

There are no specific provisions concerning these two matters. Article 95 of the Law of 14 July 1991 on trade practices and consumer information and protection is therefore applied (see reply given by Belgium to question 5 of the Checklist of issues on enforcement).¹⁹

19. Article 44.2 provides an exception to the requirement in paragraph 1 for government use or use by third parties authorized by the government, limiting the remedy for infringement to payment of adequate remuneration as provided in Article 31(h). Please describe any such limitations on remedies in the laws of Belgium and cite the legal authorities providing for those limitations.

Use of an intellectual property right by the government does not exist under Belgian law.

20. Article 45.1 requires that judicial and administrative officials be able to order an infringer to pay the right holder damages adequate to compensate for the injury caused by the infringement. In IP/N/6/BEL/1/Rev.1, the Government of Belgium identifies the provisions of law that authorize judges to order a party found to be infringing to pay the right holder damages to compensate for the injury suffered as a result of the infringement. Please explain the factors considered by the courts in determining the amount of the compensation.

Generally speaking, court decisions relating to determining the amount of compensation awarded to the victim of counterfeiting are based on Article 1149 of the Civil Code, according to which the aspects of the injury to be taken into consideration are the earnings foregone and loss suffered.

In order to quantify the loss of earnings, it is necessary first to evaluate the volume of infringement ("*masse contrefaisante*"), which enables the extent of the counterfeiting to be determined. This therefore involves calculating the sales figure achieved by the counterfeiter, but this figure must then be adjusted to take account of the fact that any sale made by the counterfeiter does not necessarily deprive the right owner of a corresponding sale, as consideration must be given to the existence of other competitors and the various advantages enjoyed by the right owner over his imitators.

As for the loss suffered, it is made up of two elements: the essentially mental anguish caused by the infringement of the exclusive right, on the one hand, and the cost of tracking the infringement and of bringing an action, on the other.

21. Article 45.2 requires that judges and administrative officials be authorized to order payment of a right holder's expenses, including legal fees. In IP/N/6/BEL/1/Rev.1, the Government of Belgium states that contrary to Article 45, the law of Belgium does not include attorney's fees in the costs that judges may order paid to right holders. Please explain what steps the Government of Belgium is taking to bring its law into conformity with this obligation.

There is no statutory provision enabling the losing party to be required to pay lawyers' fees and the cost of technical advice. As we stated in the reply to question 8 of the Checklist of issues on enforcement²⁰, lawyers' fees are not included in legal costs (see, however, the compensation for court costs referred to in points (a) and (g) of the reply in question).

Since conventions take precedence over national laws, the judicial authorities may therefore, pursuant to the TRIPS Agreement and not Article 1017 of the Judicial Code, order the infringer to pay lawyers' fees to the right holder.

¹⁹ Document IP/N/6/BEL/1/Rev.1.

²⁰ This reply contains specific information provided by the Belgian delegation in its communication of 3 November 1998.

22. Article 46 requires that judges and administrative officials be authorized to order, in certain circumstances, other remedies, including disposal of goods outside commercial channels or destruction of goods and destruction of materials and implements the predominant use of which is the creation of infringing goods. The description of laws containing such authority in IP/N/6/BEL/1/Rev.1 indicates that the remedy is available where "bad faith" is shown. Please describe the factors considered in determining whether "bad faith" exists.

(a) Patents

According to Article 52.1 of the Law of 28 March 1984 on patents, good faith does not rule out counterfeiting. If the subject of the patent is a process which enables a new product to be obtained, any identical product manufactured by someone other than the patent owner is considered, pending proof of the contrary, to have been obtained by that process. With regard to the production of proof of the contrary, account is taken of the legitimate interests of the defendant in protecting his industrial or business secrets.

In the event of bad faith on the part of the defendant, the judge orders confiscation of the counterfeit products and of the instruments and means specifically used to produce them.

Bad faith is shown where the counterfeiter has acted knowingly, i.e. where he has engaged in counterfeiting with full knowledge of the existence, force, extent and scope of the patent.

