



# **GUIDE TO GOING GLOBAL**

## **IPT**

*Belgium*



Downloaded: 09 Apr 2024

## INTRODUCTION

Welcome to the 2023 edition of DLA Piper's *Guide to Going Global – Intellectual Property and Technology*.

### GUIDE TO GOING GLOBAL SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The *Guide to Going Global* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

### INTELLECTUAL PROPERTY AND TECHNOLOGY

Inside this guide, we outline crucial aspects of IPT laws in over 40 jurisdictions that are particularly relevant to businesses seeking to expand their operations globally. We also summarize some fundamental commercial terms that customarily appear in IPT-related agreements.

You will find answers to such common questions as:

- Which jurisdictions recognize moral rights?
- What does my business need to do to have an enforceable assignment of intellectual property from an employee, from a consultant?
- What kind of liability can be excluded from a commercial contract?

With this edition, we've also included a section for each country that discusses the enforceability of electronic signatures.

Our goal is to make the guide as readable and informative as possible, providing you just the background you need to get an overview of the IPT laws in the selected jurisdictions. This is not a substitute for professional legal advice. If you have questions regarding specific matters, we encourage you to contact one of our contributors listed in the contributors section of this guide. With nearly 500 dedicated IPT lawyers around the globe, DLA Piper's IPT group is ready to handle your legal needs wherever you do business.

Also, please note that the guide's use of the term "trademarks" also refers to service marks, unless specifically addressed separately. The summary of intellectual property covers only the most commonly used categories worldwide (for example, we have not addressed plant patents). We have also referred to international treaties and conventions with their most commonly used names and not their formal titles (such as the TRIPS Agreement, the Berne Convention, the Paris Convention and the Patent Cooperation Treaty).

We hope that you find this guide valuable and we welcome your feedback.

This publication is provided to you as a courtesy, and it does not establish a client relationship between DLA Piper and you, or any other person or entity that receives it.

This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that intellectual property and technology law is dynamic, and the legal regime in the countries surveyed could change.

## BELGIUM



*Last modified 28 February 2023*

### INTELLECTUAL PROPERTY FRAMEWORK

#### Overview

In general, intellectual property rights in Belgium are governed by the following Federal statutory laws:

- Patent – Title I (Patents) of Book XI (Intellectual Property and Trade Secrets) of the Belgian Code of Economic Law (hereafter CEL)
- Copyright – Title 5 (Copyrights and Neighboring Rights) of Book XI (Intellectual Property and Trade Secrets) CEL
- Software – Title 6 (Computer Programs.) of Book XI (Intellectual Property and Trade Secrets) CEL
- Database rights – Title 7 (Databases) and Title 5 (Copyrights and Neighboring Rights) of Book XI (Intellectual Property and Trade Secrets) CEL
- Semiconductors – Title 8 (Topographies of Semiconductor Products) of Book XI (Intellectual Property and Trade Secrets) CEL
- Trademarks – Benelux Convention on Intellectual Property of February 25, 2005, as amended by the Protocol of December 11, 2017
- Designs – Benelux Convention on Intellectual Property of February 25, 2005, as amended by the Protocol of December 11, 2017

In addition, certain other statutory laws may protect other manifestations of intellectual property that do not fulfill the requirements of the intellectual property types cited above, such as trade names, company names, domain names and misleading and comparative advertising.

### COMMERCIAL CONTRACT FRAMEWORK

#### Overview

The Belgian Civil Code (hereafter “BCC”) provides the general principles of contract law, while the Code of Economic Law (CEL) provides further principles in respect of commercial cooperation contracts generally (such as precontractual information obligations and the B2B act [cf. infra]) and more specifically for certain types of contracts (such as (exclusive) distributorship and commercial agency) and in specific sectors.

Over the last few years, the BCC has been (and is currently still being) thoroughly revised. As of November 1, 2020, Book 8 BCC, which introduces new rules on evidence, entered into force. Further, the new Book 5 of the BCC entered into force on January 1, 2023 and contains legal provisions on general Belgian contract law. This book reflects the legislator’s aim to increase legal certainty by codifying and adding new important principles, such as hardship, anticipatory breach, unfair clauses and a so-called “knock-out rule” to deal with conflicting general conditions and contract terms.

Other books of the BCC (such as non-contractual liability, statutes of limitation, special agreements and securities) are also under review but have not yet entered into force. In respect of business-to-consumer (B2C) agreements, Book VI “Market Practices and Consumer Protection” CEL should be taken into consideration, and in respect of E-Commerce, Book XII “Law of the Electronic Economy” CEL shall apply.

