

CHECKLIST OF ISSUES ON ENFORCEMENT¹

Replies by Belgium

Revision

By means of a communication from the Permanent Mission of Belgium, dated 17 March 1997, Belgium has submitted the attached responses to the Checklist of Issues on Enforcement (document IP/C/5), which replaces and complements the responses submitted earlier and distributed in document IP/N/6/BEL/1.

¹Document IP/C/5.

I. CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

A. Civil and administrative procedures and remedies

1. **Specify the courts which have jurisdiction over IPRs**

(a) General rules

1. Material jurisdiction

The Justice of the Peace has jurisdiction in respect of all legal actions involving an amount not exceeding BF 75,000 (Article 590, Judicial Code, JC). It rules in the last instance concerning actions involving an amount not exceeding BF 50,000 (Article 617 JC). When the amount of the action is not specified, the plaintiff may choose between the Justice of the Peace on the one hand, and the commercial court or the court of first instance on the other, depending on the case. Nevertheless, if at the request of the defendant the Justice of the Peace estimates the value of the action to be clearly in excess of the amount corresponding to his jurisdiction, he shall refer the case to the court of first instance or to the commercial court (Article 592.3 JC).

By virtue of this same article, the court may refer the case to the Justice of the Peace at the request of the defendant, if the amount involved in the action does not exceed that falling within the latter's competence.

The court of first instance has jurisdiction to try all actions excepting those devolving directly upon the Court of Appeal and the Court of Cassation (Article 568 JC). The court of first instance has general jurisdiction, which means that all actions not falling within the specific jurisdiction of other courts shall be brought before it.

The commercial court shall exercise jurisdiction in first instance (Article 573 JC) in respect of:

- Disputes between businessmen over acts deemed to be commercial by the law and which do not fall within the general jurisdiction of Justices of the Peace or the jurisdiction of the courts.

Disputes concerning an act deemed to be commercial by the law and which does not fall within the general jurisdiction of Justices of the Peace may also be brought before the commercial court even if the plaintiff is not a businessman. In this connection, all jurisdiction clauses predating the emergence of the dispute are automatically void.

2. Local jurisdiction

Apart from cases where the law especially designates the judge having jurisdiction to try a matter, it may, at the choice of the plaintiff, be brought before (Article 624 JC):

1. The judge of the place of the domicile of the defendant or one of the defendants;
2. the judge of the place where the obligations in dispute or any one of them originated or where they are being, have been or ought to be performed;
3. the judge of the domicile elected for the performance of the act;

4. the judge of the place where the process server has spoken to the defendant in person if neither the latter nor, if appropriate, any of the defendants is domiciled in Belgium or abroad.

In the absence of specific rules concerning material and local jurisdiction for certain intellectual property rights, the general rules shall apply.

(b) Specific rules

1. Copyright and neighbouring rights

The Justice of the Peace shall try copyright cases where the amount involved does not exceed BF 75,000 (Article 590 JC).

The court of first instance shall try copyright cases where the amount exceeds BF 75,000 (Article 569.7).

In copyright infringement cases, Article 627 of the JC envisages exclusive jurisdiction for the judge in the place where the infringement occurs (Article 627.5 JC).

The law of 30 June 1994² concerning copyright and neighbouring rights provides for the possibility of an action for suspension.

Article 87.1 of the aforementioned law of 30 June 1994 envisages that the president of the court of first instance of the district where the infringement takes place shall have exclusive competence to order suspension measures.

The law of 30 June 1994 transposing to Belgian law the European Directive of 14 May 1991 on the legal protection of computer programs envisages:

- That courts of first instance shall try cases concerning the application of this law regardless of the amount of money at stake (Article 13.1; Article 569.24 JC);
- for the actions covered in Article 13.1, exclusive jurisdiction of the court convening at the seat of the Court of Appeal within whose jurisdiction the infringement occurs or, if the plaintiff so chooses, the court convening at the seat of the Court of Appeal in whose jurisdiction the defendant or one of the defendants has his domicile or residence (Article 13.2; 627.13 JC).

2. Trademarks

See general rules.

In practice, disputes will in most cases be brought automatically before the commercial court if the defendant or defendants are businessmen.

It should be pointed out, however, that only the court of first instance in Brussels tries cases concerning the annulment of collective trademarks (Article 569.8 and Article 569, *in fine*, of the JC).

²Moniteur Belge of 27 July 1994.

Article 37, A, of the law of 19 March 1962 on trademarks provides that, except for the express contractual assignment of local jurisdiction, it shall be determined, in regard to trademarks, by the domicile of the defendant or by the place where the disputed obligation arose, where it has been or should be performed. The legal text allows the plaintiff full freedom to choose, based on any of these criteria, the judge before whom he will bring the action, in other words the law does not establish an order of preference among these criteria.

When the aforementioned criteria are not sufficient to determine local jurisdiction, the plaintiff may bring the suit before the court of his domicile or residence, or, if he has neither domicile nor residence on Benelux territory, before the court of his choice, whether in Brussels, The Hague or Luxembourg.

3. Geographical indications

The commercial court shall rule in first instance on actions concerning registered designations of origins. (Article 574.3 JC).

4. Patents

Actions concerning patents fall within the exclusive jurisdiction of the court of first instance. Regardless of the amount of money involved, Justices of the Peace have no competence in such cases (Article 73.1 of the law of 28 March 1984 on patents). Article 73.1.2 settles cases where a problem of infringement is connected with a matter of unfair competition by confirming the jurisdiction of the court of first instance, thereby excluding that of the president of the commercial court deriving from the law of 14 July 1991. This is in keeping with the rules of connection (Article 30 JC).

As regards local jurisdiction, the law of 28 March 1984 sets forth two rules:

- That exclusive jurisdiction to try actions concerning patent infringements or to set the amount of the compensation envisaged in Article 29 (compensation paid by a third party who, between the time when the patent application was made public and the date of the grant of the patent, made use of the invention in a way that would be forbidden after that period by virtue of the patent), rests with the court convening at the seat of the Court of Appeal in whose jurisdiction the infringement or exploitation took place or, if the plaintiff so chooses, the court convening at the seat of the Court of Appeal in whose jurisdiction the defendant or one of the defendants is domiciled or resident.

This centralization is warranted by the complexity of the subject, which makes a certain specialization desirable, which in turn makes for uniformity of legal practice and reinforces legal guarantees;

- the law lays down supplementary rules in more precise terms:

Article 73.2 of the law under reference

Exclusive jurisdiction to try patent infringement cases or to set the amount of compensation envisaged in Article 29 (working of an invention before the grant of the patent, in a way that is forbidden once the patent is obtained) rests with the court convening at the seat of the Court of Appeal in whose jurisdiction the infringement or exploitation takes place, or, if the plaintiff so chooses, the court at the seat of the Court of Appeal in whose jurisdiction the defendant or one of the defendants has his domicile or residence.

Article 73.4 of the law under reference

The court convening at the seat of the Court of Appeal in whose jurisdiction the defendant or one of the defendants has his domicile or residence shall have exclusive jurisdiction to try:

1. Actions for a patent application or a patent;
2. actions to determine reciprocal obligations in regard to compulsory patent licensing;
3. actions for the annulment of a patent;
4. disputes over contracts assigning a patent application or a patent;
5. disputes concerning contracts for the grant of a licence to work an invention for which a patent application has been filed or which is patented, as well as those concerning contracts assigning such a licence;
6. disputes over patented inventions and the related know-how, as envisaged in Article 10 of the law of 10 January 1955, when the conciliation envisaged under this Article has failed.

Article 73.5 sets forth a rule of jurisdiction that applies to the defendant who has neither domicile nor residence in Belgium: the plaintiff shall file the action before the court convening at the seat of the Court of Appeal in whose jurisdiction the plaintiff is domiciled or resident.

5. Industrial designs

See general provisions.

