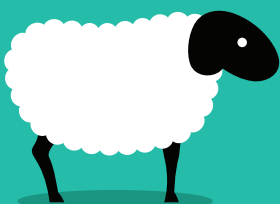
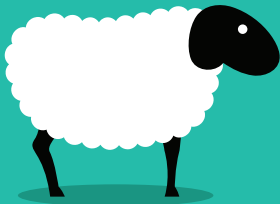


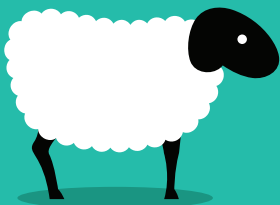
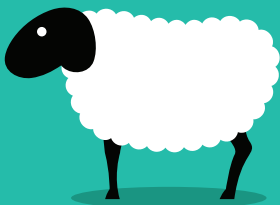
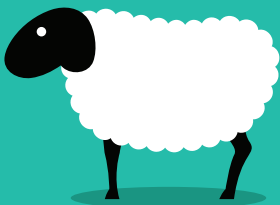
# Anti-counterfeiting 2016 A Global Guide



Belgium

Van Bael & Bellis

*Thibaut D'hulst and Eléonore Waterkeyn*



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# Belgium

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## Legal framework

Belgium is a party to all major international agreements in the IP field, including the Paris Convention, the Berne Convention and the Agreement on Trade-Related Aspects of IP Rights. In addition, the main substantive IP laws applicable in Belgium are contained in national laws, EU regulations and a Benelux convention, as follows:

- Book XI (Intellectual Property) of the Code on Economic Law;
- the Benelux Convention on Intellectual Property (trademarks and designs);
- the EU Trademark Regulation (207/2009); and
- the EU Design Regulation (6/2002).

The main laws on the enforcement of IP rights in Belgium are:

- Books XV (Enforcement) and XVII (Special Procedures) of the Code on Economic Law;
- the Criminal Code;
- the EU Customs Regulation (608/2013); and
- the EU Implementing Regulation (1352/2013).

Books VI (Market Practices) and XIV (Consumer Protection) of the Code on Economic Law are also useful instruments in the fight against counterfeiting. In the absence of infringement of IP rules, there can still be confusion between similar-looking products or services, and a confusingly similar presentation of goods or services may amount to an act of unfair competition prohibited under Book VI or XIV of the Code on Economic Law.

## Border measures

Belgium is a member state of the European Union, where goods can move freely in the internal market. Hence, border measures mainly target goods entering Belgium from outside the European Union or European Economic Area. Belgium has a number of key points of entry, including its airports and the harbours of Antwerp, Zeebrugge and Ghent. Customs monitors goods at these points of entry, as well as transport within the territory.

The principal instrument for monitoring counterfeits at the border is the Customs Regulation. This regulation allows Customs

to detain or suspend the release of products entering the territory on suspicion of IP infringement. Customs may verify goods *ex officio* or further to an application for action lodged by the rights holder.

### Application for action

If a rights holder chooses to submit an application for action, it must provide Customs with detailed information on the original goods, such as the place of production, the involved companies and traders, and the packaging and distinctive features of the products. The application for action is valid for one year and can be renewed annually. The application is made using the form published on the European Commission's website. Customs can rely on the information in the application for action to identify and suspend the release of suspected counterfeit products.

Under the Customs Regulation, the rights holder has 10 working days (or three working days in the case of perishable goods) to assess whether the products are counterfeit. Customs will generally provide the rights holder with information on the product (quantity, origin and destination) and, if requested, with pictures or samples of the goods. The rights holder can also request to extend the initial term by another 10 working days. If the rights holder does not request destruction within this term, the goods will be released.

Under the simplified procedure applied by most customs authorities, counterfeit goods will be destroyed at the expense of the rights holder, without the rights holder first having to commence proceedings on the merits to establish whether its IP rights have been infringed. This procedure allows the rights holder to apply for destruction of the products when the owner, recipient or declarant of the goods does not oppose their destruction within 10 working days. With the rights holder's consent, the goods can also be made available to charitable institutions.

If the owner, recipient or declarant of the goods opposes their destruction, the rights holder must initiate (civil or criminal) proceedings on the merits to establish whether an IP right has been infringed. In addition, the rights holder may opt not to apply the

simplified procedure and immediately initiate proceedings on the merits.

### Small consignments procedure

Rights holders that have lodged an application for action may also opt in to the small consignments procedure contained in the Customs Regulation. Under the small consignments procedure, Customs no longer needs the explicit agreement of the rights holder to destroy suspected goods, as they are presumed to be counterfeit. However, some customs authorities still inform rights holders of such seizures, which allows them to oppose the destruction within 10 working days. The small consignments procedure applies only to consignments which contain no more than three products and have a total weight of less than 2 kilograms.

### Ex officio actions

If the rights holder has not filed an application for action, customs officials may still detain goods suspected of infringing an IP right *ex officio*. In such cases, Customs will notify the rights holder, which then has four working days to submit an application for action. In the absence of such an application or if Customs is unable to identify the rights holder within one working day, the goods will be released.