(b) Trademarks

The uniform Benelux law on trademarks does not give a formal definition of bad faith, so assessment will be necessary in each specific case and will be undertaken in the light of all the circumstances of the case.

Article 4(6) of the uniform Law refers - by way of non-exhaustive examples - to two cases where the judge is undeniably faced with bad faith on the part of the person filing a trademark:

- (i)** Where filing is effected with knowledge or inexcusable ignorance of the normal use made in good faith, on Benelux territory, of a like trademark for similar products during the three years preceding the filing by a third party whose consent has not been obtained.

Ignorance is inexcusable only if the competing use is a matter of common knowledge, i.e. generally known in the circle(s) frequented or normally to be frequented by the applicant.

In order to determine the existence of knowledge of the previous trademark, mere use of it, even where not a matter of common knowledge, may be taken into account, if it is established that the applicant definitely had knowledge thereof.

- (ii) Where filing is effected with knowledge, resulting from direct relations, of the normal use made in good faith by a third party, over the preceding three years, outside Benelux territory, of a like trademark for similar products, unless that third party has given his consent or such knowledge was obtained only after the person effecting the filing had started to use the mark within Benelux territory.

Knowledge is to be interpreted in the same way as in the first case but it must result from personal relations which the applicant had with the previous user abroad. In addition, such knowledge must have preceded not only the application complained of but also commencement of the use which the person effecting the filing had made of the mark within Benelux territory.

23. Article 47 provides that WTO Members may authorize judges and administrative officials to order infringers to identify for right holders third parties involved in the production and distribution of infringing goods or services and their channels of distribution. The responses to questions 3 and 5 in IP/N/6/BEL/1/Rev.1 appear to indicate that it is only in connection with trademarks that such information will be made available to a right holder to allow the right holder "to reconstitute the chain of production and distribution of the counterfeit objects". Please confirm that this is correct and indicate whether any thought is being given to providing similar authority at least in connection with pirated copyright works.

After verification, it turns out that it is only in respect of trademarks that there is a specific rule in this area. Other intellectual property rights are therefore only subject to the general law of proof.

However, the uniform Benelux law concerning industrial designs was recently amended by a Protocol of 28 March 1995, which authorizes the right owner to request that the counterfeit provide him with information on the source of the counterfeit goods.

24. Article 48.2 permits WTO Members to exempt public authorities and officials from liability to remedies only where their actions were taken or intended in good faith in carrying out their responsibilities under the law. In IP/N/6/BEL/1/Rev.1, Belgium states that the State is liable for the actions of its officials. Please describe the circumstances in which such liability would be found to apply.

The State, like its citizens, is subject to the rules of law, in particular those governing compensation for injury resulting from culpable infringements of the rights and legally protected interests of individuals.

Liability of agents-as-bodies ("*agents-organes*") and agents-as-officials ("*agents-préposés*")

With regard to the liability of agents-as-bodies and agents-as-officials, the principle is as follows. Any liability in respect of a fault, presupposing negligence, committed by a corporate body governed by public law, an error of human conduct on the part of an official and all acts by officials which are not necessarily related to their office, the Belgian courts make a distinction, insofar as whether or not their faults are to be imputed to the public authority, according to the capacity in which the officials in question were acting:

- (i) The mere official (i.e. the agent possessing no public authority whatsoever), for whose misconduct and injurious acts the public authority incurs vicarious liability, on

the basis of Article 1384(3)²¹ of the Civil Code, provided that such acts were perpetrated in the performance of his duties and are, if only indirectly or occasionally, connected with the duties of the agent, including abuse of office not releasing the public service from such vicarious liability;

- (ii) the agent-as-body (the agent possessing some public authority), who is identified with the legal person he represents, whose personality gives way to that of the State, so that acts carried out by this agent within the sphere of his powers, that is within the limits of his duties, are acts by the legal person itself, which may therefore incur direct liability *vis-à-vis* injured third parties on the basis of Article 1382²² of the Civil Code.