In addition, in respect of business-to-business (B2B) agreements, the B2B act of April 4, 2019 amending Book VI CEL established 3 sets of rules in respect of:

1. misleading and aggressive market practices in business-to-business relations
2. the prohibition of abuse of economic dependence and
3. unfair terms.

The first set of rules is included in Book VI “*Market Practices and Consumer Protection*” CEL and entered into force on September 1, 2019. The second set of rules is included in Book IV “*Protection of competition*” of the Belgian Code of Economic Law and entered into force on June 1, 2020. The third set of rules, which determines the circumstances under which a term in business-to-business contracts is considered to be unlawful, is also included in Book VI “*Market Practices and Consumer Protection*” and entered into force on December 1, 2020. In this regard, Articles VI.91/4 and VI.91/5 CEL respectively introduce a black list of terms which are irrefutably presumed to be unlawful and a grey list of terms of which the presumption of unlawfulness may be rebutted. Besides these listed terms, Article VI.91/3 CEL provides for a general prohibition of any term in business-to-business contracts concluded between undertakings which creates an apparent imbalance between the rights and obligations of the parties. As this legislation is mandatory nature, contractual terms considered to be unlawful will be null and void.

## COPYRIGHTS

### *Nature of right*

To qualify for copyright protection, a work must be original, which has been determined by case law to mean that the protected work must be the expression of the intellectual creation of its author. Even if the work consists of elements which, considered in isolation, are not an intellectual creation of the author who employs them, the author may express their creativity in an original manner and achieve a result which is an intellectual creation through the choice, sequence and combination of those elements.

The same requirement of originality applies to the copyright protection of databases, which is considered to be original when it constitutes the author's own intellectual creation by reason of the selection or arrangement of their contents.

There is no registration process for copyright protection; the author's right arises automatically with the creation. Mere ideas or concepts are not protectable.

## Legal framework

Copyrights in Belgium are governed by Title 5 ("*Copyrights and Neighboring Rights*") of Book XI ("*Intellectual Property and Trade Secrets*") CEL.

On June 6, 2019, the EU Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directive 96/9/EC and 2001/29/EC (also known as the "Directive on Copyright in the Digital Single Market" or "DSM Directive") came into force, with its most significant changes for copyright holders being the obligation for news aggregators to remunerate press publishers and newspapers for using their content online, the introduction of a new liability regime for online content-sharing service providers and new obligations in respect of the author's remuneration, such as appropriate and proportionate remuneration, transparency and the bestseller principle. The deadline for implementation, set at June 7, 2021, was not met by the Belgian legislator. The Directive was eventually implemented in Belgium by the act of June 19, 2022, whereby most provisions have entered into force on August 1, 2022.

## Duration of right

Generally, the duration of copyright in an author's work is the author's life, plus 70 years after the author's death. There are variations of this duration depending on the type of the protected work (eg, co-authored work or if the author is unknown).

## Ownership / licenses

Only natural persons (individuals) who have created a work may enjoy the status of an author, even where an author is an employee. In this latter case, the economic rights may be assigned to the employer on the condition that such assignment is expressly agreed in writing and that the creation of the work falls within the scope of the employment agreement. However, there are some statutory presumptions, such as those regarding the assignment of economic rights in computer programs, that automatically favor employers (unless provided otherwise).

Title 5 (*Copyrights and Neighboring Rights*) also includes a rebuttable presumption of authorship; the author is presumed to be the person shown as such on the work by virtue of the mention of their name or the appearance of another sign that enables their identification.

Persons collaborating directly towards the creation of a work become co-authors. Their copyright is indivisible.

In these situations, the exercise of the right of co-authors is governed by agreement. Failing such agreement, no author may exercise this right in isolation, unless a court decision provides otherwise in case of a dispute. In situations in which the contributions of the authors may be individually identified, those authors may not, unless they agree otherwise, market their work in conjunction with new collaborators. However, they do share the right to exploit their contribution in isolation provided that such exploitation does not harm the joint work.



Contrary to the author's moral rights, which are, in principle and as a whole, non-transferable and inalienable, the economic rights are freely assignable, transferable and licensable (on an ordinary or exclusive basis), in whole or in part, in accordance with the CEL's provisions.

Through the implementation of the DSM Directive, Belgian copyright law also introduced new rights for authors and performers:

- Every author or performer assigning or licensing their rights for exploitation has the right to an appropriate and proportionate remuneration (Article XI.167/1 CEL).
- Every author or performer assigning or licensing his/her rights also has the right to transparency. In particular, the person to whom the rights are assigned or licensed will have to provide information to the author or performer on a regular basis regarding the exploitation of the work (Article XI.167/2 CEL).
- Furthermore, authors and performers having assigned or licensed their rights can claim additional appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances (the so-called "best-seller clause") (Article XI.167/3 CEL).
- Lastly, the authors or performers having assigned or licensed their rights on an exclusive basis have the right to revoke in whole or in part the license or the assignment of rights where there is a lack of exploitation of that work or other protected subject matter within the agreed term or, if no term was agreed upon, within a term determined in accordance with fair professional practices (Article XI.167/4 CEL).

