
**WORLD INTELLECTUAL
PROPERTY
RIGHTS and REMEDIES
LAWS with COMMENTARY**

Dennis Campbell—Editor
Center for International Legal Studies
Salzburg, Austria

Volume 1



For Customer Assistance Call 1-800-328-4880

© 2021 Thomson Reuters, 3/2021

Mat #42703963

Chapter 4

Belgium

Willem De Vos and Jan-Laurens Dierickx

Monard Law

Brussels, Belgium

I. INTRODUCTION

- § 4:1 Intellectual property rights
- § 4:2 Regulatory bodies and exploitation
- § 4:3 Classes of intellectual property rights in Belgium

II. PATENTS

- § 4:4 Nature
- § 4:5 Priority
- § 4:6 Conditions
- § 4:7 Beneficiaries of rights
- § 4:8 Maintenance
- § 4:9 Terms and extensions
- § 4:10 Transfer
- § 4:11 Cancellation
- § 4:12 International aspects
- § 4:13 Attacks on ownership
- § 4:14 Infringement actions
- § 4:15 Injunctions
- § 4:16 Action for damages
- § 4:17 Criminal proceedings
- § 4:18 Costs
- § 4:19 Customs actions

III. COPYRIGHT

- § 4:20 Nature
- § 4:21 Priority of rights
- § 4:22 Beneficiaries of rights: Authors, co-authors, and others
- § 4:23 Duration
- § 4:24 Transfer of rights and licensing

- § 4:25 International aspects
- § 4:26 Attacks on ownership
- § 4:27 Confiscation
- § 4:28 Costs
- § 4:29 Customs action
- § 4:30 Action for damages

IV. TRADE MARKS

- § 4:31 Nature
- § 4:32 Transfer
- § 4:33 Cancellation
- § 4:34 International aspects
- § 4:35 Attacks on ownership
- § 4:36 Infringement actions

V. TRADE NAMES

- § 4:37 Functions and principles
- § 4:38 Assessment and enforcement

VI. INDUSTRIAL AND AESTHETIC DESIGNS

- § 4:39 Nature
- § 4:40 Conditions for protection
- § 4:41 Beneficiaries of rights
- § 4:42 Maintenance
- § 4:43 International aspects
- § 4:44 Attacks on ownership
- § 4:45 Infringement actions
- § 4:46 Injunctions and confiscations
- § 4:47 Licensing

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

I. INTRODUCTION

§ 4:1 Intellectual property rights

Intellectual property legislation in Belgium is heavily influenced by the supranational organisations of which it is a member. Being part of the Benelux, Belgium did not implement separate laws for design and trade mark rights, instead referring directly to the Benelux Convention on Intellectual Property (BCIP). As such, interpretations by Dutch and Luxembourgish courts in these matters can be used before Bel-

§ 4:19 Customs actions

Pursuant to Regulation (EU) 608/2013 on customs enforcement of intellectual property rights (the “EU Customs Regulation”), Belgian customs may monitor borders for counterfeit goods. Belgian customs may verify goods *ex officio* or further to an application for customs action filed by the intellectual property rights owner.

In the case of suspected counterfeit goods, Belgian customs will suspend the release of the goods and will notify the alleged infringer and the intellectual property rights owner. The latter must confirm within 10 working days whether the goods are counterfeit and whether the goods may be released or destroyed. If the alleged infringer does not oppose within 10 working days the intellectual property owner’s claim for destruction, the goods will be destroyed at the expense of the intellectual property owner.

If the alleged infringer challenges the destruction of the goods, the intellectual property owner must start infringement proceedings within 10 working days. The alleged counterfeit goods are warehoused pending the outcome of proceedings.

III. COPYRIGHT**§ 4:20 Nature***In General*

The first Belgian Copyright Law dates from 22 March 1886. The last reform in 2015 codified all copyright rules into the new Book XI of the Code of Economic Law. The codification into the CEL did not bring that many changes to the existing ruleset. Therefore, older jurisprudence and legal doctrine are still as useful as they were in the past.

