

**Kristof NEEFS**

# **TRANSPOSING THE ENFORCEMENT DIRECTIVE: QUID NOVI SUB SOLE FOR COPYRIGHT IN BELGIUM?**

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## **0. INTRODUCTION**

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights <sup>1</sup> (hereinafter “the Enforcement

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<sup>1</sup> *Official Journal* L 195 , 02/06/2004, p.16-25

directive”) is aimed at the harmonisation of Member states’ legislation in regards to remedies and penalties for the infringement of intellectual property rights. It seeks to establish a high and homogenous minimum level of protection of IP in the European internal market. The deadline for implementation into national law was 29 April 2006. In Belgium, compliance with the enforcement directive was sought with the adaptation of 2 acts: the Act on civil law aspects of the protection of intellectual property rights <sup>2</sup> and the Act on judicial law aspects of the protection of intellectual property rights. <sup>3</sup> Both were issued on 10 May 2007.

Two separate acts were issued because of a constitutionally enshrined requirement related to legislative process, but they are to be seen as one coherent approach. <sup>4</sup> They apply to all intellectual property rights, save for trademarks and models and designs, as these are dealt with on the Benelux level. <sup>5</sup> Because Belgian legislation does not have a single intellectual property code, the implementation acts necessarily affect several national IP acts, including the Patent Act, the Act on Copyright and Neighbouring rights, the Software Copyright Act, the Act on Plant breeders’ rights, the Act on Legal protection of semiconductor layouts, the Database Act and the Trade Practices Act which provides for protection of denominations of origin. Furthermore, the acts also include changes to the Judicial Code.

The Acts on judicial and civil law aspects of the protection of intellectual property rights go beyond the mere implementation of the Enforcement directive. According to the preparatory documents, the aim of the acts is threefold: first and foremost, compliance with the obligations arising from the Enforcement directive is sought. A second objective is the concentration of intellectual property disputes to a limited amount of courts so as

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<sup>2</sup> Loi relative aux aspects civils de la protection des droits de propriété intellectuelle, *Moniteur Belge*, 10 May 2007, 2<sup>nd</sup> edition, p. 25694

<sup>3</sup> Loi relative aux aspects de droit judiciaire de la protection des droits de propriété intellectuelle, *Moniteur Belge*, 10 May 2007, 2<sup>nd</sup> edition, p. 25694

<sup>4</sup> Rapport fait au nom de la commission de l’économie, de la politique scientifique, de l’éducation, des institutions scientifiques et culturelles nationales, des classes moyennes et de l’agriculture sur les projets de loi relatif aux aspects civil de la protection des droits de propriété intellectuelle et aux aspects de droit judiciaire de la protection des droits de propriété intellectuelle, 15 March 2007, *Parliamentary document* nr. 51 2943/002, [www.lachambre.be](http://www.lachambre.be), p.4

<sup>5</sup> The Benelux treaty on intellectual property was adjusted to comply with the Enforcement directive on 1 December 2006, see Décision du 1er décembre 2006 du Comité de Ministres de l’Union économique Benelux, *Moniteur Belge*, 22 December 2006, 2<sup>nd</sup> edition, p.73952

to entice IP specialization and efficiency in the judicial system. Finally, the acts aim to adjust article 96 of the Trade Practices Act.<sup>6 7</sup>

This paper seeks to explore to what extent the recently issued acts have affected the Belgian copyright regime. It thereby firstly addresses the implementation of the Enforcement directive (part I), concluding that the acts introduce no more than minor changes, sometimes explicitly stating principles already outlined in caselaw. In part II, we briefly provide an overview of the new rules on jurisdiction over copyright disputes.

In our conclusion, we assert the view that for the most part, Belgian copyright law already provided a level of protection equal or at least very close to the one envisaged by the directive. The jurisdictional rules are evaluated as pursuing a justified objective, but a framework for mobility of magistrates is deemed desirable. On a more general note, we suggest consolidation of Belgian intellectual property laws pursuant to the harmonisation of protection which these acts have brought.