Article 16 of the law of 25 October 1966 on industrial designs provides that civil courts have exclusive jurisdiction to rule on actions brought on the basis of this law.

Barring express contractual assignment of local jurisdiction, it is determined, in regard to industrial designs, by the domicile of the defendant or by the place where the disputed obligation arose, has been or should be performed.

If the above-mentioned regulations are insufficient to determine local jurisdiction, the plaintiff may bring the suit before the court of his place of domicile or residence or, if he has neither domicile nor residence on Benelux territory, before the court of his choice, whether in Brussels, The Hague or Luxembourg.

6. Layout-designs (topographies) of integrated circuits

The law of 10 January 1990 on the legal protection of topographies of semiconductor products envisages:

- That the courts of first instance shall try cases concerning topographies of semiconductor products regardless of the amount of money involved in the action (Article 16.1 of the law under reference; Article 569.23 JC);

- that exclusive jurisdiction to try the case (Article 16.2 of the aforementioned law and Article 627.12 JC) rests with:
 1. The court convening at the seat of the Court of Appeal in whose jurisdiction the infringement is committed or, if the plaintiff so chooses, the court convening at the seat of the Court of Appeal in whose jurisdiction the defendant or one of the defendants has his domicile or residence;
 2. the court at the seat of the Court of Appeal in whose jurisdiction the plaintiff has his domicile or residence, when the defendant or one of the defendants has no domicile or residence in the Kingdom.

7. Protection of new plant varieties

The law of 20 May 1975 on the protection of new plant varieties provides that disputes over civil rights arising from this law shall come within the jurisdiction of the court of first instance (Article 38.1; Article 569.20 JC)

The court in the place where the infringement occurs has exclusive jurisdiction in actions brought in regard to the protection of new plant varieties (Article 627.5 JC).

8. Inventions and trade secrets related to national defence and State security³

Suits filed in regard to the divulgation and implementation of the above trade secrets and inventions shall fall within the jurisdiction of the court of first instance (Article 569.11).

2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the courts by the right holder?

(a) General rules

Any person who has the right to bring an action and stands to gain from it may lay the matter before the competent authority, which will render a judgement on the merits of the case (Articles 17 and 18 of the Judicial Code).

The parties are required to appear in person or to be represented by a lawyer when the action is being introduced as well as thereafter (Article 728.1 JC). The parties may also be represented before the Justice of the Peace, the commercial court and the other courts by their spouse or by a relative or associate bearing a written power of attorney officially approved by the court (Article 728.2 JC).

The judge may even order, *ex officio*, the appearance in person of the parties or of one of them (Article 992 JC). When one of the parties is a legal person governed by public or private law, the ruling or order shall designate the agent or, as appropriate, the authorities or legal representatives of said legal person who must appear before the court (Article 994 JC). The decision to order the personal appearance of the parties may neither be opposed nor appealed against (Article 996 JC).

³See Article 73 of the TRIPS Agreement.

(b) Specific rules⁴

1. Copyright and related rights

As regards actions for suspension as contemplated in the law of 30 June 1994, Article 87.1 designates the natural or legal person who may request suspension. It may be any person affected, an authorized rights administration entity or a professional or interprofessional group with legal personality.

2. Patents

Article 52.2 of the law of 28 March 1984 on patents sets forth the categories of persons who may institute actions for infringement.

These may be:

- The owner, that is the person holding title at the time of the initiation of legal proceedings, if he is the true inventor;
- the beneficial owner, by operation of the rules of ordinary law;
- the holder of a compulsory licence, provided that he has previously and unsuccessfully given notice to the owner or beneficial owner to act. This provision is necessary to ensure the effectiveness of the compulsory licence. It applies therefore only in cases of failure to make use of a compulsory licence;
- the beneficiary of an exclusive licence, so long as the contract does not withdraw from said beneficiary the faculty in principle conferred on him by law;
- finally, any holder of a licence whether compulsory or contractual, exclusive or not, may at all times voluntarily take part in infringement proceedings initiated by the owner or beneficial owner in order to obtain compensation for his own injury.

3. Trademarks

As regards collective trademarks, Article 26 of the law of 19 March 1962 provides that the right to appear in court to claim protection for a collective trademark is reserved to the owner of the trademark.

Nevertheless, the regulations for use and control may grant to the persons allowed to use the trademark the right to act jointly with the owner or to associate themselves with or take part in proceedings initiated by or against the latter.

Likewise, the regulations for use or control may stipulate that the owner, acting on his own, may make mention of the specific interests of the users of the trademark and include in his action for compensation the specific damages suffered by one or more of them.

⁴In regard to persons who have the right to institute an action for suspension based on Article 95 of the law of 14 July 1991 on trading practices and consumer information and protection, see answer to question 5 below.

3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence which lies within its control?

It is incumbent on each of the parties to substantiate its allegations (Article 870 JC). If an infringement has actually taken place, it can be proved by legal process. The judge may nevertheless order any party to the dispute to produce any evidence at its disposal (Article 871 JC).

When there are serious, precise and coinciding presumptions that one of the parties or a third party possesses a document containing proof of a relevant fact, the judge may order that the document or a duly certified copy thereof should be included in the brief of the proceeding (Article 877 JC).

If the document is in the possession of a third party, the judge will preliminarily invite said party to deposit the original or a copy of said document in the brief of the proceeding, in keeping with the procedures and time-frame specified by him. The third party may formulate its observations in writing or in chambers. The parties are authorized to examine said observations and respond to them (Article 878 JC).

The decision ordering the submission of the original or copy of a document states the identity of the party or the third party which must submit said document, as well as the applicable procedures and time-frames (Article 879 JC).

Any party or third party which refuses, without a lawful reason, to submit a document or a copy pursuant to the decision of the court, may be sanctioned for such damages as may be deemed appropriate (Article 882 JC).

4. What means exist to identify and protect confidential information brought forward as evidence?

Belgian law contains no specific provisions guaranteeing protection of confidential information. The judicial authorities must therefore bear in mind Article 43.1 of the Treaty on this point.

Rulings are rendered in public hearings. These are governed by Article 1380 of the Judicial Code which provides that clerks of the court and trustees in public registries shall, without a court order, deliver authenticated copies, duplicates or extracts of such judgements to anyone requesting them, within the limits of their powers, with liability in costs and damages.

The judge shall decide as to the confidentiality of the information to be included in the ruling.

It should be pointed out that the brief containing the different documents is open to consultation by the parties to a proceeding.

Attorneys must respect the obligation of professional secrecy stipulated in Article 458 of the Penal Code.

5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use:

- **Injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**

- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

(a) Injunctions

1. General rule

Article 95 of the law of 14 July 1991 on trade practices and consumer information and protection provides that the president of the commercial court shall ascertain the existence and order the cessation of an act, even a criminally sanctioned one, that constitutes a breach of the above-mentioned law.

This proceeding on the merits of a case which, as stated in Article 100 of the law, is formulated and initiated in proceedings in chambers, is called an action for suspension. The president of the court has very broad competence by virtue of the principle adopted by the Court of Cassation, whereby the violation of any provision of law or regulations constitutes an act contrary to honest commercial practices.

Article 96 of this law nevertheless provides that Article 95 does not apply to infringements sanctioned by the laws on patents, trademarks for products or services, industrial designs and copyright.

Article 98 of the same law sets out the persons who have the capacity to initiate an action for suspension.

These are:

1. Those directly affected;
2. the Minister, except when a proceeding concerns an action contemplated in Article 93 of the law (all acts contrary to honest commercial practices by which a vendor causes harm or cause harm to the professional interests of one or several other vendors);
3. A professional or interprofessional group with its own legal personality, excepting when the proceeding concerns an act contemplated in Article 94 of the Law (any act contrary to honest commercial practices by which a vendor causes harm or may cause harm to the interests of one or several consumers);
4. A consumer protection association with its own legal personality, provided that it is represented on the Consumption Council or that it is duly recognized by the Minister of Economic Affairs, except when the proceeding concerns an act contemplated in Article 93 of the law (see above).