In addition, the Belgian Act of June 19, 2022 implementing the DSM Directive also introduced a new Chapter 4/2 into Belgian copyright law. Chapter 4/2 is, however, not based on any of the provisions of the DSM Directive and is thus the result of a high degree of gold-plating by the Belgian legislator. In brief, pursuant to this new chapter, authors and performers of sound and/or audiovisual works will at all times retain their right to remuneration vis-à-vis streaming services for the communication to the public by such streaming services, *even if* the exclusive rights of the author or performer were already assigned or licensed to other contracting parties (such as producers or labels). Hence, the remuneration right will be *directly* payable by streaming platforms to the author or performer (albeit through their management organisations).

Chapter 4/2 received heavy criticism and has been challenged before the Belgian Constitutional Court by producers and streaming services through an application for annulment.

## Remedies for infringement

Rights holders are entitled to remedies under Title 9 ("*Civil aspects of the protection of intellectual property rights*") and Title 10 ("*Aspects of procedural law of the protection of intellectual property rights*") of Book XI ("*Intellectual Property and Trade Secrets*") CEL as well as under Book XVII ("*Specific legal procedures*") CEL. Reference should also be made to the *saisie-contrefaçon* procedure, provided in Section 1369bis of the Judicial Code, which allows a rights holder to enter, after authorization by the court's president and without prior warning, the premises of an alleged infringer or an intermediary third party in order to find evidence of and more information regarding infringements.

When implementing the DSM Directive, the Belgian legislator also introduced a new procedure in book XVII CEL, being (*ex parte*) summary proceedings against large-scale online copyright infringement. These provisions have, however, not yet entered into force: a date of entry into force still has to be set by Royal Decree. As soon as there is a *prima facie* valid copyright, neighboring right or database right, and the online infringement is *prima facie* obvious and substantial, after balancing the interests, the president of the Brussels Enterprise court can order any measure that may contribute to the cessation of the infringing acts, not only against the primary infringers but also against intermediaries.

Further, monetary relief can be sought with the damages as a lump sum. In case of a bad-faith infringement, monetary relief may also include a claim of unfair profits made, including accountability.

Finally, a number of supplementary, injunctive sanctions may be sought, such as:

- A recall or definitive removal from the channels of commerce or destruction of the infringing goods and in appropriate cases, of the materials and implements principally used in the creation or manufacture of these goods,
- The right of information, which orders the infringer to share precise information on the origin of the infringing goods or services, the distribution channels and the identity of any third parties involved in the infringement,
- The dissemination of the decision, including the displaying and publishing of the decision in full or in part.

The European principle of exhaustion (similar to the first sale doctrine) applies to copyright protected material, which implies that if a specimen (ie, a particular physical copy) of the copyrighted work has been brought into circulation by means of transfer of ownership for the first time by (or with the consent of) the rights holder within the Community, then the further distribution of that same specimen in any other way, with the exception of hiring and letting, shall not be considered as an infringement of the copyright. The exhaustion rule is reserved for the distribution of tangible objects and not for digital works (such as, for example, e-books).

In Belgium, the losing party is in principle condemned to pay the procedural costs, consisting mainly of the procedural cost indemnity (*rechtsplegingsvergoeding* or *indemnité de procédure*), the registration fees and the citation fees. The procedural cost indemnity system is set out in Article 1022 of the Judicial Code and based on a scale of lump sums intended to cover (part of) the winning party's lawyers' fees. The recoverable amounts vary between minimum and maximum amounts that are determined in function of the financial importance of the claims in the procedure. In an injunctive relief proceeding, in which no monetary relief is claimed and where the claim is thus qualified as a "not monetarily quantifiable" claim, a specific scale applies with (applicable at date of writing this Guide) a standard amount of EUR 1,800 which, upon request and depending on the circumstances, can be reduced (to a minimum of EUR 12.50) or increased (up to a maximum amount of EUR 15,000).

## MASK WORKS / TOPOGRAPHIES

### *Nature of right*

The topography of a semiconductor product shall be protected insofar as it satisfies the conditions that it is the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry. Where the topography of a semiconductor product consists of elements that are commonplace in the semiconductor



industry, it shall be protected only to the extent that the combination of such elements, taken as a whole, fulfils the above-mentioned conditions. The protection shall apply solely to the topography to the exclusion of any concept, process, system, technique or encoded information embodied in the topography.