Conditions and Requirements

Copyright laws are designed to protect the creator of an original work from others using and profiting from the work without permission. For a work to be eligible for copyright protection in Belgium, there are two main requirements that need be fulfilled:

1. The work is expressed in a concrete form; and
2. The work meets a requirement of originality.

One of the most essential requirements in copyright law worldwide also exists in Belgium: copyright law does not protect ideas, no matter how original they may be.¹ It is only the specific expression of the idea that will receive protection. As such, authors cannot invoke protection for a genre, style or technique, even if they are the first to use them.

[Section 4:20]

¹Cass. 19 March 1998, *A&M* 1998, at p. 229; Berne Convention, article 2(1), read in conjunction with World Intellectual Property Organization Copyright Treaty,

In music for instance, a certain rhythm or concept of harmony can only receive protection if incorporated together with a specific melody. This way one idea can generate multiple expressions. While this idea-expression dichotomy seems easy in theory, in practise it is sometimes difficult to draw the line between the expression and the idea behind the expression in a certain work. As such, when dealing with copyright questions, it is always advisable to check whether copyright protection can be invoked in the first place.

It also is required that the work be original. For this requirement, the Belgian legislator uses the harmonized EU standard of originality as laid out in landmark decisions *Infopaq*² and *Painer*³ of the European Court of Justice: the work should be an author's own intellectual creation, which requires the making of free and creative choices and carries the personal touch of its author. Originality does not require a work to be artistic, and certainly does not equal novelty (such as in patent or design rights).

Copyright protection is not only reserved for literary and artistic works *senso stricto*. Reference can be made to article 2(1) of the Berne Convention but, in general, any work can benefit from copyright protection as long as the above two conditions are met.⁴ The only explicit exception is in article XI.172, CEL: no copyrights for official government acts and speeches in deliberative assemblies, in public hearings of the courts or in political meetings. However, even in the latter case, only the author has the right to separately publish these speeches.

The government also is reluctant as to obscene and anti-social works. Copyrights are, to a certain extent, held to a certain social standard. As there is no required depot for copyrights, only a judge can refuse the copyrightability of an obscene or anti-social work. The term "obscene or anti-social work" is interpreted very broadly and is assessed in a contemporary context.

Registration Process and Creation of Right

Under Belgian law, no formalities need be completed to invoke copyright protection. In fact, this is prohibited by the Berne Convention, of which Belgium is a member.⁵ The creation of copyright is thus based on one fact: the original externalisation of an idea. From the

article 2.

²European Court of Justice, 16 July 2009, *Infopaq/DDF*, C-5/08, at pp. 32-39.

³European Court of Justice, 1 December 2011, *Painer/Standard*, C-145/10, at pp. 87-94.

⁴Even in the landmark case *Infopaq/DDF*, a newspaper article of 11 words was deemed sufficiently original to benefit from copyright protection. The CEL also provides special provisions for non-artistic works, such as software (Book XI, title 6) or *sui generis* databases (Book XI, title 8).

⁵Berne Convention, article 5(2): "The enjoyment and the exercise of these rights

moment of externalisation the copyrights exist immediately and wholly. Principles such as “dilution” and “incorporation” do not exist in Belgian copyright law.⁶

As for all facts, copyrights can be proven by any means of law, including testimony and conjecture. Nevertheless, in practise it can be difficult to prove the existence of copyrights in a certain work. For this reason, many authors will include ©-symbols in their works.⁷ The ©-symbol is often used in combination with the author’s name, which under Belgian law creates a presumption of authorship; not because of the symbol, but because, in combination with a name, it refers to the author. Instead of the symbol, “author” may be used.

§ 4:21 Priority of rights

In General

In Belgium, an earlier copyright will prevail over a later (in whole or in part) copyright. Earlier copyrights also can be invoked against newer trade marks or designs that use the copyrighted work without prior authorization. Cumulation of intellectual property rights, as such, is possible.

When two authors create similar works independently of each other around the same time, there is no copyright infringement if the independence can be demonstrated. If this is not possible, it should be established which of the two works is the oldest. Hence, the importance of being able to prove the date of a creation. For this reason, authors can rely on voluntary options to deposit copyrightable works as a safety mechanism, such as IDepot by the OPRI and OnlineDepot by SABAM. It also is possible to deposit a work with a notary.