Provisional measures

25. Articles 50.1 and 50.8 provide that judicial and administrative authorities shall have the authority to order prompt and effective provisional remedies to preserve relevant evidence in regard to an alleged infringement. The description of the authorities and the procedure in IP/N/6/BEL/1/Rev.1 is thorough but it does not indicate whether such actions can be taken to preserve evidence. Please explain under what circumstances a judge or administrative authority can order provisional measures to preserve evidence and indicate whether the procedure followed differs from that described in IP/N/6/BEL/1/Rev.1.

If the applicant shows that there is a risk of evidence being destroyed, the judge in chambers will consider the application to be urgent and order provisional remedies (such as an expert opinion or an injunction prohibiting the transfer of evidence).

The procedure to be followed by the judge is that included in Belgium's replies to the Checklist of issues on enforcement.²³ Therefore, where the application to be heard in chambers is made by writ, the procedure is that set out in Articles 1035 to 1041 of the Judicial Code and if it is made by *ex parte* application (urgent procedure), the procedure is that provided for in Articles 1025 to 1034 of the Judicial Code.

26. Articles 50.2 and 50.8 require Members to authorize judicial authorities and administrative bodies to grant provisional remedies when a delay is likely to cause "irreparable harm" to the right holder. In IP/N/6/BEL/1/Rev.1, the additional phrase "significant damages" is used. Please describe briefly what is required by the authorities to establish "significant damages" to the right holder and to establish "irreparable harm".

²¹ Article 1384 of the Civil Code provides, *inter alia*, that a person is responsible not only for the injury caused by his own actions but also for that caused by the actions of persons under his responsibility, or things in his care

Subparagraph 3: Masters and those vicariously liable for injury caused by their servants and agents in the capacities in which they are employed.

²² Article 1382 of the Civil Code provides that any human act that causes injury to another person obliges the person by whose fault injury is caused to compensate for it.

²³ Document IP/N/6/BEL/1/Rev.1.

The President dealing with the case uses his discretion to assess whether or not it must be dealt with expeditiously and therefore whether significant damage may be occasioned if provisional remedies are not adopted.

The law does not lay down the criteria for determining significant damage.

As a general rule significant damage may be considered to be established where there is an imminent threat of harm.

It should also be noted that urgency in matters of summary judgement does not require the threat of irreparable harm for the applicant; the threat of significant damage, i.e. of damage which is difficult to repair, is sufficient.

Our national laws and courts are very effective in this area.

27. Articles 50.2 and 50.8 also require Members to authorize judicial authorities and administrative bodies to grant provisional remedies when there is a "demonstrable risk of evidence being destroyed." As noted above, it is not clear whether provisional measures are available to preserve evidence. If such is the case, please describe briefly what factors are considered by the competent authorities to determine if there is a "demonstrable risk of evidence being destroyed".

The destruction of evidence may constitute the first signs of significant damage as defined above. The judge uses his discretion to decide, taking into account the importance of the information provided by the applicant. He will therefore require the applicant to provide proof in advance that he is the right holder and that his right is being infringed.

28. Articles 50.3 and 50.8 require Members to authorize judicial and administrative authorities to require the applicant to provide evidence to establish with a sufficient degree of certainty that the applicant is the right holder. With respect to each intellectual property right defined in Article 1.2 of the TRIPS Agreement, please describe the evidence required of right holders to establish ownership.

(a) Copyright

Subparagraphs 2 and 3 of Article 6 of the Law of 30 June 1994 concerning copyright and neighbouring rights provide that:

- Subject to proof of the contrary, the author shall be deemed to be the person who appears as such on the work by virtue of the fact that his own name or an abbreviation permitting him to be identified is mentioned;
- the publisher of an anonymous or pseudonymous work is deemed to be the author of that work in relation to third parties.

In order to facilitate proof of ownership of the rights before a judge, the author will see to it that a specific date is conferred upon his work, for instance by means of registration with the Ministry of Finance.