility that is explicitly provided for under Dutch procedural law. Under Dutch law, hearings are in principle public, but the court can order a hearing to take place behind closed doors under certain circumstances. One such circumstance is where the requirements of due observance of privacy so dictate, which, in the context of legal entities, means the protection of confidentiality.¹² In order to prevent the litigants that are present during a hearing behind closed doors from disclosing information to third parties that are not present, there is a statutory rule prohibiting the litigants from disclosing such information to anyone.¹³ It is generally felt that a similar obligation also applies to other persons who are present at the hearing, such as experts.¹⁴ Furthermore, the court has the power to prohibit the disclosure of any information from legal proceedings (such as documents filed in the proceedings, the content of witness statements, etc.).¹⁵ Such a prohibition can be reinforced by the imposition of a penalty in the event that the court's order is violated. This can be a very helpful tool, particularly in patent cases.

8. The third line along which trade secrets can be protected in patent cases consists of a variety of safeguards laid down by statute or in case law, such as the Dutch Supreme Court decision mentioned in point 6 above. I will mention a few of these safeguards and discuss how they are or could be applied. Some of them are the consequence of Article 43 TRIPS and the Enforcement Directive.

9. I will first discuss Article 843a in conjunction with Article 1019a Dutch Code of Civil Procedure. Article 843a has been depicted as providing for a type of 'Dutch discovery.'¹⁶ In fact it provides for a powerful tool on the basis of which any particular piece of evidence in the hands of a third party can be obtained or inspected further to a request filed with the court. Such a request can be filed by anyone who has a legitimate interest in obtaining the evidence, where such evidence is of relevance in determining the legal relationship between the requesting party (or his legal predecessors) and another party. The third party can be any party that has the evidence at his disposal or in his possession. Article 1019a, recently introduced on the basis of the Enforcement Directive, makes it clear that a legal relationship as referred to in Article 843a can be the result of an infringement of an IP right. So, if in the context

¹² Art. 27 Dutch Code of Civil Procedure.

¹³ Art. 29(1)(a) Dutch Code of Civil Procedure.

¹⁴ See BEIJER, *Tekst & Commentaar, Burgerlijke Rechtsvordering*, Art. 29, note 4.

¹⁵ Art. 29(1)(b) Dutch Code of Civil Procedure.

¹⁶ See WINTER in annotation under District Court of Rotterdam, October 3, 1996, *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 55 (1997).

of patent litigation the patentee wishes to inspect laboratory protocols (whether written or on disk), he can request the court to order the laboratory to allow inspection or to provide copies.¹⁷ Article 843a already existed before TRIPS entered into force and, of course, well before the Enforcement Directive came into existence.¹⁸ It should also be noted that its provisions are broader than those of TRIPS and the Directive, because the latter two refer to evidence in the hands of the opposing party in the litigation (or future litigation), whereas Article 843a enables the patentee to obtain evidence from anyone who possesses it. Pursuant to Article 43 TRIPS¹⁹ and Articles 6 and 7 Enforcement Directive dealing with evidence, Article 1019a(3) provides that the protection of confidential information should be ensured.²⁰ It is generally felt that this provision of Dutch law can only be applied if the applicant specifies the evidence he wants to have, although it is not necessary to specifically indicate each and every document. The question about the specificity of the evidence should be seen in relation to the applicant's legitimate interest in obtaining that evidence, which means that a request for evidence should not result in a 'fishing expedition'.²¹ Therefore, the applicant cannot simply say that he wants copies of the complete books and records of a company; however, he can ask for a copy of the full file on specific litigation.²² The patentee does not have the right to obtain copies of documents the existence of which is only assumed by him.²³ However, the licensee of a patent who does not properly pay the licence fees or give account regarding his sales may be put under an obligation to allow inspection of that part of his books and records relating to the sales of the licensed products. In this context the court

¹⁷ In case law it had been decided that under this provision one cannot request inspection or the submission of copies of unspecified documents, such as all protocols or any documents containing chemical formulae, but only specified documents that are known to exist; *see* among others President District Court of Breda, October 25, 2006, docket no. KG ZA 06-449 – *SLC/Stakenburg* (unpublished).