The rights holder shall have the exclusive and temporary right to reproduce and commercially exploit topography. The rights holder may, however, not assert this exclusive right in respect of:

- Reproduction solely for the purposes of analysis, evaluation or teaching of the topography or the concepts, processes, systems or techniques embodied in the topography
- A topography resulting from the analysis and evaluation of another topography carried out in accordance with item 1 at least insofar as the new topography is the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry

The terms topography, semiconductor product and commercial exploitation shall be understood in the meaning defined in Council Directive 87/54/EEC of December 16, 1986 on the legal protection of topographies of semiconductor products. As a result, a "semiconductor product" shall mean the final or an intermediate form of any product:

- Consisting of a body of material which includes a layer of semiconducting material
- Having 1 or more other layers composed of conducting, insulating or semiconducting material, the layers being arranged in accordance with a predetermined 3-dimensional pattern
- Intended to perform, exclusively or together with other functions, an electronic function

The "topography" of a semiconductor product shall mean a series of related images, however fixed or encoded:

- Representing the 3-dimensional pattern of the layers of which a semiconductor product is composed
- In which series, each image has the pattern or part of the pattern of a surface of the semiconductor product at any stage of its manufacture

## Legal framework

Protection of semiconductor topographies is governed by Title 8 ("*Topographies of Semiconductor Products*") of Book XI ("*Intellectual Property and Trade Secrets*") CEL.

## Duration of right

The exclusive right related to the protection of topographies of semiconductor products shall come into existence when the topography is fixed or encoded for the first time and shall expire 10 years from the end of the calendar year in which the topography was first commercially exploited anywhere in the world. The exclusive right shall expire where a topography has not been commercially exploited anywhere in the world within a period of 15 years from the date on which it was first fixed or encoded.

## Ownership / licenses

The ownership of the exclusive right is granted to the creator of the topography of a semiconductor product. Where this topography is created by an employee in the course of their employment, the employer shall be deemed to be the creator, unless otherwise stipulated. Where this topography is created on commission, the person who commissioned the topography is deemed to be the creator, unless otherwise stipulated.

Like a copyright and contrary to many other EU member states, the exclusive right is granted automatically, i.e., without the obligation to register, and is freely licensable and transferrable, including to successors in title of the rights holder.

## *Remedies for infringement*

The remedies for infringement of rights in a semiconductor product and the principle of exhaustion are similar to those applicable to copyright infringement.

## **PATENTS**

### *Nature of right*

A patent shall confer on its owner the right to prevent all third parties not having his consent:

- From making, offering, putting on the market or using a product which is the subject matter of the patent, or importing or stocking the product for those purposes
- From using a process which is the subject matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the owner of the patent, from offering the process for use in Belgian territory
- From offering, putting on the market, using, or importing or stocking for those purposes the product obtained directly by a process which is the subject matter of the patent

An invention is eligible for patent protection if it is:

- New
- Inventive
- Capable of industrial application

An invention is new if it does not fall within the relevant state of the art. It is inventive if it would not be obvious to a skilled technician. Finally, the term industrial application is broadly construed and includes agriculture.

The novelty of an invention is not jeopardized if the invention was disclosed to the public in the course of 6 months prior to the filing of the application and it is due directly or indirectly to:

- An obvious abuse in relation to the applicant
- The invention being shown at an exhibition organized by the public authorities or an official international

## exhibition

In the latter case, the applicant shall declare, when submitting their application, that the invention was actually disclosed during an exhibition and furnish a relevant certificate

In order to benefit from the priority right, registrations must be carried out before the end of the 13th month following the date of the first registration (priority date). In addition, the applicant must make a "statement of priority" when applying.

Any person who, prior to the patent application or the priority date, used or possessed the patented invention in good faith on Belgian territory is entitled to continue the exploitation of the invention, notwithstanding the existence of a patent granted to a third party.

## Legal framework

Patents in Belgium are governed by Title I ("Patents") of Book XI ("*Intellectual Property and Trade Secrets*") CEL.

In accordance with the new European patent system, several updates are expected on EU level, including:

1. Regulation (EU) No 1257/2012 of the European Parliament and of the Council of December 17, 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection,
2. Council Regulation (EU) No 1260/2012 of December 17, 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements,
3. Agreement on the Unified Patent Court 16351/12 of January 11, 2013 (UPC Agreement).

Regulations (EU) 1257/12 and (EU) 1260/2012 already entered into force on January 20, 2013 only apply once the UPC Agreement enters into force. As the Protocol on Provisional Application of the UPC Agreement entered into force following Austria's official ratification on January 19, 2022, the last part of the preparatory work in establishing the Unified Patent Court (UPC) is currently being conducted.