### Criminal prosecution

Customs officers, police officers and officers of the Federal Public Service for Economy have the power to carry out inspections and searches throughout the country. They can issue warnings, propose settlements to infringers and initiate criminal proceedings.

### Warnings

Law enforcement agents may issue warnings to infringers to cease the infringement. If the infringer does not comply with the warning within the given timeframe, the case is transferred to the public prosecutor, unless the case is settled.

### Settlements

Law enforcement agents can also propose an out-of-court settlement, provided that the infringer agrees to abandon the goods and the





## The president of the commercial court can appoint experts to access all relevant premises to draft a report on items that are relevant to the alleged infringement, including the origin and destination of the products and the extent of the infringement

injured party waives its right to file a criminal complaint.

### Criminal proceedings

Book XV of the Code on Economic Law imposes criminal penalties for IP infringement with malicious or fraudulent intent. In addition, Article 498 of the Criminal Code penalises fraud with regard to the nature or origin of goods sold. Criminal proceedings can be initiated by an injured party claiming damages or by the public prosecutor.

Criminal investigations are secret.

However, any interested party may be granted access to the file or given information on the status of the investigation on request. At the end of the investigation, the party claiming damages has the right to access the file and request additional investigatory measures.

Malicious or fraudulent infringement of IP rights is penalised with imprisonment for one to five years and/or a fine of between €500 and €100,000. The criminal courts may also impose a variety of penalties, such as forfeiture and destruction of the infringing goods (even where the goods are not the property of the infringer), total or partial closure of the establishment operated by the convicted person and temporary or permanent disqualification from commercial activities. Infringement of Article 498 of the Criminal Code may lead to imprisonment of one month to one year and/or a fine of €300 to €6,000.

The injured party may claim damages during the criminal proceedings or may initiate separate civil proceedings seeking damages. To claim damages, the same principles apply as in civil cases on the merits

(see below). The injured party must prove its loss or damage and, if the damage cannot be quantified, the criminal courts can decide *ex aequo et bono* on the amount of the damage. In addition, the party claiming damages may request the seized materials used in the creation or manufacture of the infringing goods, as well as samples of the infringing goods.

### Civil enforcement

The rights holder may choose to assert its claims before civil courts through:

- cease and desist proceedings;
- anti-counterfeit seizure;
- summary proceedings; and
- proceedings on the merits.

Actions based on IP rights are brought before the commercial courts; all claims relating to Community trademarks or designs must be brought before the Commercial Court of Brussels.

### Cease and desist proceedings

Cease and desist proceedings are brought before the president of the commercial court and are intended to terminate an ongoing infringement or prevent a threatened infringement.

If the rights holder has established that the alleged infringement is plausible, the president orders the infringing party to cease the infringement. The order is usually accompanied by penalty payments in case the infringer fails to comply with the order. The penalty payments may be calculated per day or per infringing act or product found on the market after a specified date. The rights holder can also seek a cease and desist order



## Working closely with the authorities and educating Customs on identifying counterfeit products will significantly enhance enforcement and keep counterfeits off the market

against intermediaries whose services are used by a third party to infringe IP rights.

When granting a cease and desist order, the president can also order corrective measures such as the recall of goods, and definitive removal from the market and destruction of the infringing goods and, if applicable, the materials used in the creation or manufacture of the goods. Further, if appropriate and proportionate, the president may order the infringing party to hand over all information available on the origin and the distribution channels of the infringing goods and services. Finally, the president may order that the judgment (or a part thereof) be published at the expense of the infringer.

Cease and desist proceedings are proceedings on the merits which are (usually) shorter than normal proceedings on the merits. However, it is not possible to claim damages during cease and desist proceedings. To claim damages, the rights holder can subsequently initiate separate proceedings on the merits.

### Anti-counterfeit seizure

This *ex parte* procedure is particularly effective to obtain evidence of infringement. The anti-counterfeit seizure is a unilateral procedure, which involves an element of surprise that can be useful to prevent the infringer from destroying evidence of the infringement.

The claim for an anti-counterfeit seizure is brought before the president of the commercial court, who must assess whether the requested measures are necessary for the protection of the IP right and reasonable in the case at hand. In its claim, the rights holder

can request descriptive measures or seek protective measures preventing alienation of the infringing goods.

**Descriptive measures:** The president of the commercial court can appoint experts to access all relevant premises to draft a report on items that are relevant to the alleged infringement, including the origin and destination of the products and the extent of the infringement. To obtain descriptive measures, the rights holder must prove the validity of the IP rights at issue and provide sufficient indications that these have been or will be infringed. There is no need to provide evidence of the infringement. Indeed, the anti-counterfeit seizure is precisely intended to collect such evidence of an alleged infringement.