Notwithstanding the provisions of Articles 17 and 18 of the Judicial Code, the associations and groups contemplated under points 3 and 4 above may institute legal action in defence of their collective interests as defined in their regulations.

2. Specific rules

(a) Copyright and neighbouring rights

The law of 30 June 1994 concerning copyright and neighbouring rights provides for the possibility of an action for suspension.

Article 87.1 of the aforementioned law of 30 June 1994 envisages that:

"The President of the court of first instance in the district where the infringement occurs shall have exclusive jurisdiction to order suspension. He shall ascertain the existence and order the suspension of any infringement of copyright or a neighbouring right.

The action shall be formulated and initiated in proceedings in chambers.

A ruling shall be made on the action notwithstanding any criminal proceedings instituted based on the same facts.

The judgement shall be provisionally enforceable, regardless of any appeal and without the deposit of a security, except where the judge orders that such security be provided."

(b) Patents

Article 52.4 of the Law of 28 March 1984 on patents provides that the court shall issue a suspension order to any infringer, at the request of the injured party.

(c) Layout - designs (topographies) of integrated circuits

Article 13 of the Law of 10 January 1990 on legal protection for the topographies of semi-conductor products provides that, at the request of an injured party, the court may issue a ruling for suspension of the infringement to any infringer.

(d) Trademarks

It has been seen that Article 96 of the Law of 14 July 1991 on trade practices expressly excludes the applicability of actions for suspension as contemplated in Article 95 of the same law to infringements penalized by the Law on trademarks. Nevertheless, the Court of Cassation has confirmed an established precedent whereby this exclusion did not cover cases where the use of a trademark though not an infringement, constitutes unlawful use of the trademark.

Further, the judge ruling on suspension is also competent to try breaches of service marks predating 1 January 1987 and of which no confirmatory deposit has been made.⁵

Finally, when the protection being sought is not for the mark as a trademark but as something else, for example a non-commercial company name or even a tradename, the action for suspension may apply.

⁵Article 96.2, Law of 14 July 1991.

(e) Industrial designs

Article 14.5 of the Law of 25 October 1966 on industrial designs provides that an action may not be brought based on legal provisions repressing unfair competition for acts that constitute no more than an infringement of an industrial design.

(b) Damages, including recovery of profits, and expenses including attorney's fees

The judge may order the infringer to pay adequate compensation to the right holder for damages suffered by the latter as a result of the infringement of his intellectual property rights:

- On the basis of a general provision (Article 1382 of the Civil Code). This general provision states that any human act that causes injury to another person obliges the person, by whose act the injury is caused, to compensate for it. This is applicable even if the person at fault was not aware that the act concerned was in breach of an intellectual property right;
- on the basis of a specific provision.

1. Copyright

The Law of 30 June 1994 on copyright and neighbouring rights permits actions for damages.

Article 87.2 of the aforementioned law of 30 June 1994 envisages that:

"The handing over of the counterfeit objects and plaques, moulds, matrices or other utensils that were used directly to commit the infringement that may still be in the possession of the defendant, may be ordered as part of the compensation due to the plaintiff.

If the defendant acts in bad faith, he shall be issued with a ruling for the confiscation of the counterfeit objects and the plaques, moulds, matrices and other utensils that were used directly to commit the infringement or, as appropriate, an order to pay a sum of money equal to the price of these objects or of other goods already sold."

2. Topography

The Law of 10 January 1990 on legal protection of topographies of semi-conductor products prescribes that the court may, upon application of the injured party, order any infringer to pay compensation to the plaintiff for the damages caused by the infringement.

3. Patents

Article 52.4 of the Law of 28 March 1984 on patents provides that, at the request of the injured party, the court may order any infringer to pay compensation to the plaintiff for damages caused by the infringement.

4. Trademarks

Article 13 of the Law of 19 March 1962 provides that the owner is entitled to claim compensation for any damages suffered as a result of the use of the disputed trademark by the author of the infringement.

Article 13.A.4 of this law further allows the owner of the trademark, in addition to an action for damages or in its stead, to bring an action for the recovery of profits derived from the unlawful use of the trademark, as well as an action for a statement of accounts in that connection. The law states that the courts shall reject the action if they are of the opinion that the use is not in bad faith or that the circumstances of the case do not justify the ruling being sought.

5. Industrial designs

Article 13.4 of the Law of 25 October 1966 provides that the licensee, acting together with the owner, may initiate proceedings for compensation of any damages suffered as a result of the infringement of an exclusive right.

The judge may order the infringer to reimburse the right holder any court expenses incurred.⁶ Attorney's fees may not be recovered, subject to an order to pay costs.⁷

Each party therefore bears its own attorney's fees, regardless of the outcome of the trial. This principle is at odds with Article 45 of the TRIPS Agreement which provides that the judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees.

(c) Destruction or other disposal of infringing goods and materials/implements for their production

1. General rules

The judicial authorities shall have the authority to order that goods that they have ascertained to be in breach of a right should be excluded from commercial circuits or destroyed, without compensation.

The destruction of goods is a measure which can obviously be contemplated only as part of an action on the merits of a case, as it is anything but provisional.

When destruction is requested in Belgium, it is granted without too much difficulty. There are even cases in which the holder also has the possibility of taking delivery of the disputed products.

In general, the decision provides that the costs of destruction or delivery of the products shall be borne by the infringer.

The judge may order the seizure of works infringing intellectual property rights (also called seizure-description): Patentees, holders of supplementary protection certificates for medicinal products, holders of and applicants for plant breeders' rights, their successors in title and the owners of copyright, may, with the permission of the judge given upon application, arrange for one or several experts appointed by the judge, to undertake a description of the equipment, machines, works, plant varieties, reproductive and propagating material and of all allegedly counterfeit objects and procedures, as well as drawings, documents, calculations, writings, plants or parts of plants that may help to prove the alleged infringement, and tools that have produced the disputed items (Article 1481 JC). The petition shall take the form of a unilateral application and must therefore necessarily be signed by an Attorney (Article 1026 JC).

⁶Cf. answer to question 8.

⁷Cf. answer to question 8.

The judge ordering the seizure may use the same order to forbid the holders of the counterfeit objects to alienate them, appoint a trustee, place the objects under seal and, if the acts in question have produced revenue, to authorize the attachment of such funds (Article 1481 JC).

The petition shall contain an election of domicile in the communes where the description must be made. The patent, the supplementary protection certificate for medicinal products, the plant breeders' right or a copy of the filed application duly certified by Service for the Protection of New Varieties and, if appropriate, the supporting documents, must be attached to the petition (Article 1482 JC).

The judge may require the applicant to deposit a security, in which case the judge's order is delivered only upon receipt of proof of the deposit of the security (Article 1483 JC).

The parties may attend or be represented at the drawing up of the description if specially authorized to do so by the judge ordering the seizure (Article 1484 JC).

The seizure - description is always carried out on the strength of an authorization by the judge ordering seizure, which authorization is also a warrant to search the premises of a third party (Article 1485 JC). The seizure is valid for one month (Article 1488 JC) and differs from ordinary law according to which seizures are in principle effective for three years. The summons to appear at the trial on the merits of the case must be issued within a month of the date of submission of the expert's report or of the attachment of the revenue⁸ (Article 1488 JC).

At the request of the creditor and in cases requiring immediate action, the judge may issue an order of distraint of attachable goods belonging to the debtor (Articles 1413 to 1428 JC).

Furthermore, the judge may also issue an order of attachment in respect of a third party (Articles 1445 to 1460 JC). This is an act by which the creditor confiscates from a third party sums of money or property owed by said third party to his debtor.