The unitary patent system will make it possible to get patent protection in up to 25 EU Member States by submitting a single application with the European Patent Office, thus simplifying the procedure and making it more affordable for applicants.

The UPC is an international court established by the participating EU Member States to deal with infringement and validity cases of unitary patents as well as European patents, thus eliminating costly parallel proceedings and increasing legal certainty. The unified patent jurisdiction will consist of a first instance court in Paris (with a section in Munich) and a court of appeal in Luxembourg, as well as local divisions in several countries, including in Brussels.

With the upcoming entry into force of the UPC Agreement expected to occur on June 1, 2023, the transitional measures of the unitary patent system already started on January 1, 2023. Since this date, patent applicants are now able to file early requests for unitary effect as well as requests to postpone the decision to grant a European patent. These measures will remain applicable until the full entry into force of the **unitary patent system**.

**Institute for Patent Attorneys** – The new Belgian law of July 8, 2018 regulates the profession of 'Patent Attorneys' in Belgium. An Institute for Patent Attorneys will be established and everyone who is registered in the register of authorized representatives becomes a member of the institute and will, amongst other things, have the right to speak in patent litigation before the Belgian courts. The law of July 8, 2018 is accompanied by 2 Royal

Decrees of September 30, 2020: (i) Royal Decree on the representation of patents, which entered into force on November 14, 2020 and (ii) Royal Decree on the disciplinary regulations applicable to patent attorneys, which partly entered into force on December 1, 2020. The provisions regarding the right to speak in patent litigation and confidentiality for Patent Attorneys have, however, not yet entered into force.

## *Duration of right*

Patents have a duration of 20 years from the date of filing of the patent application. Renewal of the right is not possible. With regard to medicinal or plant products, the patent holder may apply for a supplementary protection certificate (SPC) which extends the duration of protection of the medicinal or plant product by the patent for a maximum of 5 years.

Exploitation of the invention is not a prerequisite for maintaining patent protection. However, if the invention is not exploited in Belgium for a period of 4 years following the date of patent application or for a period of 3 years following granting of the patent, the competent government minister can grant a compulsory license.

## *Ownership / licenses*

The Patents Act provides that the patent rights are owned by the inventor or the inventor's successor in title.

Each co-owner has a personal right to exploit the invention. Rights granted to third parties or action taken against patent infringement requires approval of all co-owners or, in case of disagreement, as determined by a court. In the event that one of the co-patentees wishes to assign their share, the other co-patentees have a pre-emption right over it for a 3-month period from the moment they have been informed of the intention to assign. In addition, the "default" co-ownership regime as provided in the Belgian Civil Code (especially with regard to succession rights) is not applicable to patent co-ownership.

If a patent application is submitted only by one owner without the involvement of the other joint owner(s), the other joint owners may initiate legal proceedings requiring the transfer of the patent or the patent application as joint owner.

If the public interest so requires, the competent ministry can grant a compulsory license under certain specific conditions.

## *Remedies for infringement*

The remedies for patent infringement and the principle of exhaustion are similar to those applicable to copyright infringement.

## **TRADEMARKS**

### *Nature of right*

A registered trademark provides its owner with an exclusive right to prevent any third party, without its consent, from:

- Using in business a sign that is identical to the trademark for goods or services that are identical to those

for which the trademark is registered

- Using in business a sign that is identical or similar to the trademark and, because the goods or services covered by the trademark and the sign are identical or similar, there is a risk of confusion in the mind of the public due to the association between the sign and the trademark
- Using in business a sign that is identical or similar to the trademark for goods or services which are not similar to those for which the trademark is registered, where the trademark enjoys a reputation in the Benelux territory and where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the reputation associated with the owner of the trademark
- Using a sign for purposes other than those of distinguishing the goods or services, where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the reputation of the owner of the trademark

Any signs (such as, but not limited to, names, designs, imprints, stamps, letters, numerals, shapes of goods or their packaging, colors and slogans) that are able to be represented graphically and used to distinguish the goods or services of a company are eligible to be registered as individual trademarks. However, signs solely comprising a shape that is imposed by the very nature of a product, which gives the product substantial value or which is necessary for obtaining a technical result may not be registered as trademarks.

In order to be registered, the sign must have a sufficient "distinctive character." Such distinctive quality is not a constant but a variable. This means that a rather weak trademark at the time of registration may become a strong trademark through intensive advertising and surveillance, or, conversely and failing sufficient advertising and surveillance, that a strong trademark may become a weak trademark with a smaller scope of protection or even become the normal commercial description of a product or service for which it is registered as a result of the activity or inactivity of its owner, in which case the trademark shall be declared as lapsed.