Moral Rights

There are moral rights attached to every copyrighted work in Belgium. The rights are so closely related to the author’s personality that they can be exercised only by him. The rights are, therefore, “inalienable” (article XI.165 section 2, CEL). However, the inalienable character is not absolute. It is possible for an author to contractually refrain from the concrete exercise of a certain moral right in relation to a certain work. The agreement must be confirmed in writing. This does not constitute a waiver of the moral right. Under no circumstances can or may the moral rights be transferred.

Moral rights include the right of disclosure (also called the right to divulgation), the right to paternity, and the right to integrity. Using his right to integrity, an author can resist any deformation, mutilation, or deterioration of the work. This part of the right to integrity

may not be subject to any formality.”

⁶Cass. 17 February 2017, *Cassegrain / Calem*, C.15.0144.

⁷Usually using the following format: “© name of the author, year of publication.”

can never be waived. After the death of the author, moral rights are transferred to the author's heirs or other persons designated by the author.

§ 4:22 Beneficiaries of rights: Authors, co-authors, and others

The basic rule is that the copyright belongs to the person who created the work. Because a creative intellectual activity can only be provided by a physical person, it is impossible for a legal person to be designated as the original author. Such a legal person may, however, be able to obtain certain attributes of copyright by way of a transfer from the author, as is often the case in the context of an employment relationship. If it is impossible to determine who was the author of a work, the work will be labelled as anonymous.

Co-authorship, such as when a book features a different illustrator and writer, also exists in Belgium (articles XI.168 and XI.169, CEL). Both co-authors must jointly exercise the copyright in that work. The authors of the original work must be assimilated to the authors of the new work if the contribution of the former is used in the new work (article XI.179, CEL).

For the purposes of that contribution, he must be regarded as the author and will enjoy the rights resulting therefrom (article XI.180, CEL). In audio-visual works, in addition to the director, the other natural persons who have contributed to the work also are considered to be the authors. These include:

1. The screenwriter;
2. The editor;
3. The copywriter;
4. The graphic designer of animation works or of animation sequences in an audio-visual work, which are an important part of that work; and
5. The composer of musical works with or without words specially created for the audio-visual work.

An author who refuses or is unable to complete his contribution to the audio-visual work (e.g., following a resignation) may not oppose the use of his contribution for the completion of the work. The most important neighbouring rights in Belgium are performance rights. Each performer has an inalienable moral right to his performance (article XI.204, CEL) and only the performer has the right to reproduce his performance or to authorise its reproduction in any way or form, directly or indirectly, temporarily or permanently, in whole or in part. That right includes the exclusive right to license his performance rights (article XI.205, CEL).

§ 4:23 Duration

In general, after the death of an original author, a copyright will

continue to exist for 70 years in favour of the person(s) the author has designated for that purpose or, failing that, in favour of his heirs (article XI.166, section 1, CEL). In the case of co-authorship, the copyright in the work only cease 70 years after the death of the last living co-author (article XI.169, CEL).

Copyright protection for an audio-visual work expires 70 years after the death of the longest surviving of the following persons: the director, the screenwriter, and the composer of musical works with or without words specially created for the audio-visual work (article XI.166, section 2, CEL). The term of protection for a musical composition with lyrics will be 70 years after the death of the last surviving person of the following, whether or not they are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided both contributions were specifically created for the composition. For instance, the rule does not apply when the lyrics originate from a previously published book, sample, or televised interview.

It is possible that a work is created without a known or identifiable author. These are called anonymous works. This situation is surprisingly common. In many cases, when a company releases a product, it is not known or published who the actual author is, usually because there are many people who have contributed to the creation of the work. If the author is not identifiable, it also is impossible to apply the general rule of 70 years after the death of the author. In that case, the copyright ends 70 years after the first publication of the work (article XI.166, section 3, CEL). Termination or bankruptcy of a company does not equal the death of the author and does not affect this rule.