Seizures are intended to place safely "in the hands of the law " goods belonging to the debtor, to "block" such goods so as to prevent the debtor of disposing of them to the detriment of his creditors.

2. Specific rules

(a) Patents

Article 52.4 of the Law of 28 March 1984 envisages that in case of bad faith, the court may rule that the infringing objects and the instruments or means specifically used to produce them should be confiscated and delivered to the plaintiff.

⁸Article 1488 provides that if in the month following the date of submission of the expert's report or of the attachment of revenue, the description is not followed by a summons to appear at the trial on the merits of the case at the court in the jurisdiction in which the description was made, the order issued by the judge in pursuance of Article 1481 shall cease to be effective, and the applicant may no longer use it or make it public. This is without prejudice to damages.

As regards patents and supplementary protection certificates for medicinal products, the summons is issued to appear at the trial on the merits at the court convening at the seat of the Court of Appeal in the jurisdiction in which the infringement or exploitation has taken place or, if the plaintiff so chooses, at the court convening at the seat of the Court of Appeal in whose jurisdiction the defendant or one of the defendants has his domicile or residence.

Where appropriate, the court will award a sum of money equal to the price of objects already sold.

(b) Topographies

Article 14 of the Law of 10 January 1990 provides that in case of bad faith, the court may rule for the confiscation and delivery to the plaintiff of semi-conductor products infringing an exclusive right, and of the instruments and means specifically used for their production.

(c) Trademarks

Article 31*bis*, 1 of the Law of 1962 enables the right holder to claim ownership of moveable goods infringing his right or of the goods used for their production, or to require that they be destroyed or placed out of use.

This claim may be enforced against sums of money presumed to be earned as a result of the infringement. The claim will be rejected if the infringement has not been committed in bad faith.

(d) Other remedies

1. Publication

The court may also order the publication of the ruling. In Belgium, as this measure is treated as a form of compensation, it is in principle ordered only in a trial on the merits. There are nevertheless some exceptions. Thus, in the case of a servile infringement, when the counterfeit product could in itself cause serious harm to the consumer, the judge sitting in chambers may be inclined to rule for publication.

(a) Copyright

Article 87.1 of the Law 30 June 1994 concerning copyright and neighbouring rights provides that in addition to the suspension of the disputed act, the president of the court may, as he sees fit, order the publication of all or part of the ruling, at the expense of the defendant.

(b) Topographies

Article 13 *in fine*, of Law of 10 January 1990 on the legal protection of the topographies of semi-conductor products provides that the court may order the publication of the ruling.

(c) Patents

Article 53 of the law of 28 March 1984 on patents provides that the courts may order the publication of the ruling.

2. Returning counterfeit goods

Once the infringer has sold the goods they belong to his clients. In such a case, the court cannot order him to take them back. It may nevertheless order him to write to his clients to inform them of the existence of a court ruling.

3. Penalty payment

At the request of one party, the judge may sentence the other party, if the main sentence is not satisfactory, to pay a sum of money known as a penalty payment, though without prejudice to any damages that may be adjudged. Nevertheless, the penalty payment may not be imposed in the event of a previous ruling to pay a sum of money, nor in the case of actions for the execution of work contracts (Article 1385*bis*, JC).

For example, the judge may attach a penalty payment to an order to cease using an infringing trademark, to furnish commercial information, to destroy certain objects or write to clients.

This means that the defendant is sentenced to pay a lump sum, be it for non-compliance with the order given, or an amount per day (or per hour) of delay in complying with the order.

The penalty payment benefits the plaintiff. It is a means of pressure totally independent of other measures of compensation. In other words, the amount of damages that could be payable by the party ordered to make a penalty payment is not influenced by the existence of such penalty payment.

- Trademarks

By virtue of Article 13*bis*, 5 of the Law of 1962, the court may, upon application of the right holder, order the author of the infringement to provide all information at his disposal concerning the origin of the infringing goods and to make available all related information.

This provision allows the right holder to reconstitute the chain of production and distribution of the counterfeit objects, thus getting at the source of the infringement.

6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?

See answers to questions 3 and 5.

7. Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?

Abuse of the right to institute proceedings may be penalized by the award of damages if the aggrieved party so requests, pursuant to Article 1382 of the Civil Code.

Such an action is deemed to be frivolous and vexatious. The exercise of the right to bring legal action becomes abuse if it represents a manifest fault which reveals malicious intent or bad faith. This is never presumed. The party alleging abusive proceedings by his adversary must substantiate the existence of serious misconduct and the damage caused by it.

The same rule exists in regard to appeals. When an appeal judge rejects a main appeal, he also uses the same ruling to award any damages sought for frivolous and vexatious appeal (Article 1072*bis* JC).

Furthermore, said frivolous and vexatious appeal could incur a fine, which matter will be exclusively dealt with at a hearing scheduled in the same ruling for a date soon thereafter. The fine is payable to the Treasury. It may also be awarded independently of damages for frivolous appeal.

In keeping with consistent practice of the Court of Cassation, the State is liable for the actions of its officials, the State and its organs being jointly and severally liable in that regard. The State is liable for the actions of judges.

8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

(a) Costs

Article 1017 of the Judicial Code provides that in principle, all final judgements include an order for the party losing the case to pay costs, unless there are specific laws that provide otherwise and without prejudice to a possible agreement between the parties, which would be included in the ruling.

Costs include (Article 1018 of the Judicial Code):

- (a) Stamp duty⁹, registry charges¹⁰, and registration fees¹¹;
- (b) emoluments and salaries for the drafters of legal documents¹²;
- (c) the cost of a certified copy of a court decision;
- (d) the cost of all investigatory measures in particular, witnesses'¹³ and experts' fees;
- (e) travel and accommodation expenses for judges, clerks of the court and the parties, when such travel has been ordered by the judge;
- (f) the cost of legal documents that have been drawn up exclusively for the purposes of the trial;
- (g) compensation for court costs. Such compensation is intended partly to offset lawyers' fees payable by the party winning the case. Such payments are regulated by Royal Decree¹⁴;
- (h) execution costs (Article 1024 of the Judicial Code).

⁹Pursuant to Article 8 of the Regent's Decree of 26 June 1947 containing the Stamp Duty Code, a fee shall be charged for documents served by process servers other than deeds of protest and records of public sales of moveables; duly certified copies, duplicates or extracts of said documents.

¹⁰Include enrolment fees, fees for drafting and for despatch (Articles 268 to 274 of the Royal Decree of 30 November 1939 containing the Code of Fees for Registration, Mortgages and Registry Services).

¹¹Pursuant to Article 142 of the Code of Registration fees, a 3 per cent charge may be levied for all court decisions and judgements, handed down in respect of all matters, involving an order whether final, provisional, principal, ancillary or conditional, to pay sums of money or sell moveable goods. This rule is waived in respect of injunctions and decisions handed down in respect of appeals against said injunctions (Article 143). This fee is payable in case of a judgement, even an interim judgement. On the other hand, the records of conciliation proceedings (Article 733), not being judicial documents even in form, are not subject to the fee mentioned in Article 142.

¹²These emoluments are set by the Royal Decree of 30 November 1976 which lays down the schedule of charges for civil and commercial documents drawn up by process servers.

¹³The witnesses' fee is set by Royal Decree of 27 July 1972.

¹⁴The amount of the compensation for court costs is set by the Royal Decree of 30 November 1970, which contains a schedule of costs recoverable by the judge, in pursuance of Article 1022 of the Judicial Code.

The following are not included in costs:

- (a) Lawyers' fees;
- (b) costs incurred in relation to briefs and opinions;
- (c) arbitrary and unnecessary costs, that is, arbitrary and unnecessary costs to be borne by the ministerial officer who incurred them.¹⁵

The parties must advance all these fees during the proceedings.

Nevertheless, in order to ensure that indigent persons also have access to the courts to enforce their rights, the Judicial Code has provided for legal aid and for *pro deo*.