## *Legal framework*

Benelux trademarks are governed by the Benelux Convention on Intellectual Property of February 25, 2005. An update thereof was effected through the implementation of the Directive (EU) 2015/2436 of the European Parliament and of the Council of December 16, 2015 to approximate the laws of the Member States relating to trademarks. This Directive has been implemented pursuant to a protocol signed by the Benelux member states on December 11, 2017 in the Benelux Convention on Intellectual Property and has entered into force on March 1, 2019.

In respect of European Union trademarks (EUTM), the last update occurred with Regulation (EU) 2015/2424 of the European Parliament and of the Council of December 16, 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), which came into force on March 23, 2016 and, for a number of provisions, on October 1, 2017. Most notably, it included a name change for the traditional Community trademarks (CTM) to European Union trademarks (EUTM) as well as a name change for the OHIM to EUIPO. Considering the multiple and substantial amendments, Council Regulation (EC) No 207/2009 has now been codified in Council Regulation (EC) No 2017/1001 of June 14, 2017 on the European Union trade mark.

## *Duration of right*

The duration of trademark protection is 10 years starting from the date of filing of the application and is renewable for an unlimited number of consecutive 10-year periods.

## *Ownership / licenses*

The exclusive rights conferred by a trademark are acquired by virtue of registration to the registration holder. Thus, no protection to trademark owners is guaranteed without registration, unless such unregistered trademarks are well known. There are no specific provisions in Belgian law with respect to co-ownership of trademarks.

Independent of the transfer of all or part of a business, a trademark may be transferred with respect to all or some of the goods or services for which the trademark was filed or registered. A trademark may also be the subject of a license for all or some of the goods or services in respect of which the trademark was filed or registered.

## *Remedies for infringement*

The remedies for trademark infringement and the principle of exhaustion are similar to those applicable to copyright infringement.

## **TRADE SECRETS**

### *Nature of right*

A definition has been inserted into Belgian law as a transposition of Directive 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure gets implemented, by the Act of July 30, 2018. A new Title 8/I has been inserted in Book XI CEL in order to implement the main provisions of EU Directive 2016/943.

The general definition of a 'trade secret' has been transposed from the Directive into article I.17/I CEL:

"Trade secret: information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

Under Belgian law, a distinction must also be made between so-called "manufacturing secrets" (or *secrets de fabrique*), of which the illegitimate disclosure by employees and former employees is sanctioned by criminal law (under Section 309 of the Criminal Code), and confidential information in general.



In order to assess whether a third party acts unlawfully, another distinction should be made between disclosure and use of the information, as well as between acts committed in good faith and acts conducted in bad faith.

## Legal framework

The following statutes govern actions by an employer against (former) employees:

- i. Section 309 of the Criminal Code, which prohibits the disclosure of manufacturing secrets of the employer

Please note that this requires proving a malicious or fraudulent intent, which, as an evidentiary burden of proof, may be a high bar to clear.

- Section 17 of the Act of July 3, 1978 on Employment Agreements states that employees are obliged, both during and subsequent to the term of the employment contract, to refrain from the unlawful acquisition, use or disclosure (within the meaning of Article XI.332/4 CEL) of a trade secret (within the meaning of Article I.17/1(1) CEL) or secrets related to personal or confidential matters, of which they learn in the performance of their professional activities.

The following legislation governs actions against other third parties:

- Title 8/1 of Book XI CEL
- Civil liability law, namely Sections 1382-1383 of the Civil Code or (in case 2 undertakings are involved) Section VI.104 of Book VI "Market Practices and Consumer Protection" CEL, in conjunction with Section 39(2) of the TRIPS
- Agreement and with Section 8 of the European Convention on Human Rights, if the third party illicitly obtains, misappropriates, discloses and uses a trade secret and thus causes or threatens to cause prejudice to a third party
- Contract law, if an agreement (such as a non-disclosure agreement) was concluded with the third party.

## Duration of right

Not applicable.

## Ownership / licenses

As for most European jurisdictions, competition rules prevail over contractual arrangements. Licenses in respect of trade secrets are subject to Commission Regulation (EC) 316/2014 of March 21, 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

## Remedies for infringement

Actions for misappropriation can be brought in criminal and civil proceedings, on the one hand, and in contractual liability and liability ex delicto on the other hand. In principle, both (interim and final) injunctive and monetary relief can be obtained.

