

Fashion and the Law

Belgian Report



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Lille, 4th of June 2010

Preliminaries

Convention Benelux Intellectual Property

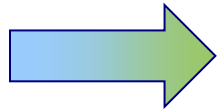
Design / Copyright

Patent/ Trademark

Trade secret / Unfair competition

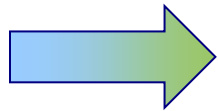
General Overview: Belgian IP Protection

Conclusions



Need of protection (Globalization/e-commerce...)

Which protection suits for **fashion design**?



Scope of “fashion design” :

clothing/shoes/accessories

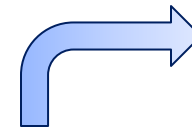
aesthetic/ functional aspect



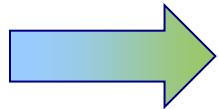
Copyright?



Design? Patent?



Trademark



Ephemeral Nature (if poss: no cost/ no formalities?)

Intellectual Property Right (Relevant tools)

European harmonization

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No Belgian law on Trademark + on Design

The Benelux Convention on Intellectual Property of February 25, 2005

**Office Benelux on Intellectual
Property**

**Benelux convention on
Trademark (+Office)**

**Benelux Convention on
Designs (+Office)**

International Legal personality

Independent of all three Benelux Countries

Agenda

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- Benelux Convention on Intellectual Property
- Scope: “the appearance of a product or a part of a product”
- Need **registration** (Benelux filing)
- Need to be **novel** and have an **individual character**
- Subsist **5 years** (Max.25 years)
- Exclusive rights
- Criminal penalization / Civil Sanction

C.J.Benelux, 16 décembre 1991 – Adidas /Coenraad et Triumph



« The submission of a model,.... which does not note any other characteristic of the model other than a given system of geometrical forms, accompanied by the indication that these forms present a contrasted color in comparison with the rest of the model, without any mention of the colors used, does not preclude the attribution of the exclusive right”.



Is there a system of combination of Design Law and Copyright protection?

Art. 21 of the Uniform Law on Designs of 1 December 1979

*“A design having a **marked artistic character** may be protected both by this Law and by the copyright laws if the conditions for the application of both such legislation are met.” “Designs having no marked artistic character shall be outside the protection under copyright law”.*

But:

“the merit of a work is not a condition for the acquisition of maintenance of a copyright”