As envisaged in Articles 664 to 699 of the JC, legal aid means fully or partly dispensing those who do not have the funds necessary to bear the costs of a proceeding, even an extrajudicial proceeding, from paying stamp duties, fees for registration, registry services and copies of court rulings, as well as the other costs entailed in a proceeding. It also ensures the services of the Ministère des officiers publics et ministériels free of cost to those concerned.

Beneficiaries of legal aid are dispensed from advancing the fees entailed in court proceedings. These fees may, however, be recovered subsequently from the beneficiary of legal aid if it is ascertained that his financial situation has changed since the decision to grant legal aid.

Pro deo, which is envisaged in Articles 455 and 455bis of the JC, is provided by the Bar Council of each bar. Persons with insufficient income can thus benefit from the services of a lawyer free of cost.

(b) Duration

We are not in a position to supply statistics as to the duration of these proceedings. This varies with the importance of the case.

B. Administrative procedures and remedies

9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.

(a) Administrative procedures

Pursuant to Articles 144 and 145 of the Constitution, disputes concerning civil rights fall exclusively within the jurisdiction of the courts. In principle, disputes concerning intellectual property rights fall within the exclusive competence of the courts.

Nevertheless the Council of State may well be called upon to make a ruling on an appeal for the annulment of an administrative decision concerning an intellectual property right. The Council of State shall nevertheless have no jurisdiction to hand down a ruling on a matter the examination of which would entail a pronouncement as to the existence or the scope of an intellectual property right.

¹⁵Article 866 of the Judicial Code.

(b) Competent jurisdiction

The administrative division of the Council of State shall hand down decisions on appeals for annulment on account of infringement of formal requirements of substance or requirements prescribed under penalty of nullity, excess of jurisdiction or abuse of authority, filed against decisions and regulations of the different administrative authorities or against administrative adjudicatory decisions (Article 14, Coordinated Laws on the Council of State, RC of 12 January 1973, Moniteur Belge of 21 March 1973).

(c) Conditions to be met by the appellant for an appeal for annulment to be admissible

The appellant must be capable of or competent to institute legal action and must stand to gain from the appeal. If an action at law is to be admissible, the person bringing the action must have the capacity, or if it is a corporation under public law, the required competence for that purpose.

(d) Rules concerning court attendance

The appellant may introduce, pursue and complete any legal action brought before the Council of State. It is not compulsory for a lawyer to be involved.

Article 19.2 of the Coordinated Laws on the Council of State envisages that: "The parties may be represented or assisted by attorneys registered with the Bar Association or, pursuant to the Judicial Code, by any person established in a member State of the European Communities, where he has had authorization to practice as a lawyer for at least three years".

(e) Measures of investigation

The Council of State may request all useful information from any authority, may request any document, require additional explanations from the parties, interrogate them or any other persons, conduct on-the-spot verifications, engage experts and decide on their terms of reference.

(f) Remedial measures that may be ordered by the Council of State

(1) Annulment of the contested decision, entirely or in part:

An annulled decision no longer exists and, in principle, is deemed never to have existed. The decision annulling an administrative decision is applicable *erga omnes*.

(2) No power to issue injunctions:

In principle, the Council of State is not empowered to issue injunctions to administrative authorities.

This notwithstanding, the Council of State may impose a penalty payment on the administration under certain conditions. In that regard, Article 36 of the Coordinated Laws provides that:

"1. When the restoration of legality means that the annulment of a juridical act such as mentioned in Article 14 must be followed by a new decision by the authorities or by a new act on the part of the authorities, the person upon whose application the annulment was made may, if the authority does not meet its obligations, request the Council of State to impose a penalty payment on the authority in question. When an annulment order involves an obligation for the administrative authority to refrain from taking certain decisions, the person upon whose

application the annulment order is issued may request the Council of State to instruct the authority, under penalty of a fine, to withdraw the decisions taken by it in violation of the obligation of restraint deriving from the annulment order. The application will be admissible only if the applicant has requested the authority, by registered letter, to take a new decision and if at least three months have elapsed since the notification of the annulment order. The penalty payment cannot be incurred before notification of the order setting the amount.

2. The Council of State may set the penalty payment as a global amount, or as an amount per unit of time or per infringement. In the two latter cases the Council may also set an amount beyond which no penalty payment is incurred.

3. The chamber that has imposed the penalty payment may, upon the application of the authority sanctioned, annul the payment, suspend the deadline for a period to be set by it, or reduce the penalty payment in the event of permanent, temporary or partial incapacity of the sanctioned authority to comply with the main ruling. If the penalty payment is incurred prior to this incapacity, the chamber can neither annul nor reduce it.

4. The penalty payment envisaged in paragraph 1 above shall be effected at the request of the applicant and with the intervention of the Minister for Home Affairs. It shall be allocated to a budget fund within the meaning of the law of 27 December 1990 establishing budget funds. This fund is called the "Penalty Payments Management Fund."

(3) No power to award damages:

A party suffering damages as a result of an administrative measure may seek compensation for said damages before the courts on the basis of Articles 1382 and 1383 of the Civil Code.

(4) No power to set aside decisions:

The Council of State is not empowered to replace an annulled administrative decision with a new decision.

II. PROVISIONAL MEASURES

A. Judicial measures

10. Describe the types of provisional measures that traditional authorities may order, and the legal basis for such authority.

11. In what circumstances may such measures be ordered *inaudita altera parte*?

12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.

The judicial authorities are empowered to order the adoption of expeditious and effective provisional measures to prevent an act that may infringe an intellectual property right and, in particular, to prevent the introduction of goods into commercial circuits.

(a) Characteristics and conditions

Sitting alone, the President of one of the three courts (first instance, labour, commerce) shall be competent to take provisional decisions on issues that must be settled without delay. The judge shall make a ruling after the plaintiff has "applied for interim relief" (Articles 584 to 589, JC; Articles 1035 to 1040). An application for interim relief may be filed in complete independence of any trial on the merits¹⁶. It may also take the form of an interlocutory application in relation to an action filed in another jurisdiction. Finally an application for interim relief may be filed at the end of proceedings, if it is necessary to decide on urgent problems of compliance.

The intervention of the judge in chambers presupposes:

- Urgency, that is, that immediate steps must be taken to avoid significant damages;
- that the ruling issued is provisional in nature. The president of the chamber does not hand down judgements establishing rights in relation to the legal situation of the parties. In principle, the sole purpose of his decision is to arrive at an accommodation between the parties while they await a decision from the judge of the merits, who is in no way bound by the ruling of judge in chambers.

(b) Procedure

In principle, the application for interim relief is instituted by writ served by the process server. The time-frame for the subpoena is in principle two days. In case of extreme urgency, this time-frame can be shortened by the president of the chambers at the request of the plaintiff. It may also take the form of voluntary attendance in court pursuant to ordinary law within the meaning of Article 706 JC. The contentious procedure would be followed in that case.

Nevertheless, if absolutely necessary, the matter can be brought before the president by written application (Article 584). The initiation of proceedings in this way is authorized by way of exception in situations of extreme urgency, when even the shortening of the time-frame for the subpoena allowed under Article 1036 is not sufficient. The judicial authorities are then empowered to take provisional measures without the other party being heard, in particular, in a case where any delay may cause irreparable harm to a right holder or when there is a provable risk of destruction of evidence.

The use of a written application instead of a subpoena to appear in chambers, the latter providing the basic guarantee of contentious proceedings, is not allowed whenever the bilateral proceedings can be effectively used.

It is interesting to note that for some time now Article 19.2 of the Judicial Code has again been finding ever more frequent application. This Article provides that "the judge may, as an interlocutory measure, render a preliminary investigatory ruling or a ruling to settle the situation of the parties provisionally".