¹⁸ *See* also GIELEN, *Bescherming van Bedrijfsgeheimen* 55 (1999).

¹⁹ The text of Art. 43(1) reads: 'The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.'

²⁰ The aspect of confidentiality played a role in a case where the owner of a copyright regarding software seized data carriers containing the allegedly infringing software. In order to safeguard confidentiality, the President of the District Court authorised inspection of these carriers only by a third party who would check the software to see whether it was of an infringing nature and then report on his findings without disclosing any other information to the owner. The third party was bound to secrecy about the information. President District Court of Breda, October 25, 2006, 2007 *Bijblad bij de Industriële Eigendom* 437 – *SLC/Valar Groep*.

²¹ *See* SIJMONSMA, Article 843a Wetboek van Burgerlijke Rechtsvordering ont(k)leed, 2007 *Ars Aequi Libri* 38.

²² In this context I refer to a case where the alleged infringer in a patent infringement case knew that the patentee had sued his former patent attorney and that, in those proceedings, it had been held that the patent was null and void. The patentee was ordered to allow inspection of the file of the proceedings between him and his former attorney.

²³ President District Court of The Hague, July 27, 2005, 2005 *Intellectuele Eigendom en Reclamerecht* 378 – *Honeywell/Apollo*.

should in the light of the applicants legitimate interest not require that the documents are clearly defined, but whether they are definable.²⁴ Also, it is not necessary for the contents of the evidence in question to be known or to support a position taken in the proceedings. For example, inspection of documents from which it appeared that former employees had violated a non-competition clause in their employment agreement was allowed notwithstanding the fact that the former employees denied such violation.²⁵

10. As described above, Article 843a Dutch Code of Civil Procedure is a tool by which, for example, a patentee can request inspection or delivery of copies or extracts of evidence which is in the hands of a third party. Pursuant to Article 7 Enforcement Directive, the national laws of EU Member States should now provide for provisional measures for the preservation of relevant evidence in respect of an alleged infringement. Such measures may include a detailed description of the infringing goods (with or without the taking of samples), the physical seizure of the goods and/or, in appropriate cases, the seizure of materials and implements used in the production and/or distribution of these goods as well as the documents relating thereto, subject to the protection of confidential information.²⁶ Once a court decides that specific evidence should be filed for inspection or that copies should be made available, the question is how due account should be taken of the protection of such confidentiality. As an example, I refer to a case on the alleged infringement of a right to a trade name. The owner of the trade name rights wanted to secure evidence concerning the infringement and requested that all the books and records of the defendant – including computer files, correspondence and diaries – be seized and put under legal custody. The defendant argued that establishing the alleged infringement did not necessitate the seizure of all of its books and records. The Court of Appeal decided that it was true that there was no need to inspect all of the books and records in order to establish infringement of the trade name rights, but that the books and records could reveal the extent of the infringement and would provide evidence as to damages. The court then dealt with the issue of the safeguarding of trade secrets. This was done by ordering that the seized goods be put in the custody of a third party and prohibiting this third party from giving any information about the contents of the seized goods to the applicant or any other party until the President of the District Court ruled on the way in which the evidence was to be used in light of the due protection of trade secrets.²⁷ The protection of trade secrets also played a crucial role in a recent patent case, *Synthon/Astellas*. The facts of the case were as follows: Synthon was sued in Germany for infringement of the German part of a European patent. The patentee, Astellas, wanted to secure evidence in the Netherlands in connection with the German litigation. At the *ex parte* request of Astellas, the court ordered that the documents to be seized were be put into the custody of a bailiff, who would make copies of the documents for the benefit of inspection by

²⁴ See VAN DER KORST, *supra* note 10, at 98.

