

Council for Trade-Related Aspects of  
Intellectual Property Rights

Original: French

CHECKLIST OF ISSUES ON ENFORCEMENT

Replies by Belgium to Questions 15 to 19

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?**

15.(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 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 officials 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 mark rights;
- copyright and neighbouring rights;
- industrial design rights.

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.

(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?**

16.(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 submission of an application;
- any evidence proving the status of author or original owner.

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.

**Where there are one or more collecting societies whose sole purpose or one of whose main purposes is to manage or administer copyright or neighbouring rights, or they assume to have the right to act?**

The answer to this question is yes; 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 100,000 BF 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;
- placing the goods under a different customs procedure.

Counterfeit and pirated goods may be handed over to the Exchequer.