



Enforcement of IP rights

Belgian Report

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Several enforcement initiatives

- Anti-Counterfeit Association (ABAC / BAAN). In charge of managing all infringing products for several TM (Nike, Delvaux). Funny story about it ...
- Belgian Private/Industry initiative: European Brands Association
- Special police division for online crime, including IP infringements (Computer Crime Unit, CCU)
- *Réseau Européen Anti Contrefaçon (1997, supported by EC Comm.)*, with the aim of setting up a central database to support investigations by national associations and enforcement agencies
- Close collaboration with other national/international initiatives in the music industry (IFPI) and software industry (BSA)

Implementing 2004/48 Directive

- Law of 9 May 2007 on civil law aspects of the protection of intellectual property rights, OJ (MB), 10 May 2007, p.25704, erratum OJ(MB), 15 May 2007, p.26677, effective since 10.05.2007
- Law of 10 May on judicial law aspects of the protection of intellectual property rights, OJ (MB), 10 May 2007, p.25694, erratum, 14 May 2007, p.26121, effective since 1.11.2007
- Said laws apply to all IP rights except Trademarks and models and designs : civil aspects of those fall under the scope of the Benelux Convention on Intellectual Property , (25st February 2005)
 - Trademark : art. 2.21/2.22 of the Benelux Convention
 - Design-Model: art. 3.17/3.18 of the Benelux Convention

Civil remedies

- Evidence (art. 6 Dir.2004/48/EC) – art. 870 Belgian Judicial Code / art. 495 Bis Penal Code). A Judge may order the presentation of relevant evidence by an opposing party or by any third party. Non compliance: criminal offense
- Measures preserving evidence (art. 7 Dir.) – 1369 bis/Ter Belgian Judicial Code . “Saisie en matière de contrefaçon” – “Beslag inzake namaak”
- Right to information (art.8 Dir.) – art. 86 ter§3 (copyright act) – art. 3.18.4 (CBPI- design) ... (literal implementation)
- Provisional and precautionary measures (art. 9 Dir.) :
 - Interlocutory injunction (already in place in Belgium)
 - Counterfeit seizure (idem) – but extension – normal precautionary seizure (art.584, 5° Judicial Code : “seizure of movables and immovable...” physical seizure (art.1369 bis /ter Judicial Code)

Civil remedies

- Corrective measures (art. 10 Dir.): art. 86 ter§2 Copyright Act. (almost literal transposition) – proportionality
- Injunctions (art. 11 Dir.) : art. 86 ter§1 Copyright Act, ... Against infringers and intermediaries / recurring penalty payment/ publication
- Alternatives measures (art. 12 Dir.). Pecuniary compensation instead of measures art.10-11 – superfluous (no automatically grant of these measure by the judge)
- Damages (art. 13 Dir.): art. 86 bis §1-§2 Copyright Act... Guidelines when setting damages suffered from infringement :
 - Compensation of all prejudice suffered
 - If undeterminable: ex aequo bono (lump sum)
 - Bad faith implication : recovery of all profits, reporting, confiscation,...
- Legal cost (art.14 Dir.): 1017 Judicial Code (borne by the unsuccessful party..)
- Publication of judicial decisions (art. 15 Dir.) : art.86 ter§4 Copyright Act

Criminal remedies

Law of May 15, 2007 on the fight against counterfeiting and piracy of IP rights:

- If the draft Directive on criminal aspects of IP rights infringement is adopted *as is*, Belgian law is largely compliant.
- Alignment of the level of penal protection of all IPRs (in the past: only Copyright/TM)
- Criminal sanction are reinforced : 100 to 100.000 €/3 months to 3 years. In reality? : will depend on each case – too premature to evaluate
- Border and Customs Measures (1383/2003 EC)
- Coordination between national authorities
- Competent authority will be able to act on its own without a formal complaint of the right-owner