In the case of works published in several volumes or episodes, the period of protection will run for each volume separately (article XI.166, section 4, CEL). This poses the question what to do if a previous copyrightable work has merely been rereleased or upgraded. For instance, what happens when an old animated motion picture is rereleased in high definition or completely redrawn? In that case, the updated work will receive copyright protection but only with regard to the new, updated elements in the work. It should still be possible for third parties to copy the original work without infringing the new, updated version of the work. Performance rights expire fifty years after the date of the performance (article XI.208, CEL).

§ 4:24 **Transfer of rights and licensing**

Works Created by Employees

When an author creates works in performance of an employment contract or statute, copyrights may be transferred to the employer to the extent that such transfer of rights is expressly provided for and to the extent that the creation of the work falls within the scope of the

erty holder himself, and usually *ex aequo et bono* based on factors such as procedural costs, loss of profit, and damage to reputation.

§ 4:30 Action for damages

In addition to injunction and confiscation procedures, in many cases, it is possible to obtain compensation for infringements of intellectual property rights. In principle, only a judge on the merits can award damages. Compensation is, therefore, not possible in an injunction procedure or in a counterfeit seizure procedure.¹ It is better to wait with claims for damages until third-party proceedings have been completed (and the procedure on the merits has begun).

A civil party also can claim damages in criminal proceedings. However, in such cases, criminal law is applied, which means that judges more often consider the financial and personal circumstances of the defendants. For this reason, criminal proceedings are often only instituted in the case of clear and extensive infringements.

IV. TRADE MARKS

§ 4:31 Nature

Creation of Rights

Trade mark protection can be obtained in Belgium by filing:

1. A Benelux trade mark application with the Benelux Office for Intellectual Property (BOIP);
2. An international trade mark application, covering the Benelux through the Madrid system; or
3. A European trade mark with the EU Intellectual Property Office (EUIPO).

Belgium, The Netherlands, and Luxemburg have entered into the BCIP, creating a unitary trade mark that provides protection in the entire Benelux territory (the “Benelux trade mark”). A Benelux trade mark application can be filed in Dutch, French, or English with the BOIP. The applicant must identify the goods and services in correspondence with the Nice Classification and the type of trade mark (verbal, figurative, semi-figurative, colour, and shape). The BOIP will first determine if the application fulfils all formal requirements. If all formalities have been met, the trade mark application will be published in the BOIP’s trade mark register. In a second stage, the BOIP will determine if there are any absolute grounds for refusal.

The BOIP does not check whether the trade mark application is in conflict with earlier registered trade marks (relative grounds for

[Section 4:30]

¹Ghent, 5 May 2014, *DAOR* 2015, at p. 104; Brussels, 28 February 2018, *IRDI* 2018/1, at pp. 64-72.

refusal). A Benelux trade mark will be registered within three to six months if the BOIP does not find absolute grounds to refuse trade mark registration and no opposition proceedings were initiated by third parties. Trade mark registration fees are €244 for one class of goods and services. An additional fee must be paid to add more classes: €27 for a second class and €81 per class from the third class on.

Absolute Grounds for Refusal of Registration

The BOIP examines a Benelux trade mark application for the following absolute grounds of refusal (article 2.2 *bis*, BCIP):

1. Signs that cannot constitute a trade mark;
2. Trade marks that are devoid of any distinctive character;
3. Trade marks that consist exclusively of signs or indications which may serve, in business, to designate the characteristics of the goods or services;
4. Trade marks that consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade;
5. Signs that consist exclusively of the shape, or another characteristic, that result from the nature of the goods themselves, for which it is necessary to obtain a technical result, or that give substantial value to the goods;
6. Trade marks that are contrary to public policy or to accepted principles of morality;
7. Trade marks that are of such a nature as to deceive the public, such as as to the nature, quality, or geographical origin of the goods or service;
8. Trade marks that have not been authorised by the competent authorities and are to be refused or invalidated pursuant to article 6 *ter* of the Paris Convention;
9. Trade marks that are excluded from registration pursuant to EU law on the protection of designations of origin and geographical indications, traditional terms for wine, traditional specialities guaranteed, or plant variety rights; and
10. Trade mark applications made in bad faith.