The implementation of Directive 2016/943 in Title 8/I of Book XI CEL ensures that the competent judicial authorities may, at the request of the trade secret holder, order a number of provisional and precautionary measures against the alleged infringer, such as the cessation of or the prohibition of the use or disclosure of the trade secret on a provisional basis; and/or the prohibition of the production, offering, placing on the market or use of infringing goods, or the importation, export or storage of infringing goods for those purposes; and/or the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into, or circulation on, the market; or, as an alternative to the aforementioned measures, make the continuation of the alleged unlawful use of a trade secret subject to the lodging of guarantees intended to ensure the compensation of the trade secret holder. In addition, in a court proceedings on the merits of the case, a series of injunctive and corrective measures can be sought, as well as damages and dissemination of the information concerning the decision.

## OTHER KEY IP RIGHTS

### *Nature of right*

Not applicable for this jurisdiction.

### *Legal framework*

Not applicable for this jurisdiction.

### *Duration of right*

Not applicable for this jurisdiction.

### *Ownership / licenses*

Not applicable for this jurisdiction.

### *Remedies for infringement*

Not applicable for this jurisdiction.

## INTELLECTUAL PROPERTY IN EMPLOYMENT CONTEXT

### *Employees*

Generally, subject to some exceptions, such as software and topography protection, and, in the absence of contrary, contractual or statutory, provisions, employees will retain ownership of the intellectual property developed by them.

In particular, reference can be made to the following rights:

## Copyright

Where works are created by an author under an employment or a public servant's contract, the economic rights may be assigned to the employer on the condition that such assignment is expressly agreed in writing and that the creation of the work falls within the scope of the contract. However, there are some presumptions, such as those regarding the assignment of economic rights in computer programs, that automatically favor employers.

The original author retains the moral rights on the work, since such rights are, in principle and as a whole, non-transferable and inalienable.

## Patent

Title I (Patents) of the Code of Economic Law provides that the right to a patent shall belong to the inventor or the inventor's successor in title. Title I (Patents) has not set out special rules regarding patent rights of employees, so that the status of such inventions is governed by the employment contract. Belgian case law, however, generally makes a distinction between inventions performed during professional duties (pro employer), personal inventions (pro employee) and mixed inventions (depending on the circumstances of the case and the judge's discretionary power). It is therefore accepted that the employer is entitled to the invention that is made in the framework of an employment contract, *ie*, the invention that is made during an agreement and by an employee that is hired or instructed by their employer to make inventions or to carry out research in a given domain.

## Design

If a design has been created by an employee in the course of their employment, the employer shall, unless specified otherwise, be regarded as the creator.

## *Consultants / contractors*

In principle, subject to some exceptions, such as topography protection, and in the absence of contrary contractual or statutory provisions, consultants and contractors will retain ownership of the intellectual property developed by them, even if it is commissioned and paid for by another party.

In particular, reference can be made to the following rights:

## Copyright

Where works are created by an author under an employment or a public servant's contract, the economic rights may be assigned to the employer on the condition that such assignment is expressly agreed in writing and that the creation of the work falls within the scope of the contract. However, there are some presumptions, such as those regarding the assignment of economic rights in computer programs, that automatically favor employers.

The original author retains the moral rights on the work, since such rights are, in principle and as a whole, non-transferable and inalienable.

As of August 1, 2022, it is no longer required to include a clause in an employment or public servant's contract stipulating a specific profit share for the author in case of exploitation of the assigned work in a form unknown at the date of the contract. The new remuneration rights regarding appropriate and proportionate remuneration and

the best-seller clause now provide for a sufficient safeguard in this respect.

## Patent

The patent applicant shall generally be deemed to be entitled to exercise the rights to the patent. Where an application for the granting of a patent has been made either for an invention unlawfully taken from an inventor or the inventor's successors in title or in violation of a legal or contractual obligation, the injured party may, in their capacity as owner, claim the transfer of the application or of the granted patent, notwithstanding all other rights or proceedings.

## Design

If a design has been created on commission, the commissioning party shall, unless specified otherwise, be regarded as the creator, provided that the commission was given with a view to commercial or industrial use of the product in which the design is incorporated.

## KEY COMMERCIAL CONTRACT CONSIDERATIONS

### *Registration of commercial agreements*

There are no general registration requirements for commercial contracts. Registration of licenses for patents, designs and trademarks is possible and necessary for the license to have *erga omnes* (ie, absolute) opposability, but is not required for the validity of the transfer itself.

### *Recognized language of commercial agreements*

Commercial contracts may be concluded in any language. From an enforceability perspective, the claimant must prove that the counterparty consented to the terms, which includes understanding the language. For consumers, this evidentiary burden of proof will be a high bar to clear if the contract language is not the official language of the region of residence of the consumer.

### *Country-specific issues for online content*

Book XII "Law of the Electronic Economy" CEL provides several additional requirements regarding the information to be provided to conclude online agreements, including information about the service provider and the languages in which the agreement can be concluded.