The damages

- The principle : integral reparation. Can be : loss of royalties, loss of profit/margin, “loss of value” including the moral right of a company, ‘banalization’ of a product, legal cost, ...
- The reality : two different “schools” :
 - Some strictly apply the civil code : all the damage must be repaired but only the damage. Difficult to assess and can lead to a very symbolic reparation.
 - Since the modification of the law in 2007, some others go for a lump sum based on equity. The judge must be “*reasonable*” and may go for a lump sum only when it is not possible to determine the damage on *any other basis*.
- Examples : the software and music industries : price of the product + 200%

Civil and Criminal Remedies

General Remarks :

- No paramount change for Belgian Copyright Act
- Alignment of the level of protection of all IPRs
- Specialization of the Court thanks to a centralization of jurisdiction

Two major things to mention :

- The “cease” procedure
- The “go fishing” procedure

« Cease » procedure

- All and any IP right
- Since recently, it may also take into account the economic implications (unfair practice, parasitism, etc.). Same judge.
- Follow the procedure of an interlocutory and urgent court order, but the decision is on the merits.
- Even if another litigation is already pending, this procedure takes the lead.
- BUT, the measures are limited by the law :
 - Cease order
 - Publication under strict conditions (very different from France)
 - No money
 - Possible to transfer the infringing material to the plaintiff
 - Other measures ? The Tiscali case

The “go fishing” procedure

- The problem :
 - How can I get the evidence of the infringement before launching a litigation? When the products are available for the public it is easy, but if not ...
 - How can I prevent the defendant to quickly destroy infringing product after serving the writ ?
- Art. 1369 bis/Ter of the Belgian Judicial Code
 - The past. Belgium was a “paradise” for right holder (TM and author right). *You just had to ask ...*
 - The enforcement directive is stricter. The Belgian supreme court ruled that although the Belgian law is not a copy-paste of the Directive (which is OK under the directive), the Parliament has nevertheless clearly intended to align Belgian law on the directive as far as the *conditions* to request a measure are concerned.
 - The court of appeal in Mons has ruled recently (April 2010) in the same way in a software case where the measure was asked based on a anonymous declaration.

§ 3. Le président, statuant sur une requête visant à obtenir des mesures de description, examine :

- 1) si le droit de propriété intellectuelle dont la protection est invoquée est, selon toutes **apparences**, valable ;
- 2) s'il existe des **indices** selon lesquels il a été **porté atteinte** au droit de propriété intellectuelle en cause ou qu'il existe **une menace** d'une telle atteinte.

§ 5. Le président, statuant sur une requête visant à obtenir, outre la description, des mesures de saisie, examine :

- 1) si le droit de propriété intellectuelle dont la protection est invoquée est, selon toutes **apparences**, valable ;
- 2) si **l'atteinte** au droit de propriété intellectuelle en cause **ne peut être raisonnablement contestée** ;
- 3) si, après avoir fait une **pondération des intérêts en présence**, dont l'intérêt général, les faits et, le cas échéant, les pièces sur lesquelles le requérant se fonde sont de nature à justifier raisonnablement la saisie tendant à la protection du droit invoqué.

L'ordonnance motive expressément la **nécessité** des mesures de saisie autorisées au regard des conditions posées par le présent paragraphe.

The “go fishing” procedure

- Because the traditional case law is so old and known, some low-level tribunal still apply the old criteria.
- Dozens of request in the country everyday.
- From a practical point of view, how does it occur?
- Obligation for the applicant to lodge a complaint on the merits of the case within 20 workdays or 31 regular days from the receipt of the expert report
- Compensation if the plaintiff does not further pursue the procedure on the merits or if there is no infringement.

Is it too efficient ?

- With a good discovery procedure, you have good chances to get evidence of the infringement and to seize infringing products
- With the go fishing procedure, you have good chances to quickly get an order with high penalty in case of further violation
- An additional procedure for damages is long, largely uncertain and costly. History shows that a lot of right holders are reluctant to proceed.



Questions ?

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