²⁵ See District Court of Dordrecht, June 24, 2004, LJN AP3695 –*Hoogendonk/Dutch Spiral*.

²⁶ This is now provided for in Art.1019b Dutch Code of Civil Procedure.

²⁷ Court of Appeal of Den Bosch, May 30, 2007, 2007 Praktijkids, no. 104 – *EBM/ESQ*.

Astellas and then return the originals to Synthon. After the documents had been seized and copied, Astellas' lawyers were allowed by the bailiff to inspect the copies and, on that basis, they drew up a report which was filed in the German litigation. Synthon opposed this procedure and the court had to decide whether or not the order for seizure had been granted in the correct way and/or had been misused by the patentee. The first issue, however, was whether protective measures to secure evidence can also be ordered if such evidence is relevant for infringement only of foreign rights. Synthon took the position that the Dutch provisions only applied to Dutch IP rights. Synthon's standpoint was rejected by the court on the grounds that this would be against the harmonization principles underlying the Enforcement Directive. The court also relied on Article 31 of what is known as the EEX Regulation,²⁸ which provides that an application may be made to the courts of an EU Member State for such provisional, including protective, measures as may be available under the law of that state even if, pursuant to the Regulation, the courts of another Member State have jurisdiction as to the substance of the matter. Next, the court decided that permission to proceed with the securing of evidence by seizing documents does not automatically mean that there is a right to inspect the documents seized. Therefore, the order permitting seizure had been too wide in so far as it said that the bailiff should make copies *for the benefit of inspection* by Astellas. Astellas, on its side, took the position that inspection by Astellas itself was necessary in order for a proper description to be drawn up by the bailiff. The court rejected this point of view as well, stating that it was up to the bailiff to draw up the requisite description. The argument that the documents were seen only by Astellas' lawyers, but not by Astellas itself, was rejected on the grounds that a patentee's lawyer is considered to be representative of the patentee and should be identified with him. So, the court ordered Astellas to ensure that everyone who had directly or indirectly taken cognizance of the documents and the data contained therein kept these secret. Surprisingly, however, the court decided that this order was not valid for the German proceedings and did not order Astellas to withdraw the report from those proceedings. I agree with Vollebregt, who wrote a critical note under this decision saying that the court should have gone further by also ordering the withdrawal of the report from the German proceedings, and should not have left it to the German court to decide what could be done with the report.²⁹

11. Let me then turn to some other provisions that can cause tension between the obligation to provide information in proceedings on the one hand, and the protection of trade secrets on the other. In IP cases the principle of due regard for the confidentiality of information is provided for in Article 6 Enforcement Directive, which follows Article 42 TRIPS. One of the items of information most often required in patent infringement cases is information on the source of the infringing products. A general obligation to furnish such information is provided for in Article 8 Enforce-

²⁸ Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters, OJ L 12/1 from January 16, 2001.

²⁹ President District Court of Arnhem, June 1, 2006, 2007 *Intellectuele Eigendom en Reclamerecht* 350, 2007 JGR, no. 28 with annotation VOLLEBREGT –*Synthon/Astellas*.

ment Directive, which follows Article 47 TRIPS. Such information pertains to not only the source, but also the distribution channels of the allegedly infringing products. It often happens that the defendant does not wish to disclose such information because he considers the names and addresses of his supplier(s) or customers as trade secrets. It is my opinion that in such a case, and assuming the court concludes that the products are infringing, the defendant's interest in keeping the contact details of his supplier(s) and customers secret should not outweigh the patentee's interest in stopping the infringing activities in an efficient way. Otherwise the obligation laid down in Article 8 Enforcement Directive would be of very little use. In this context it is noteworthy that neither Article 47 TRIPS nor Article 8 Directive explicitly refers to the interests of protecting trade secrets. The interest of protecting trade secrets in relation to the obligation to provide information on distribution channels might, however, play a role where the court orders a recall of the infringing products.³⁰ In order to verify whether a defendant in a patent case has in fact sent a communication to his customers requesting a recall, the court can order the defendant to provide the patentee with a full list of his customers. The Dutch Supreme Court said that this is an effective way of verifying whether the defendant has complied with the order, but also ruled that the court should take into account the defendant's interest in not disclosing commercial information to his competitor(s). In most cases this interest is taken into account by ordering the defendant to disclose the relevant data to a neutral person (such as a notary or auditor) who could then check whether the communication was sent and report on it to the patentee.