Thanks to this provision, the court trying the case on merits may, for example, issue a provisional ruling prohibiting the use of a disputed trademark under penalty of a fine, without making a ruling on the substance of the case.

¹⁶See nevertheless the case of seizure in the event of infringement (answer to question 5). The judicial authorities must therefore take into account Article 50.6 of the Treaty on this point.

Likewise, pursuant to Article 19 of the Judicial Code, the courts may admit an action brought, even with a view of obtaining a declaration to prevent the infringement of a seriously threatened right, in the event, for example, where the user of a trademark fears being himself challenged by the owner of another trademark, or, in the reverse situation, where the owner of an original trademark has every reason to fear the imminent danger of the use of a disputed trademark.

When the action is initiated and investigated based on a unilateral application, the judge will verify the application, investigate the matter and may convoke the applicant and the intervening party so as to hear their explanations (Article 1028 JC).

The ruling is explained, and is handed down in chambers. The clerk of the courts serves notice of the ruling to the applicant and to the intervening parties, if appropriate, by official correspondence and within three days of its pronouncement.

The Code sets out precisely the remedies for appeal and setting aside by which an order issued upon a unilateral application may be challenged.

1. The applicants or intervening parties may lodge an appeal if the order is injurious to their interests (Article 1031 JC). This appeal must be initiated by unilateral application drafted in keeping with Article 1026 JC and submitted to the clerk of the courts in the appellate jurisdiction. The time-frame is one month as from the notification of the order being challenged (Articles 1030 to 1031 JC). This remedy is not open to third parties who may be prejudiced by the order.
2. A third-party appeal may be entered against the decision by any person not having participated in the unilateral proceeding in the same capacity (Articles 1033, 1034, 1025 JC). This must be submitted within one month of the date when the order was notified to the opposing third party.
3. The applicant and the parties who participated in the unilateral proceeding may, if the circumstances have changed and subject to any rights acquired by a third party, request the amendment or setting aside of the order (Article 1032 JC).

(c) Possible provisional measures

Any measure that is not final (final measures, for example, are the destruction of merchandise or claiming ownership of it) may be requested and granted by the judge in chambers.

For example, the judge in chambers by order:

- A penalty payment;
- orders forbidding use;
- the rendering of accounts¹⁷;
- un expert evaluation;
- an advance on the transfer of profits¹⁷;
- publication of the decision.

13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

¹⁷See the section on trademarks above.

(a) Duration

These proceedings are rather expeditious. Although we have no statistics in this regard, it may be said that in general they last anything from a few days to a few weeks in first instance.

(b) Cost

See the answer to question 8.

B. Administrative measures

14. Reply to the above questions in relation to any administrative provisional measures.

Articles 17 and 18 of the Coordinated Laws on the Council of State provide that:

Article 17

"1. When an administrative decision or regulation may be annulled under Article 14.1, the Council of State shall have exclusive competence to order the suspension of its execution. Once the parties have been heard or called as witnesses, the suspension is ordered in a judgement giving the reasons on which it is based and handed down by the chamber competent to rule on the merits of the case. In a case of extreme urgency, it may be issued provisionally by the president of the chamber or by the judge designated by him for that purpose, subject to confirmation by the chamber within 45 days of the application. If the urgency is such that the parties or some of them cannot be heard, the order of suspension shall also summon the parties to appear within three days before the competent chamber, which will rule on the confirmation of suspension. The president of the chamber who has ordered the provisional suspension or the judge designated by him, may not sit in the chamber that will rule on the maintenance of the suspension.

2. The suspension of execution can only be ordered if serious arguments are put forward that can justify the annulment of the disputed decision or regulation and on condition that the immediate execution of the decision or regulation could cause serious injury which would be difficult to make good. Rulings handed down by virtue of paragraphs 1 and 2 are subject neither to appeal nor third-party appeal. The decisions by which suspension has been ordered may be postponed or modified at the request of the parties.

3. The application for suspension shall be initiated by a request different from the action for annulment and at the latest, together with the latter. It sets forth the arguments and facts which, in the applicant's opinion, justify the suspension or, as appropriate, the adoption of provisional measures. The suspension or other provisional measures ordered before the filing of action for annulment of the decision or regulation shall be immediately lifted by the president of the chamber who ordered them if he observes that no action for annulment invoking the arguments that had justified them has been introduced within the time-frame laid down in the rules of procedure.

4. The chamber shall make a ruling within 45 days on the application for suspension. If suspension has been ordered, it makes a ruling on the action for annulment within six months of the handing down of the order.

5. At the request of the applicant, the decision ordering suspension or provisional suspension of the execution of a decision or a regulation may impose a penalty payment on the authority concerned.

6. If the general assembly of the administrative division does not annul the disputed decision or regulation, the suspension shall immediately cease to be effective. In such a case, the matter is referred to the chamber to which it had been submitted initially, for an examination of any other arguments."

Article 18

"When an application for suspension of a decision or regulation is brought before the Council of State pursuant to Article 17, it alone may, provisionally and under the conditions prescribed in Article 17.2.1, order any measures necessary to safeguard the interests of the parties or of persons who stand to gain from the resolution of the matter, except for measures to safeguard civil rights.

Once the parties have been heard or duly summoned as witnesses, these measures shall be ordered by a decision stating the reasons on which it is based and taken unanimously by the chamber competent to rule on the merits.

In case of dire urgency, the measures may be ordered on the application of the party who had requested suspension, by the president of the chamber or the judge designated by him for that purpose, subject to confirmation by the chamber within 45 days of the application. If the parties have not been heard, the order shall summon them to appear within three days before the chamber, which will make a ruling on the maintenance of measures that may not have been complied with."

III. SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES

15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trade mark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?

(a) Pursuant to Article 1 of Council Regulation (EC) No. 3295/94 of 22 December 1994, which lays down measures to prohibit the release for free circulation, export, re-export or entry under a suspensive procedure of counterfeit and pirated goods, suspension of the release or detention of goods may be applied in relations with non-EEC member countries when the goods are:

- Placed on the market;
- in the customs warehouse;
- in external transit;
- for inward processing while under the suspensive procedure;
- for processing in bond;
- for temporary admission;
- for export;
- for re-export.

(b) Without prejudice to application of Article 29 of the Code of Criminal Procedure, which obliges official to inform the Royal Prosecutor of any offence, the following are excluded from the scope of the aforementioned regulation:

- Temporary storage;
- internal transit;
- inward processing under the economic regime;
- outward processing;
- free zones and bonded warehouses.

(c) Suspension of the release or detention of goods only applies to goods that infringe the following intellectual property rights:

- Trade marks;
- copyright and neighbouring rights;
- industrial designs rights.

(d) Goods of a non-commercial nature in the personal luggage of travellers within the limits fixed for customs-free entry are also excluded from the scope of the regulations in question.

(e) The aforementioned regulations do not apply to goods bearing a trade mark with the consent of the owner of the trade mark or protected by copyright or neighbouring or design right and which have been manufactured with the consent of the owner of the right but are placed in one of the situations referred to in paragraph (a) above without the latter's consent.

16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?

(a) The Director-General of the Customs and Excise Authority is responsible for receiving and dealing with requests for action by owners of rights. Such requests should be made to the following address:

Administration centrale des douanes et accises
Division Procédures douanières (direction 13)
Section Contrefaçon et Piraterie
Cité administrative de l'Etat - Tour Finances
Boulevard du jardin botanique, 50 - Bte 37
1010 Brussels

Tel: 32+ 2+ 210.31.64

Fax: 32+ 2+ 210.32.47

(b) Suspension of the release or detention of goods may be authorized during a period of 10 working days from the date of the applicant's notification in order to allow the owner of the right to provide evidence of referral of the case to the legal authority competent to take a substantive decision.

(c) Proof of the status of owner of the right, which must accompany the request, consists of:

- Proof of registration;
- proof of deposit;
- any evidence proving the status of author or original owner.