## I. TRANSPOSING THE ENFORCEMENT DIRECTIVE

### 1.1. *Presumption of authorship/ownership- Article 5 Enforcement directive*

Article 5(a) of the Enforcement directive imposes on Member states the obligation to legally establish a presumption of authorship. For someone to enjoy this presumption of authorship, it is to be sufficient for “*his/her name to appear on the work in the usual manner*”. This provision reflects the rule laid down in article 15 of the Berne Convention.<sup>8</sup> Article 5(b) of the Enforcement directive also dictates the adaptation of a presumption of ownership to holders of rights related to copyright with regard to their protected subject matter, because the latter are often the ones engaging in procedures to defend rights and to fight piracy (recital 19 Enforcement directive). As copyright protection is

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<sup>6</sup> Exposé des motifs sur l’avant-projet de loi relative aux aspects civils de la protection des droits de propriété intellectuelle, [http://www.mineco.fgov.be/intellectual\\_property/patents/news/intellectual\\_property\\_protection\\_001.pdf](http://www.mineco.fgov.be/intellectual_property/patents/news/intellectual_property_protection_001.pdf), (« hereinafter « Exposé des motifs »), p.2

<sup>7</sup> Loi du 14 juillet 1991 sur les pratiques du commerce et sur l’information et la protection du consommateur, *Moniteur Belge*, 29 August 1991

<sup>8</sup> Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works, [http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf)

granted to the creator of the work, the presumption of authorship can be overruled by proof of the contrary.

In Belgium, article 9 to 12 of the Act on civil law aspects of the protection of intellectual property rights insert the presumptions of authorship and ownership into the Copyright Act.<sup>9</sup> Presumed to be author in absence of proof to the contrary according to the revised article 6 Copyright Act is he or she whose name or a sign<sup>10</sup> by which he or she is identifiable appears on the work or a reproduction thereof; or is mentioned during communication to the public of the work. A similar provision related to the detention of neighbouring rights is inserted for performing artists (article 35 §1*bis* Copyright Act), for producers of phonograms and of the first fixations of films (article 39 §2 Copyright Act) and for broadcasting organisations (article 44 §2 Copyright Act).

Whether the adaptation of the presumption of authorship presents a significant change to copyright in Belgium is questionable, as a legal presumption was already in place before the changes. Oddly, the wording of article 6 Copyright Act *before* the implementation acts was closer to article 5(a) Enforcement directive and its inspiration, article 15(1) Berne Convention, than the current text. The broadening of the scope to reproductions and to mention during communication to the public of the work is not foreseen in the Enforcement directive, nor in the Berne Convention, but it should be regarded as a mere clarification of the existing interpretation of the presumption of authorship in Belgian law.<sup>11</sup> According to the preparatory documents, the explicit mention of communications to the public was inspired by the ever increasing amount of acts to be qualified as such within the context of the internet.<sup>12</sup> The creation of a

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<sup>9</sup> Loi relative au droit d'auteur et aux droits voisins du 30 juin 1994, *Moniteur Belge*, 27 July 1994, p.19297

<sup>10</sup> In Belgium, both the Dutch and the French text are authentic. A difference between the two versions of the Copyright Act survived the acts of 10 May 2007: the Dutch text uses the word "letterteken", literally "acronym", while the French text uses the word "sigle" which means sign. The Council on Intellectual Property's advice to adjust the Dutch wording for legislative quality's sake was neglected by the legislator, see "Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom", 5 May 2006, [http://www.mineco.fgov.be/intellectual\\_property/patents/news/intellectual\\_property\\_protection\\_n\\_002\\_nl.pdf](http://www.mineco.fgov.be/intellectual_property/patents/news/intellectual_property_protection_n_002_nl.pdf), p.5

<sup>11</sup> A.VISSCHER & B.MICHAUX(2000), *Précis du droit d'auteur et des droits voisins*, Brussels, Bruylant, p.47

<sup>12</sup> Exposé des motifs, p.40

presumption of ownership for holders of neighbouring rights as dictated by article 5(b) Enforcement directive is a novelty in Belgian copyright.

## 1.2. Evidence - Article 6 Enforcement directive

Article 6(1) Enforcement directive requires that:

*“Member States shall ensure that, on application by a party which has presented reasonable evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information”.*

Furthermore, judicial authorities should according to article 6(2) be enabled to order the communication of banking, financial or commercial documents in case infringements are committed on a commercial scale. This order is again subject to the protection of confidential information.