The BOIP will notify its provisional decision to refuse a trade mark registration on absolute grounds to the applicant, allowing the latter to file an objection within one month from notification. The BOIP will make a final decision taking into account objections raised by the applicant (article 2.11, BCIP). The BOIP's final decision may be appealed to the Benelux Court of Justice within two months from notification (article 1.15 *bis*. BCIP).

Priority

The filing date of a Benelux trade mark application is set when all formal application requirements are fulfilled. Priority is determined

based on the filing date. An applicant also may claim priority based on a foreign trade mark registration.

Conditions

A sign (e.g., names, letters, shapes of goods, or colours) that can be represented graphically and that is used to distinguish the goods or services of a company is eligible for trade mark registration. The sign must have a sufficient distinctive character, meaning that it must be perceived by the public as a means to identify goods or services as originating from the trade mark applicant and to distinguish them from goods or services of other companies.

Descriptive signs that designate a characteristic of the goods or services are not eligible for trade mark protection. A Benelux trade mark can obtain a distinctive character through use before the filing date. In principle, only registered signs enjoy trade mark protection. Unregistered signs may enjoy trade mark protection if they are well-known in accordance with article 6 *bis* of the Paris Convention.

Beneficiaries of Rights

Any natural person or legal entity can be a Benelux trade mark owner. The filing also names the trade mark representative, if present.

Maintenance

A registered Benelux trade mark is valid for 10 years. A registration can be renewed for consecutive terms of 10 years upon payment of a maintenance fee (article 2.9, BCIP). No proof of use is required for renewal of a Benelux trade mark. A Benelux trade mark may be revoked if it has not been genuinely used in the Benelux territory within five years (article 2.27, BCIP).

§ 4:32 Transfer

Assignment

A Benelux trade mark may be transferred in respect of all or some of the goods or services for which it was filed or registered, independently of the transfer of all or part of the undertaking of the trade mark owner (article 2.31, section 1. BCIP).

Assignments that are not laid down in writing are null and void. The same is true for assignments or other transfers not made for the whole of the Benelux territory (article 2.31, section 2. BCIP). An assignment must be recorded with BOIP's trade mark register to be enforceable against third parties (article 2.33, BCIP).

License

A Benelux trade mark may be the subject of a license for all or some of the goods or services in respect of which it was filed or registered. A license can be limited to one of the Benelux countries

(article 2.32, BCIP). A written license agreement must be recorded with BOIP's trade mark register to be enforceable against third parties (article 2.33, BCIP). A licensee may only bring independent trade mark infringement actions if the trade mark license has been registered and the licensee has obtained permission of the trade mark owner for that purpose.

§ 4:33 Cancellation

In General

Benelux trade mark law offers third parties the possibility to oppose Benelux trade mark applications (pre-registration phase) as well as Benelux registered trade marks (post-registration phase).

Opposition Proceedings (Pre-Registration Phase)

Third parties may start opposition proceedings before the BOIP within two months from the publication of a Benelux trade mark application based on their earlier trade mark rights. The following conflicts with earlier rights may lead to a refusal of the Benelux trade mark application (article 2.2 *ter*, BCIP):

1. Identical trade marks for identical goods and services;
2. Identical or similar trade marks for identical or similar goods or services, creating a likelihood of confusion on the part of the public;
3. Identical or similar trade marks, irrespective of the identity or similarity of the goods and services, provided that the earlier trade mark is a well-known trade mark and the use of the later trade mark, without due cause, would take unfair advantage of or be detrimental to the distinctive character of an earlier well-known trade mark; and
4. An earlier application for a designation of origin or geographical indication.

These grounds also are known as relative grounds for refusal of trade mark registration. The basic fee for filing an opposition is €1,045. If the BOIP finds the opposition admissible, a cooling-off period of two months will follow. During this time, parties may discuss a settlement agreement. If no agreement is reached, the opposition proceedings will start. The opponent must file his arguments within two months. The defendant may reply to the opponent's argument and ask proof of use of the earlier trade mark within two months. The BOIP may allow parties to submit additional arguments and will finally decide the case. The BOIP's decision may be appealed to the Benelux Court of Justice within two months from notification.

Invalidity and Revocation Proceedings (Post-Registration Phase)

Third parties may counterclaim the revocation and/or invalidity of a