### *Enforceability of online/clickwrap/shrinkwrap terms*

In order to enforce online general terms and conditions (including online or clickwrap terms), (i) the contractual provisions must be made available to the other party in such a way that he or she can store and display them; (ii) the other party must have been aware and have consented to the content of the terms; and (iii) a written mention of the other party accepting the terms can be given by any means which guarantees that the acceptance stemmed from that party.

### *Governing law*

Subject to the case law of the European Union on the conclusion of cross border online agreements, the Rome I and Recast Brussels I regulations, and the limitations they impose on consumer contracts and employment contracts, the governing law and venue for resolution of disputes (including arbitration) specified in a commercial contract will generally be accepted and recognized.

## KEY COMMERCIAL CONTRACT TERMS

### *Enforceability of warranty disclaimers*

Limitations and exclusions of warranty claims are generally permissible, including in business-to-consumer contracts, but are subject to the Act of September 1, 2004 (corresponding to Articles 1649*bis* and following of the Civil Code) on the protection of consumers in respect of the sale of consumer goods, which provides a 2-year warranty period.

### *Enforceability of exclusions/limitations of liability indemnification*

Limitations of product liability for defects are severely restricted under Belgian law. Aside from product liability, liability in general may be excluded in principle, subject to certain conditions. For instance, liability may not be excluded if such would lead to a complete elimination of the main obligations of the agreement, or would lead to limiting one's liability for fraud, willful misconduct, death or personal injury. Since the entry into force of the provisions regarding business-to-business agreements of the law of April 4, 2019, excluding one's liability for gross negligence is also prohibited.

### *Indemnification*

The concept of indemnification will, in general, be interpreted in accordance with Belgian law principles (which do not define indemnification) to provide a similar effect, such as a guarantee provided to the indemnitee.

### *Electronic signatures*

Until mid-2016, the use of electronic signatures in the European Union was governed by Directive 1999/93 on a Community framework for electronic signatures (E-Signature Directive) as transposed into the national laws of 28 member states of the European Union. In Belgium, the E-Signature Directive was implemented by the Act of July 9, 2001 laying down a legal framework for electronic signatures and certification services.

The Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (eIDAS Regulation) was adopted in July 2014, and has been effective as of July 1, 2016. The eIDAS Regulation aims to provide more predictable regulatory environment and is directly applicable in all member states of the European Union without having to be transposed in national legislation.

The eIDAS Regulation has a 2-tier approach. This means that all electronic signatures – that is, "*data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign*" – receive some legal recognition – but only so-called "qualified" electronic signatures are automatically assimilated with handwritten signatures. Thus, in case of a dispute, it will be up to the competent court to decide whether a

"non-qualified" electronic signature can be assimilated with a handwritten signature. The eIDAS Regulation does not preclude member states from deciding that, in certain circumstances, only specific types of electronic signatures, such as qualified electronic signatures, can be used.

Under Belgian law for example, an employment contract can only be signed electronically by using a specific type of qualified electronic signature. In any event, both the employer and employee retain the right to conclude an employment contract by using a handwritten signature.

The approval of Book VIII of the new Belgian Civil Code, which entered into force on November 1, 2020, introduces new rules on evidence and specified the position of electronic signatures with regard to evidence. Book VIII now expressly includes an electronic signature within the definition of "signature", by stating that a signature is "a sign or a sequence of signs, applied by hand, electronically or by any other process, through which a person identifies himself and from which his will is shown". For the definition of an electronic signature, Book VIII of the new Belgian Civil Code directly refers to the definitions given under the eIDAS Regulation.

On June 3, 2021, the EU Commission published its proposal on the revision of the eIDAS Regulation, which constitutes a complete overhaul of the European digital identification framework. The proposal is currently in the preparatory phase in the European Parliament following the ordinary legislative procedure and may thus still be amended.

## KEY CONTACTS



### Alexis Fierens

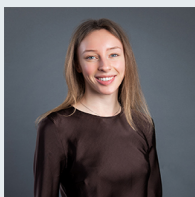
Partner

DLA Piper UK LLP

[alexis.fierens@dlapiper.com](mailto:alexis.fierens@dlapiper.com)

T: +32 (0)2 500 1592

[View bio](#)



### Emma Stockman

Lawyer

DLA Piper UK LLP

[emma.stockman@dlapiper.com](mailto:emma.stockman@dlapiper.com)

T: +32 (0)2 500 1583

[View bio](#)



## **Disclaimer**

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at [www.dlapiper.com](http://www.dlapiper.com).

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

This may qualify as 'Lawyer Advertising' requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Copyright © 2023 DLA Piper. All rights reserved.