The Belgian legislator did not explicitly adapt a measure to implement article 6, on the grounds that the existing legal framework suffices to comply with the requirements of the directive. Article 870 and further of the Belgian Judicial code already provide the necessary tools to allow a judge to order the presentation of relevant evidence by an opposing party, and even by third parties, which is not foreseen in the Enforcement directive. Non-compliance with such an order is a criminal offence (article 495<sup>bis</sup> Penal Code). In regards to the protection of confidential information, the Exposé des Motifs emphasises the need for a horizontal, coherent legislative approach because this issue affects more than intellectual property disputes.<sup>13</sup>

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<sup>13</sup> Exposé des motifs, p.10-12; “Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom”, o.c., p.3-4

### 1.3. Measures preserving evidence - Article 7 Enforcement directive

Article 7 Enforcement directive seeks to grant the courts the tools to take provisional measures to preserve evidence that is relevant to the infringement case before the proceedings. Measures to this end may include *“the detailed description, with or without the taking of samples, or the physical seizure of (allegedly<sup>14</sup>) infringing goods and in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto.”*

For copyright holders and holders of a neighbouring right, such a mechanism was already in place in Belgium with the counterfeit seizure (“beslag inzake namaak” / “saisi en matière de contrefaçon”) in article 1481 Judicial Code. This procedure permits securing the evidence by description by an expert of devices, machines, works and all objects of which it is claimed they are infringing copyright or a neighbouring right; of all plans, documents, calculations and writings which could lead to the proof of infringement and finally of all tools directly used to perform the allegedly infringing act. It also allows the physical seizure of counterfeited goods and -when applicable- of the revenues out of the alleged infringement. As the procedure could be granted by unilateral request, the allegedly infringing party needed not be heard before the measure could be taken, so there was no risk of evidence being destroyed or hidden.

Article 22 to 31 of the Act on Judicial aspects of the protection of intellectual property rights move the counterfeit seizure to a separate chapter XIX<sup>bis</sup> “Proceedings regarding intellectual property rights”, subtitle “counterfeit seizure”, article 1369<sup>bis</sup> in the Judicial Code. Although in the sphere of copyright enforcement the procedure in place met the requirements of the directive for the most part, some changes and reformulations have been made. Aside from changes relating jurisdiction which we will describe further on, the following are the most important:

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<sup>14</sup> It appears to be a legislative error that the English version of the Enforcement directive refers to “infringing goods” in the context of measures to be taken before proceedings. The Dutch and the French version refer to “litigieuze goederen” and “marchandises litigieuses” respectively, both signifying “litigious goods” which in our view is more appropriate terminology.

First and foremost, the judge is now able to summon the defendant *before* the descriptive measures are ordered. This is a significant change, as much of “the surprise effect” of the counterfeit seizure might be lost by the *ex ante* hearing of the allegedly infringing party. Courts should tread lightly in making use of this possibility, as the effectiveness of the procedure would suffer from “warned” infringers destroying or hiding evidence.

Secondly, the scope of the subject matter of the counterfeit seizure has been broadened. From now on, not only allegedly infringing goods and materials, tools and documents used for the production thereof can be subjected to the prejudicial measures. Article 1369*bis* /1, §2 and §4 Judicial Code now includes materials, tools and documents which were used or are to be used for the distribution of allegedly infringing goods. This change is derived directly from article 7(1) Enforcement directive.<sup>15</sup>

Thirdly, the new text requires that the court upon the request for descriptive measures in the framework of the counterfeit seizure verifies that:

1. *the intellectual property right for which protection is requested appears to be valid*
  2. *there are indications of an infringement or threat of infringement of the intellectual property right*
- (Article 1369*bis* /1, §3 Judicial Code)

This two-step test reflects the requirement of a minimum presentation of reasonable evidence by the applicant, in line with article 7(1) Enforcement directive. In case the applicant requests the physical seizure of goods, §5 further requires that the judge decides upon the necessity of such measures by taking into consideration *the evidence lodged by the applicant, the facts of the case and a balance of the interests of all parties and of the public*. These considerations and the motivation of the judge should be explicitly mentioned in the order. This requirement of motivation is not new, as it was already articulated in case law before the implementation acts, and the conditions for granting counterfeit seizure are almost identical to the ones expressed in said case law.

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<sup>15</sup> “Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom”, *o.c.*, p.9

<sup>16</sup> Nonetheless, the clarification of the conditions to grant descriptive and seizing measures (with the latter being more strict) is welcomed for the sake of legal certainty.