**Protective measures:** The president may also order a seizure prohibiting the holder from disposing of or modifying the infringing goods or equipment used to make and/or distribute the infringing goods, and relevant documentation. In addition, the president may appoint a guardian, seal the items and authorise the seizure of the profits directly resulting from counterfeiting. The president may grant protective measures if:

- the allegedly infringed IP rights appear to be valid;
- the infringement cannot reasonably be challenged; and
- the measures are justified based on the evidence and considering the interests of the parties and the public interest.

In order to reduce the risk of frivolous use of the anti-counterfeit seizure and/or to ensure

that compensation will be paid if necessary, the plaintiff may be required to provide security.

Within 20 working days – or 31 calendar days – of submission of the expert report with the descriptive measures, the anti-counterfeit seizure must be followed by an action on the merits. If no action on the merits is brought, the order will cease to have effect: the protective measures will be lifted and the plaintiff is prevented from using the contents of the report.

### Summary proceedings

Summary proceedings are short proceedings which allow the rights holder to obtain a preliminary injunction or an array of interim

measures. Summary proceedings will succeed if the claim is urgent and the interim measures requested are temporary and not detrimental to the case on the merits.

In extremely urgent cases, where the element of surprise is essential or the defendant is unknown, the plaintiff may initiate *ex parte* summary proceedings.

The Judicial Code allows rights holders to claim special security where an infringement is committed on a commercial scale. In such case the rights holder can request, in summary proceedings, the seizure of the alleged infringer's property to ensure future compensation. This allows the president of



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the commercial court to order the freezing of the infringer's bank accounts or the seizure of payments received by the infringer. This measure will be granted only if the requested measures are urgent and not detrimental to the case on the merits, and provided that the following criteria are met:

- The allegedly infringed IP rights appear to be valid;
- The infringement cannot reasonably be challenged; and
- The measures are justified based on the evidence and considering the interests of the parties and the public interest.

### Proceedings on the merits

In proceedings on the merits, the rights holder can claim infringement and request damages from the infringing party.

As regards damages, the injured party is entitled to compensation for any injury sustained due to the impairment of a right. In principle, the same rules of calculation apply as to a claim for damages before the criminal court (see above). The compensation covers both lost profits and actual damage in terms of goodwill, image and reputation. Where the extent of the damage cannot be determined, the court can determine the damages in fairness.

In addition, the party claiming damages may also request the seized goods and tools used in their creation or manufacture, as well as samples of the infringing goods. If the goods, materials and tools are no longer in the defendant's possession, the court may award an amount equal to the price received for the goods, materials and implements sold. Confiscation offsets damages up to the value of the confiscation.

If the infringer is found to have acted in bad faith, the court may order the infringing party to surrender the profits resulting from the infringement.

Finally, the court may recall the infringing goods from the market or order the removal and/or destruction of the infringing goods, as well as the materials and tools used in the creation or production.

The limitation period for claims for compensation of non-contractual damages is five years.

### Anti-counterfeiting online

Counterfeit products are frequently sold online – for example, through auction sites, online marketplaces and social media. The increasing number of platforms where counterfeits are sold makes it more difficult for rights holders and law enforcement agents to detect IP infringements. In order to tackle this issue, Belgium has created a taskforce specialising in online enforcement: the Cybersquad unit (set up by Customs).

Cybersquad was established by the Federal Public Service of Finance in September 2012 in order to tackle customs issues in the ever-growing international e-commerce market. The main purpose of Cybersquad is to monitor the online sale of illegal products, such as counterfeit goods and medicines, drugs and weapons. Cybersquad shuts down illegal websites selling illegal goods on the Internet. It also actively searches the Internet for infringing websites and may open an investigation following the seizure of postal packages by customs authorities.

Customs also identifies the persons responsible for illegal websites and transfers the files relating to activities in Belgium to the Public Prosecutor's Office. If the infringement bears no relation to Belgium, Customs will cooperate with foreign colleagues.

Illegal websites can be reported to Cybersquad by sending an email to [ecustoms@minfin.fed.be](mailto:ecustoms@minfin.fed.be).

The national implementation of the EU E-commerce Directive (2000/31/EC) provides that internet service providers (ISPs) cannot be held liable for holding illegal data if they were unaware of the illegal nature of such information or if, after they were informed of the illegal data, they removed the data ('notice and takedown'). However, intermediaries whose services are used by a third party to infringe IP rights may be ordered to terminate the infringement. These intermediaries may also be ordered to provide information on the infringement to the rights holder. Such an order does not prejudice the exemption of liability of the ISP.

### Preventive measures/strategies

One of the most effective preventive measures for rights holders is an application for



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action. Working closely with the authorities and educating Customs on identifying counterfeit products will significantly enhance enforcement and keep counterfeits off the market. Technological identification measures can also be a very helpful tool which facilitates identification of counterfeit goods by Customs.

Rights holders should also monitor their supply chains, control their relationships with contractors and revise contracts and licence agreements to ensure that no infringing goods originate from their own production and distribution networks. These products may be more difficult to identify and repress.

Raising awareness among consumers through websites that inform them of the dangers of counterfeiting and making use of the notice and takedown procedures of search engines, online markets, auction websites and social media will help to reduce sales of counterfeit goods online. **WTR**

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