Protocol of June 2002: has repealed art. 21 of the Uniform Benelux Law

CSQ : An original design may be protected under copyright law

Case Law



van ^{OOO}Bommel[®]
SUPERIOR SHOES
SINCE 1734



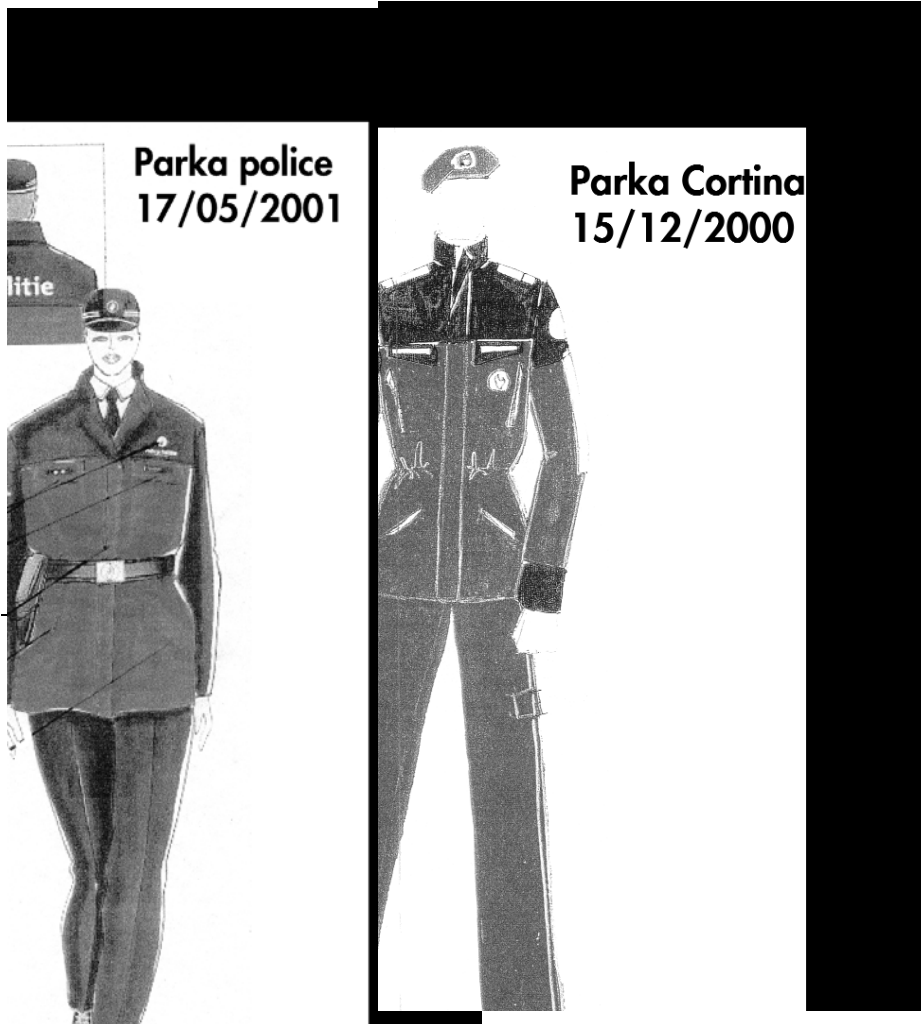


- “Even though a work fits the fashion tendency’s framework, it can still be protected if it bears the footprint of its author”
- “In order to be capable of being protected, the work must go beyond the technical effect and cannot be only determined by functional requirements, instead it must bear the hallmark of its author”
- The counterfeiting in IP law is assessed by reference to the similarities rather than the differences. It must be assessed according to the overall picture of the two objects for the average buyer.
- The counterfeiting exists as soon as an identical model or only a similar one, in both its essential and protected characteristics, is put on the market even though, in fact, the public may see ultimately that the two models do not have the same origin. There is counterfeiting even when there is no risk of confusion between two works.
Brussels, 11.09.2001 , A&M, 2006/1, p.48 - “Nouchka”

- *The originality of the disputed bags resides in the combination of different matters (washed out jeans, tulle, leather, animal paintings), disposed in a determined order*
- *It is incumbent upon the defendant, who contends that the disputed models are not original, to substantiate the existence of prior creations,....*

C.A. Brussels, 20.10.2005, A&M, 2006/1, p.48 (Handbag model)

- Law on 30th of June 1994 on Copyright and Neighbouring Right
- **Applied Art** (aesthetic and utilitarian creation)
- **Originality** condition (extensive interpretation) – result from a proper creative activity
 - “ individual characteristic”*
 - ...The piece of clothing or accessory must have a proper shape or appearance and has to distinguish itself from lookalike products ...*
 - “extensive interpretation”*
- Creation must be **expressed** in some concrete way
- Copyright exists from the creation of a work: **no formal registration**
- Economic and moral rights
- **70 years** after the death of the author
- Criminal sanction (art.80) and civil (art.86..)



- « *the eleven similarities allow to conclude to the manifest loan of the original work* »
- « *the invoked similarities do not result from the chance* »
- « *the assessment of the differences is unnecessary in this case* »

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- The Belgian patent law of 28 March 1984
- The invention must be **new**, involve an **inventive step** and be **capable of industrial application**
- (long) **Registration** procedure – 20 years
- “first to file” principle
- New Criminal sanction + Civil sanction

- **Convention on Intellectual Property of 25 February 2005**
- Wide scope: names, designs, stamps, seals, letters, figures, shapes of products or packaging and all other signs able to be represented graphically and used to distinguish the goods or services of a company shall be regarded as individual trademarks.
- Distinctive, Licit, Available
- Registration of the trademark - 10 years (renewals)
- Action against unauthorized use (art.2.20) – criminal/Civil sanction

- « **Mini Mexx** » (shoes, clothing, etc.) / « **MiniMax** » (shoes, clothing, etc.)
→ *No risk of confusion* (aural “a-e”, visual “xx”, conceptual differences “mexx - Mini&Maxi”)

- “**Exit and Co** (Shoes) / “**Exit**” (Clothing) : similarities of products (different nature but common function and destination) *risk of confusion* (“exit”: essential distinctive element”), juridical - economical link

CASE BY CASE APPROACH



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Law of 14 July 1991 on Trade Practices and Consumer Protection:

"Any act contrary to honest commercial practice whereby a seller damages or may damage the professional interests of one or more other sellers is prohibited"

1. The violation of a "trade secret" is prohibited under this law (+other specific ones)

"Information related to a specific expertise in a business activity like formula, computer program, process, method, device, technique, pricing information, customer lists or other non-public information"

"any information that has economic value as a result of its secrecy and reasonable effort are being used to keep it secret"

Several ways to protect it: confidential, non competition agreements, ...

2. Unfair competition and Parasitic competition : honest commercial practice

Cease and desist action

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Copyright

- Automatically protection of the entire work – originality
- Not time or money
- But: no registration = what is protected?

Design

- Not the work as a whole but – shape, ornamentation, color or design
- Take into account the ephemeral and transitory nature of fashion
- Shorter protection in time

Patent

- Functional design/invention (technical solution for technical problem)

Trademark

- Company's calling card - People recognize your products and services by the (brand) name you give them : symbolic function- but no protection of the garment in itself

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- Range of protection mechanisms – in Belgium (globally in Europe)
- Importance of copyright protection (and unfair competition)
- Contrast with USA
- Need of information / formation about IP Tools

Thanks for your attention!



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