Fourthly, article 7(2) of the Enforcement directive requires that upon the granting of measures preserving evidence, the applicant can be asked for adequate security or an equivalent thereof to ensure that the defendant will receive compensation for any prejudice suffered from the measures in case the applicant does not further pursue the procedure on the merits or in case it was found that there is no infringement. (as reiterated in article 7(4)). This requirement was translated in article 1369*bis* /3, §2 Judicial Code. Importantly, from now on the defendant will automatically be entitled to compensation in case the procedure on the merits dismisses the infringement claim or in case the applicant does not further pursue proceedings. Furthermore, in order to limit the duration of taken measures and their potential damage inflicting effects the applicant is required to lodge a complaint on the merits of the case within 20 workdays or 31 regular days (whichever is longest) from the receipt of the expert report, lest all measures are recalled or lose their binding effect. (article 1369*bis* /9 Judicial Code) This stands in sheer contrast to previous case law which only granted compensation for the defendant in case the pursuit of a counterfeit seizure also constituted behaviour sanctioned by Article 1382 or 1383 of the Civil Code. To qualify for compensation, the mere fact that the proceedings demonstrated that no infringement had taken place was not enough. <sup>17</sup> Consequently, the new legislation makes it easier for subjects of the counterfeit seizure to acquire compensation from the applicant.

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<sup>16</sup> Cass. 25 March 2005, C.04.0006 (counterfeit seizure in a patent dispute)

<sup>17</sup> Cass. 11 March 2005, C.03.0591



In conclusion, the most important change to the copyright counterfeit seizure <sup>18</sup> is the possibility for the judge to summon the defendant *before* the measure is enacted. It remains to be seen whether the courts will easily make use of this possibility, but this provision bears the risk of diminishing the effectivity of the procedure by taking away the surprise effect. The new text furthermore provides a framework which de facto will limit the procedure to cases where infringement is more or less obvious: on the one hand the applicant will have to be more cautious because compensation in case of non-infringement will be granted automatically, and on the other hand the judge approving the measures is now explicitly required to balance all interests involved.

#### 1.4. *Right to information – Article 8 Enforcement directive*

The Enforcement directive provides a right of information in procedures concerning an infringement <sup>19</sup>, which was inserted in Belgian copyright in article 86ter, §3 Copyright act. Said provision allows the court which has found an infringement to order that the infringer reveals all information relating to the origin and the distribution channels of the infringing goods upon the request of the party eligible to lodge a counterfeit claim.

The same order can be imposed to any person in the possession of infringing goods on a commercial scale, any person using the infringing services on a commercial scale or any person providing on a commercial scale services used in infringing activities. The

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<sup>18</sup> The most important change in Belgian law in general is the opening of the counterfeit seizure procedure to all holders of an intellectual property right, whereas the Judicial Code previously only allowed the holders of a patent, a supplementary protection certificate, plant breeders' rights and finally copyright and neighbouring rights including the right of database producers. The omission of trademark holders from this list was found to be discriminatory by the Belgian Constitutional Court (Cour d'Arbitrage, case 53/2004, *Moniteur Belge*, 29 June 2004, p.52913) and it did not comply with article 2(1) Enforcement directive which was clarified by a Commission statement (Statement by the Commission on article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, *Official Journal*, L 94, 13 April 2005, p.37) From the entry into force of article 22 of the Act on judicial aspects of the protection of intellectual property rights, the counterfeit seizure will therefore also be open to holders of trademarks, models and designs, geographical indications, designations of origin and semi-conductor layouts. Exposé des motifs, p.6-8

<sup>19</sup> The Belgian Council of Intellectual Property discussed whether the right of information in article 8 Enforcement directive actually required a court declaring that an infringement had occurred. The majority of members concluded this was indeed the case, which appears to be a correct interpretation of the wording of the directive. See Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom, *o.c.*, p.18-19

provision in question is a literal implementation of the corresponding article 8 Enforcement directive.