12. There is one other situation in which the infringing party can be required to disclose information he considers to be confidential. Under Dutch patent law, in the event of infringement the patentee can request the surrender of profits, in respect of which the infringing party must render account, for example by providing invoices etc.³¹ If the infringing party can convince the court that all or part of such information is confidential and should not be disclosed, the court can easily order the infringing party to render account to an expert, such as an auditor, who then reports to the court on the figures necessary to calculate the profits. In this way, due regard is given to the last sentence of Article 41 TRIPS. I also refer to Article 8(2)(b) Enforcement Directive, which provides that the judicial authorities may order that information be given on, among other things, the quantities of infringing products produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

13. Finally, I will refer to some other provisions that may result in the disclosure of confidential information during litigation. Under Dutch law (Article 19 Dutch Code of Civil Procedure), the principle is that the litigants are obliged to present all facts that are relevant for the decision in a complete and truthful way. If they do not, the court can draw whatever conclusion it deems expedient. Hiding facts because they are confidential seems to be in conflict with this principle. However, as already

³⁰ Explicitly made possible by Hoge Raad, February 23, 1990, 1990 Nederlandse Jurisprudentie 664, with annotation VERKADE (*Hameco*).

³¹ Art. 70(4) Dutch Patent Act.

follows from the aforementioned decision of the Dutch Supreme Court³², a party can invoke protection against the disclosure of trade secrets. The protection of trade secrets is also covered by another procedural provision, namely Article 22 Dutch Code of Civil Procedure, which states that the court can in all cases and at any time during litigation request one or more of the litigants to file particular documents. The relevant party can refuse to do so if there are compelling grounds not to file the document(s) in question. The legislative history shows that the protection of confidential information constitutes compelling grounds as referred to above. It is up to the court to decide how in such a case the information can be disclosed, on the one hand, and due regard given to its confidentiality, on the other.³³ The latter can be achieved in different ways, for example by imposing an obligation of confidentiality on the parties, by not mentioning the information in the judgment or by holding the hearing behind closed doors.³⁴

14. As we have seen, the TRIPS treaty – and following this treaty the Enforcement Directive – sets out a general framework for securing protection against the disclosure of trade secrets in patent and other IP proceedings. However, the way in which such protection is guaranteed in litigation practice is very much judge-made law and can therefore differ from country to country. I have tried to give some insight into the way in which Dutch courts deal with the protection of trade secrets and it seems that this could be inspiring to other courts that have less experience in patent litigation. It will be interesting to see how other courts are dealing with the subject, because it is through the exchange of information on litigation practice that real harmonization can be achieved. We should be very grateful to Joseph Strauss for having played such an important role in the harmonization process of IP law not only on a European, but also on a global, level.

³² See *supra* note 10.

³³ There is a further provision in the Dutch Code of Civil Procedure, namely Art. 162, which provides that the court can, in the course of litigation, order one or more of the parties to open the books and records or documents that they are legally required to keep. This provision elaborates on Art. 22 and does not seem to have much of an independent value. In contrast to Art. 22, Art. 162 does not state that a party is entitled to refuse such an order if there are compelling grounds for doing so. However, it is generally felt that such a right exists also in relation to Art. 162; see VAN DER KORST, *supra* note 10, at par. 6.4.

³⁴ See VAN DER KORST, *id.* at par. 6.4.