The first two means mentioned (proof of registration and proof of deposit) apply to the owners of trade marks or industrial design rights. For both these rights, the two means of proof must be taken into consideration. If the supporting document is a Benelux certificate of deposit issued more than one year previously, however, proof that the certificate is still valid is required.

Regarding the third means of proof cited, Article 6.2 of the Law of 30 June 1994 on copyright and neighbouring rights provides that: "Unless otherwise proved, the author shall be deemed to be the person identified as such on the work with his own name or a sign permitting his identification." If there is a dispute, proof is the responsibility of the infringer (defendant), who must use all legal means to show that the person claiming to be the owner of the right is not in fact the owner.

Attention is however drawn to the following special cases:

- Works of collaboration: for joint works of collaboration and works of collaboration that can be separated, covered by Articles 4 and 5 of the aforementioned Law respectively, it will be noted that the rights belong to the co-authors (or their successors in title) for 70 years after the death of the last surviving co-author;
- anonymous and pseudonymous works: anonymous works (which do not bear any indication of the author's name) or pseudonymous works (where the author conceals his identity under a borrowed name) may appear to be exceptions to the rule that the original owner is the creator. Since the true author is necessarily unknown, it had to be determined who would be the owner of the rights in relation to third parties and especially who had the right to institute legal proceedings. In this particular case, Article 6.3 of the aforementioned Law provides that the publisher of an anonymous or pseudonymous work is deemed to be the author in relation to third parties. This assumption is only valid in relation to third parties. In other words, the creator is still the owner of the rights in relation to the publisher, unless he assigns his rights to the latter;
- posthumous works: Article 2.6 of the aforementioned Law states that any person who, after expiry of copyright protection (70 years after the author's death), lawfully publishes or communicates to the public for the first time a work not previously published benefits from protection equal to the author's economic rights. It therefore follows that, for posthumous works published less than 70 years after the death of the author, the heirs or legatees remain the owners of rights in the work.

With regard to the title under which a person who is not the owner of the right is authorized to utilize the right, both the harmonized Benelux Laws on trade marks and industrial designs as well as the Community trade mark regulations provide that the granting of a right of use must be the subject of a licensing agreement and that, in order to be used as evidence against third parties, it must be registered in the trade mark register (or the industrial design register, whichever is relevant). A person claiming the title referred to in Article 2(b) of the implementing regulations must provide proof that his right to a licence has been entered in the register. In addition, the trade mark procedure includes a special category of trade marks whose use is authorized for a specified group of persons. These are collective trade marks, which are registered as such in the name of an association or group of enterprises. Deposit of such trade marks must be accompanied by regulations on use of the trade mark indicating the persons authorized to use it on their products. In this particular case (of rather limited

scope), the title of legitimate user of the trade mark must be proved in conformity with the regulations on use deposited.

If the representative is bound by an agency contract to the owner of the right or any other person authorized to use the rights set out in Council Regulation (EC) No. 3295/94, he may prove his entitlement as a representative by presenting a power of attorney signed by the principal. The power of attorney may be a private agreement or an authenticated agreement (see Article 1985 of the Civil Code).

If the person represents a commercial company or a commercial-type non-trading company, he may prove his status as a representative of the company by presenting a copy of the acts of association (statutes of the company) or a copy of their publication in the Official Journal of the country where the company has its headquarters.

Under the Benelux system of harmonized laws, any natural or legal person may represent an applicant provided that he presents a power of attorney. This obligation also applies to lawyers responsible for applying for a trade mark or industrial design right. In Belgium, however, the general law on legal proceedings states that a lawyer registered with the bar is deemed to represent his client because he has the supporting documents. It appears logical to apply this rule to the act of a lawyer in filing the application referred to in Regulation No. 3295/94. Where relevant, the measures taken by the customs authorities must be followed by legal proceedings.

Article 73 of the Law of 30 June 1994 on Copyright and Neighbouring Rights (M.B. 27 July 1994, err. M.B. 22 November 1994) states that "societies administering rights have the right to institute legal proceedings to defend the rights that are statutorily their responsibility".

(d) Security equivalent to the customs or statistical value of the goods, according to whether or not the goods are from the Community, for a minimum amount of BF 100,000 must be provided by the owner of the right within 10 working days following suspension of the goods. The security is to cover costs such as storage and damages payable to the importer if it is proved that the goods are not counterfeit or pirated.

(e) In application of the provisions on professional secrecy in Article 320 of the General Customs and Excise Law, coordinated on 18 July 1977, a sample of the goods may be inspected by the owner of the right but no other information may be given to him.

17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?

No fees are payable for processing the request when it is made by the owner of the right.

The decision granting the request for action made by the owner of the right is valid for six months and renewable upon request.

18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to *ex officio* action?

Counterfeit or pirated goods for which no request for action has been filed by the owner of the right may be detained for three working days. Before expiry of this period, the owner of the right must submit a request for action: if he does not, the goods are released following completion of customs formalities.

19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.

Without prejudice to the other rights of action open to the owner of a trade mark which is found to have been counterfeited or the owner of a copyright or neighbouring right or of an industrial design right which is found to have been pirated, Member States take the measures necessary to allow the competent authorities:

- As a general rule and in accordance with the relevant provisions of domestic law, to destroy goods found to be counterfeit or pirated or dispose of them outside commercial channels in such a way as to preclude injury to the owner of the right, without compensation of any sort and at no cost to the Exchequer;
- to take, in respect of such goods, any other measures which effectively deprive the persons concerned of the economic benefits of the transaction.

The following in particular are not regarded as having such effect:

- Re-exporting the counterfeit or pirated goods in the unaltered state;
- other than in exceptional cases, simply removing the trade marks which have been affixed to the counterfeit goods without authorization.

IV. CRIMINAL PROCEDURES

20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.

Article 1 of the Penal Code contemplates three types of punishable acts:

"An act that incurs a serious penalty under the law is a crime.
An act that incurs a correctional penalty under the law is an offence.
An act that incurs a minor penalty under the law is a breach."

Infringements of dedicated intellectual property laws are generally classified as offences. Offences are tried by courts of first instance (described as correctional courts) (Article 179 of the Code of Criminal Procedure).

It is noteworthy that police courts have jurisdiction to try offences that have been classified as breaches (Article 137 of the Code of Criminal Procedure).

21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?

(a) Copyright and neighbouring rights

(See Chapter VIII, section 2 of the law of 30 June 1994 on copyright and neighbouring rights, published in the Moniteur Belge of 27 July 1994).

Article 80 of the law under reference describes the offence of infringement and similar offences.

It reads as follows:

"Any malicious or fraudulent breach of copyright or neighbouring rights constitutes the offence of infringement.

The same applies to the malicious or fraudulent use of the name of an author or the holder of a neighbouring right or any distinctive sign adopted by him to identify his work or his service; any objects thus produced shall be deemed to be counterfeit.

Those who knowingly sell, hire, make available for sale or hire, keep in storage for hire or sale, or introduce counterfeit goods into Belgian territory for commercial purposes shall be guilty of the same offence".

Comment: The provisions of Book 1 of the Penal Code shall apply. This means that the rules of ordinary criminal law in regard to participation, repeated offences, attenuating circumstances, and so on, are applicable.

(b) Trademarks

(See Articles 8 to 14 of the law of 1 April 1879 concerning trademarks, published in the Moniteur Belge of 3 April 1879).

The following are punishable under Article 8 of the aforementioned law:

- "A. Those who have infringed a trademark and those who have made fraudulent use of a counterfeit trademark;
- B. Those who have fraudulently affixed to or made to appear on products they have produced or in which they trade a trademark belonging to another, whether by adding or removing some part thereof or by any kind of alteration;
- C. Those who have knowingly sold, placed on sale or in circulation products bearing a counterfeit trademark or a trademark fraudulently affixed to them."