### 1.5. *Provisional and precautionary measures – Article 9 Enforcement directive*

Article 9 Enforcement directive describes the provisional and precautionary measures the European legislator deemed necessary for the adequate protection of IP. It includes the possibility to order interlocutory injunctions preventing imminent infringements or forbidding the continuation of alleged infringements; and the seizure of suspected goods. Interlocutory injunctions can under Belgian judicial law already be ordered by the courts, and as was outlined in 1.2.2., Belgian copyright holders could already resort to the counterfeit seizure. In result, article 9 needed no specific implementation save for the sanctions which are outlined in 9(2); namely “*the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts*” and the safeguards for the defendant as outlined in 9(5) to (7).<sup>20</sup>

Because this measure goes beyond the scope of the powers of courts when ordering a normal precautionary seizure,<sup>21</sup> article 15 of the Act on judicial law aspects of the protection of intellectual property rights inserts into article 584 Judicial Code a provision 5° which permits the court to impose the seizure of movables and immovables only after taking into consideration the three criteria which are also made applicable to the physical seizure of allegedly infringing goods in Article 1369bis /1, §5 Judicial Code. Given the potential detrimental effects of these measures to the defendant’s business, it can be hoped the courts will tread lightly in granting the judicial weaponry of article 9(2) Enforcement directive.

To further ensure the defendant’s interests are not unnecessarily harmed, the application of article 584, 5° Judicial Code triggers safeguard provisions similar to the ones provided in the counterfeit seizure subsection. According to article 1369ter Judicial Code, the applicant here too has to pursue the proceedings on the merits within 20 work days or 31 days (whichever is longest) from the signification of the ordinance, failure of

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<sup>20</sup> Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom, *o.c.*, p.22-28

<sup>21</sup> Exposé des Motifs, p.54-55

which leads to the recall or the loss of the binding effect of the measures. Applicants can be required to provide a security, and they are again obliged to pay compensation for any damages resulting from the provisional measures in case they do not choose to pursue proceedings in time or in case the court finds there was no infringement or threat of infringement of the intellectual property right.

#### 1.6. *Corrective measures – Article 10 Enforcement directive*

Article 10 Enforcement directive has been almost literally transposed into the Belgian IP acts. In copyright, the corrective measures mentioned in article 10 are to be found in article 86ter, §2 Copyright act. From the entry into force of the implementation acts, the party eligible to lodge a counterfeit claim can request the *recall of goods that have been found infringing his copyright or neighbouring right, their definitive removal from the channels of commerce or their destruction*. These measures are to be carried out at the expense of the infringer, who has no right to compensation; nor do the measures affect the damages due to the rightholder. The court considering the ordinance of such measures will take into account the proportionality between the infringement and the ordered measures as well as the interests of third parties.

#### 1.7. *Injunctions – Article 11 Enforcement directive*

Where an infringement of an intellectual property right has been found, article 11 Enforcement directive requires that Member states provide for an injunction to prohibit the continuation of the infringement, both against infringers and against intermediaries whose services are used by a third party to infringe. When provided for by national law, the imposing of a recurring penalty payment in case of non-compliance should be made possible.

For copyright, this provision was copied in article 86ter, §1 Copyright act. The inclusion of injunctions against intermediaries changes nothing in practice, as pursuant to article 8(3) Directive 2001/29/EC of 21 May 2001 of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the

information society <sup>22</sup> such an action was already possible. At the time, no explicit transposition was made because the legislator was unanimous that the action ex article 87 Copyright act could also be filed against intermediaries.<sup>23</sup>

It should also be noted that this provision does not affect the regime of ISP liability as installed in article 18 to 21 of the Act of 11 March 2003 on certain legal aspects of information society services <sup>24</sup>

### *1.8. Alternative measures – Article 12 Enforcement directive*

Member states may according to article 12 Enforcement directive stipulate that judicial authorities can order pecuniary compensation instead of the measures foreseen in article 10 and 11; in case those measures would cause disproportionate harm and when such compensation appears satisfactory. The implementation laws and the Exposé des Motifs do not mention this provision, as transposition would have been entirely superfluous. None of the provisions mentioned in 1.6 and 1.7 require the judge to automatically grant the measures.

### *1.9. Damages – Article 13 Enforcement directive*

Article 13 of the Enforcement directive sets guidelines for the judicial authorities when setting damages suffered from infringement. These guidelines have been transposed in article 86bis Copyright act, of which §1 and §2 read:

- “§1 *Without prejudice to §3, the injured party is entitled to compensation of all prejudice suffered from the infringement of copyright or a neighbouring right.*
- §2 *When the prejudice cannot be determined in any other way, the judge can set the damages ex aequo et bono to a lump sum.*

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<sup>22</sup> Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, *Official Journal* L 167, 22/06/2001, p.10

<sup>23</sup> Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom, *o.c.*, p.31 ; Exposé des Motifs, p.42-43

<sup>24</sup> Loi du 11 Mars 2003 sur certains aspects juridiques des services de la société de l'information, *Moniteur Belge*, 17 March 2003

*The judge can by way of compensation order the handover to the claimant of infringing goods and, in appropriate cases, of the materials and instruments that were predominantly used for the creation or the production of those goods and that are still in the possession of the defendant. When the value of those goods, materials and instruments exceeds the actual prejudice, the judge determines the remaining amount to be paid by the claimant.*

*When the infringer acted in bad faith, the judge can by way of compensation order the recovery of all profits out of the infringement and the reporting related thereto. In determining the profits to be recovered, only costs directly related to the infringing activity will be deducted.”*

§1 is a reference to the general rule of civil liability as laid down in article 1382 and 1383 Civil Code: all prejudice, but no more, is to be compensated by the party which has caused the harm. This rules out the imposing of punitive damages,<sup>25</sup> save for the sanction of civil confiscation in article 86bis §3:

“§3 *When the infringer acted in bad faith, the judge can order the confiscation of the infringing goods and, in appropriate cases, of the materials and instruments that were predominantly used for the creation or the production of those goods and that are still in the possession of the defendant. When the goods, the materials and instruments are no longer in the possession of the defendant the judge can order the payment of a sum equal to the price received for the goods, materials and instruments. The confiscation absorbs compensation for the value of the confiscated goods.”*

As such, these provisions bring little changes to the Belgian Copyright regime, as they were already in place in article 87 §2 Copyright Act. However, the judge is no longer ex officio obliged to impose civil confiscation in case bad faith has been established, which was the case before the implementation acts. The legislator changed the mechanism

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<sup>25</sup> Advies van 5 mei 2006 van de Raad voor de Intellectuele Eigendom, o.c., p.34 ; Exposé des Motifs, p.26-31 and the references therein.

because existing case law demonstrated that judges were reluctant to establish bad faith because of the automatic sanction of civil confiscation resulting thereof.<sup>26</sup>

#### *1.10. Legal costs – Article 14 Enforcement directive*

The Enforcement directive imposes as a general principle that reasonable and proportionate legal costs and other expenses are to be borne by the unsuccessful party in the proceedings, unless equity does not allow this. Belgian law in general is already in line with the directive's requirements concerning legal costs, see article 1017 Judicial Code. As far as "other expenses", such as attorneys' and experts' fees, are concerned the legislator refers to case law of the Cour de Cassation, and as was the case with the protection of confidential information, this question was deemed to require a horizontal approach.<sup>27</sup>

#### *1.11. Publication of judicial decisions – Article 15 Enforcement directive*

Article 15 Enforcement directive requires that judicial authorities in Member states should be able to order appropriate measures for the dissemination of information concerning the decision at the expense of the infringer, thereby including the publication or display of the decision.

Such an order was already provided for in Belgian copyright under article 87, §3 Copyright act, with a recent example being Google which was obliged to publish a judgement issued by the Brussels Court of first instance on its homepage.<sup>28</sup> Pursuant to the implementation acts, these measures have now been moved to article 86ter, §4 Copyright act.

#### *1.12. Assessment of the implementation*

Adapting Belgian copyright to the requirements of the Enforcement directive does not appear to have caused a substantial change. For the most part, the mechanisms and

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<sup>26</sup> Exposé des Motifs, p.30-31 and the references therein.

<sup>27</sup> Cass. 2 September 2004, C.01.0186.F; Exposé des Motifs, p.16

<sup>28</sup> Brussels, 5 September 2005, [http://www.copiepresse.be/jugement\\_copiepresse\\_google\\_fr.pdf](http://www.copiepresse.be/jugement_copiepresse_google_fr.pdf)

remedies the directive provides for were already present and they were merely reworded to be in line with the implementation. The introduction of a presumption of ownership for holders of neighbouring rights might –as the drafters of the Enforcement directive intended- facilitate the pursuit of infringers by phonograms producers and broadcasting organisations, but this does in our view not represent a major change.