Comment: The provisions of Book 1 of the Penal Code shall not apply. Articles 9, 10 and 11 of the Law of 1879 contain provisions regarding the treatment of participation, repeated offences and attenuating circumstances.

(c) Geographical indications

(See Chapter III entitled "Registered designation of origin" of the law of 14 July 1991 on trade practices and consumer information and protection, published in the Moniteur belge of 29 August 1991.)

Based on Article 20 of the aforementioned law, it is forbidden:

- "1. to use a description by presenting it as a registered designation of origin when such description has not been recognised as a registered designation of origin;
- 2. to manufacture, offer for sale and sell under a registered designation of origin, products that do not meet the prerequisites established for the recognition of a registered designation of origin;

3. to manufacture, offer for sale and sell under a designation of origin, products not covered by a certificate of origin when such a certificate is required."

Comment: The provisions of Book 1 of the Penal Code shall apply (Article 110 of the above-mentioned law on trade practices.

(d) Industrial designs

There are no specific criminal provisions in this regard.

(e) Patents

There are no specific criminal provisions in this regard.

(f) Layout-designs (topographies) of integrated circuits

There are no specific criminal provisions in this regard.

(g) Protection of undisclosed information

By prohibiting "any act contrary to honest trade practices by which a seller harms or may cause harm to the professional interests of one or more other sellers", Article 93 of the Law of 14 July 1994 on trade practices and consumer information and protection provides protection for trade secrets.

This is not a criminal law provision in the strict sense. The affected party may bring an action for suspension before the commercial court. "Those who do not comply with a judgement or a decision handed down (...) as a result of an action for suspension", shall be subject to a fine of BF 200,000 to BF 4,000,000¹⁸ (Article 104 of the above-mentioned law).

(h) Control of anti-competitive practices in contractual licences

The law of 5 August 1991 on the protection of economic competition (published in the Moniteur belge of 11 October 1991) provided for a system of administrative sanctions against practices that restrict competition.

22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?

Under Article 1 of the law of 17 April 1878 containing the preliminary title of the Code of Criminal Procedure, it is the Ministry of Home Affairs that may initiate criminal prosecution.

As regards trademarks, public proceedings can only be initiated as a result of a complaint by the injured party (Article 14 of the law of 1 April 1879 on trademarks).

For the other offences, the Ministry of Home Affairs may initiate proceedings *ex officio*.

23. Do private persons have standing to initiate criminal proceedings and if so, who?

¹⁸The amounts given are the real amounts. This means that account has been taken of Article 1 of the Law of 5 March 1952 (published in the Moniteur belge of 3 April 1952, latest amendment done on 24 December 1993, published on 31 December 1993) providing that the amount of the fines shall be increased by 1,990 décimes.

Any person may notify the authorities of breaches of which they are aware.

Obviously, mere denunciation does not, strictly speaking, initiate criminal proceedings. The Ministry of Home Affairs shall independently decide on the appropriate course of action to be taken in response to denunciations.

Under the law on trademarks, criminal proceedings can only be initiated when a complaint is filed by the aggrieved party.

Any aggrieved person may initiate criminal proceedings by suing for damages before a trial judge, (Article 63 of the Code of Criminal Procedure).

It should be noted that Article 73 of the law on copyright and neighbouring rights provides that societies administering rights may initiate legal action in defence of the rights for which they are statutorily responsible.

24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:

- Imprisonment;
- monetary fines;
- seizure, forfeiture and destruction of infringing goods and materials and implements for their production;
- other.

(a) Copyright and neighbouring rights

(See Chapter VIII, Section 2 of the law of 30 June 1994 on copyright and neighbouring rights)

1. Imprisonment

(See Article 81 of the above-mentioned law)

Any repetition of the offence of counterfeiting or other similar offences shall be punished by imprisonment ranging from 3 months to 2 years (and by a fine of between BF 20,000 and BF 20,000,000 or any one of these penalties).

Comment: Imprisonment is foreseen only in cases of repeated offences.

2. Monetary fines

(See Article 81 of the law under reference)

The offence of counterfeiting and similar offences are subject to a fine of between BF 20,000 and BF 20,000,000.

Repeat offenders shall be punished by imprisonment (ranging from 3 months to 2 years) and a fine ranging from BF 20,000 to BF 20,000,000, or one of these penalties only.

3. Seizure

(See Article 82 of the law 30 June 1994)

Any proceeds received from the fraudulent execution or representation of copyright or a neighbouring right may be seized as objects of criminal origin. They shall be awarded to the claimant in proportion to the share that his work or service would have had in the representation or execution and shall be taken into account in evaluating compensation.

In addition to this provision of the law of 1994, note should also be taken of Article 42.3 of the Penal Code, which states: "Any pecuniary benefits derived directly from the offence, any goods and valuables that have replaced them and any revenue derived from the investment of such benefits shall be subject to special forfeiture."

4. Other

The court may order the publication of the judgement (Article 83 of the same law).

If the offence is repeated, the court may order the definitive or temporary closure of the establishment used by the indicted person. (Article 85 of the above-mentioned law).

(b) Trademarks

(See Articles 8 to 14 of the law of 1 April 1879 concerning trademarks)

1. Imprisonment

Anyone who has committed one of the offences outlined in Article 8 of the aforementioned law (see answer to question 21) shall incur a prison sentence ranging from 8 days to 6 months (and a fine of between BF 5,200 and BF 400,000), or one of these penalties only.

2. Monetary fines

Anyone who has committed one of the offences outlined in Article 8 of the aforementioned law (see answer to question 21) shall be subject to a prison sentence ranging from 8 days to 6 months (and a fine of between BF 5,200 and BF 400,000), or to one of these penalties only.

3. Seizure/forfeiture/destruction

Article 12 of the law 1879 is quoted hereunder:

"Products bearing a counterfeit trademark or a fraudulently affixed trademark, as well as the tools and implements used to commit the offence may be confiscated, entirely or in part, if they are in possession of the offender.

The confiscated objects may be awarded to the plaintiff suing for damages, or up to the amount of the damages.

In all cases, the court may order the destruction of the infringing goods".

Together with this provision of the law of 1879, account must also be taken of Article 42, 3 of the Penal Code, which states: "Any pecuniary benefit derived directly from the offence, any goods and valuables that have replaced such benefits and any revenue derived from the investment of such benefits shall be subject to special forfeiture."

4. Other

The court may order the publication of the ruling (Article 13 of the law under reference).

(c) Geographical indications

Article 103 of the law 14 July 1991 on trade practices and consumer information and protection provides for a fine of between BF 100,000 and BF 4,000,000 on anyone who maliciously infringes a registered designation of origin.

(d) Industrial designs

There are no criminal sanctions in this regard.

(e) Patents

Idem.

(f) Layout-designs (topographies) of integrated circuits

Idem.

(g) Undisclosed information

See answer to question 21 (g)

(h) Control of anti-competitive practices in contractual licenses

See answer to question 21 (h)

25. Describe provisions governing the length and any cost of proceedings Provide any available data on the actual duration of proceedings and their cost, if any.

Pursuant to Article 21 of the preliminary title of the Code of Criminal Procedure, legal proceedings shall be barred by limitation after five years as from the day when the offence was committed.

If the offence has been downgraded to a breach, the time-frame will be one year only.

Limitation may only be interrupted for the purposes of investigations or prosecutions (Article 22 of the preliminary title). A similar time-period (five years or one year depending on the case) will start to run following interruption of limitation. In the event of the interruption of limitation, the time-period cannot exceed twice the period of limitation initially envisaged.

The effective duration of proceedings will depend on the complexity of the matter, the attitude of the parties and the court's case-load.

In this connection it is important to take account of the practice of the European Court of Human Rights as regards the right of every person to have their case heard within a reasonable period of time.

It is not possible to give a general answer to the question of the cost of criminal proceedings.