## II. COPYRIGHT JURISDICTION

The second objective of the recently issued acts was the centralization of jurisdiction over intellectual property disputes so as to develop a certain expertise within the designated courts. For copyright, disputes of which the value does not exceed 1860EURO remain under the jurisdiction of the Peace courts (Juge de Paix/Vrederechter), as this litigation mostly concerns unauthorized reproduction of photographs and music. The centralisation of those disputes would have implied an unnecessary increase in legal costs for the parties.<sup>29</sup> Appeals lodged against these decisions have however been assigned to the courts established in the seat of the Cour d'Appel of each district, as have copyright disputes the value of which exceeds 1860EURO. (Article 633*quinquies* Judicial Code) This rule assigns exclusive jurisdiction to these courts, so contracting parties cannot provide otherwise in an agreement. It also applies to actions related to technological protection measures.

The Council on Intellectual Property rightfully points out that the centralization might – apart from developing expertise within the designated courts- also bear the risk of disregarding the expertise which is already available within courts. This flaw could be remedied by providing a system where the president of the Cour de Cassation can appoint judges from Tribunaux de Première Instance or from Tribunaux de Commerce other than those established in the seat of the Cour d'Appel.<sup>30</sup> The exposé des motifs does refer to the need for greater mobility of judges, but regrettably no such provision was inserted by means of the implementing acts.<sup>31</sup>

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<sup>29</sup> Exposé des Motifs, p.19

<sup>30</sup> Advies van 6 mei 2006 van de Raad voor de Intellectuele Eigendom, *o.c.*, p.44

<sup>31</sup> Exposé des Motifs,

The annex to this paper provides an overview of copyright jurisdiction in Belgium as of November 2007, the entry into force of the Act on Judicial aspects of the protection of intellectual property rights.

### **III. CONCLUSION**

The acts implementing the Enforcement directive bring no paramount change for Belgian copyright. Apart from minor changes such as the presumption of ownership for holders of neighbouring rights, the level of protection matched the one sought by the directive.

Although the specialisation of the courts is a valid objective, efforts to centralize jurisdiction should find their counterpart in a mechanism permitting mobility of magistrates, so as to take full advantage of the expertise which is present in the courts whose jurisdiction has now been taken away. It remains to be seen how the designated courts will function within this renewed framework.

On a more general closing note, given that the implementing acts align the level of protection of all intellectual property rights; the legislator would do well to consolidate the existing IP laws into a single intellectual property code. This will increase transparency, avoid discrimination between IP rights and allow a less chaotic implementation of future European and international obligations in the field of intellectual property.



## Annex

## Copyright jurisdiction in Belgium as of November 2007

	<i>Claimant:</i>	Commercial	Commercial	Non-commercial	Non-commercial
Counterfeit Claim	<i>Defendant:</i>	Commercial	Non-commercial	Commercial	Non-commercial
	< or = 1860EURO	Juge de Paix	Juge de Paix	Juge de Paix	Juge de Paix
Counterfeit Seizure	> 1860 EURO **	Tribunal de Commerce	Tribunal de Première Instance	Tribunal de Première Instance <i>or</i> Tribunal de Commerce *	Tribunal de Première Instance
		President of Tribunal de Commerce	President of Tribunal de Première Instance	President of Tribunal de Première Instance <i>or</i> of Tribunal de Commerce *	President of Tribunal de Première Instance
Summary proceedings		President of Tribunal de Commerce	President of Tribunal de Première Instance	President of Tribunal de Première Instance <i>or</i> of Tribunal de Commerce *	President of Tribunal de Première Instance
		President of Tribunal de Commerce	President of Tribunal de Première Instance	President of Tribunal de Première Instance <i>or</i> of Tribunal de Commerce *	President of Tribunal de Première Instance
Action in cessation		President of Tribunal de Commerce	President of Tribunal de Première Instance	President of Tribunal de Première Instance <i>or</i> of Tribunal de Commerce *	President of Tribunal de Première Instance
		President of Tribunal de Commerce	President of Tribunal de Première Instance	President of Tribunal de Première Instance <i>or</i> of Tribunal de Commerce *	President of Tribunal de Première Instance
* In these cases the claimant is offered choice of jurisdiction					
** For all disputes of which the value exceeds 1860EURO, jurisdiction is territorially centralized to the Tribunaux de Première Instance and the Tribunaux de Commerce of the seat of the Cour d'Appel of each district. This rule also applies to appeals lodged against decisions of the Juge de Paix.					

