Belgium*

Bernard Vanbrabant**
Alain Strowel***

1. To what extent does national law differentiate in terms of the effects of copyright law?

a) According to the various work categories

Although regulations on copyright law in Belgium are essentially integrated into a general law – the Act of 30 June 1994 on copyright and related rights (Copyright Act)[1] – clearly the effects of this law vary to a non-negligible extent depending on the literary and artistic categories concerned. First, in addition to the general law, the existence should be noted of a specific law that was adopted, also on 30 June 1994, to transpose the European Directive of 14 May 1991 on the legal protection of *computer programs* (Computer Programs Act).[2] If we then consider the structure of the Copyright Act, and in particular Chapter I, devoted specifically to copyright law, it will immediately be observed that Section 1, which sets out the provisions applicable to any type of work, is followed by a number of sections on the established categories of works: *literary works* (Section 2),[3] *graphic or plastic arts* (Section 3),[4] *audio-visual works* (Section 4)[5] and *databases* (Section 4bis);[6] Chapter I also includes a section common to *audio and audio-visual works* (Section 6).[7] Finally,

---

* The following text is a translated and condensed version of the report submitted for the XVII Congress of the International Academy of Comparative Law, held in Washington, DC, in July–August 2010.

** Lecturer at the University of Liège and a lawyer (Loyens & Loeff, Brussels) b.vanbrabant @ulg.ac.be

*** Professor at the University of Liège and at the University Faculties at Saint-Louis (Brussels), and a lawyer (Covington & Burling, Brussels) strowel@fusl.ac.be.

1 Act of 30 June 1994 on Copyright and Related rights, *Moniteur (Official Gazette),* 27 July 1994, p. 19297, Err. *M.B*, 22 November 1994, p. 19297. The text of the Copyrifht Act can be accessed online at the following website: http://www.juridat.be/cgi_loi/loi_a.pl?language=fr&caller=list&cn=1994063035&la=f&fromtab=loi&sql=dt='loi'&tri=dd+as+rank&rech=1&numero=1 (28 January 2010).

2 Act of 30 June 1994 transposing into Belgian law the European Directive of 14 May 1991 on legal protection of Computer Programs, *Mon*., 27 July 1994.

3 Article 8 of the Act, only provision of Section 2 of Chapter 1.

4 Articles 9 to 13, forming Section 3 of Chapter 1.

5 Articles 14 to 20, forming Section 4 of Chapter 1.

6 Articles 20bis, 20ter and 20quater of the Act, forming Section 4bis of Chapter 1. It is a matter of protecting databases as literary works, the *sui generis* right of the producer being established and governed by a separate Act.

7 This contains a single provision related to equitable remuneration.

the application of several of the exceptions to the exclusive rights, listed under Section 5 of Chapter I, is also limited depending on the nature of the work concerned.[8] The same applies as regards additional provisions that set the remuneration owed by virtue of acts of reproduction or communication subject to some of these exceptions (Chapters III, IV, Vbis and VI, Copyright Act).[9] Finally, the provisions in the sections of Chapter I devoted respectively to the publishing contract (Section 7) and to the representation contract (Section 8) may not be applied to any kind of work given the nature of such contracts.

b) According to factual aspects, e.g. different markets,[10] competitive conditions[11]

Case law has also sometimes taken into account other factual criteria that were not provided for in the law on copyright and related rights. In this way the *functional characteristics* of a work seem to have weight in appreciating the condition of originality.[12] Similarly, in cases where the moral right to integrity[13] is raised in the context of commissioned architectural works, the action brought by the author (the architect) has been rejected because of the "*utilitarian function*" of the buildings concerned.[14] Finally, if the *non-substitutability* of a (functional) work was taken into consideration in Belgium in one case at least, it was less a matter of setting aside the rules of copyright than of obtaining confidential information (necessary for the interoperability of a computer program). Belgian law does not subordinate, however, protection of any kind of work to the condition of *fixation* (in a material form) contemplated by Article 2(2) of the Berne Convention, it being understood that the absence of fixation can raise difficulties as regards evidence.

---

8 This point is developed in our answer to Question 5.

9 System of compulsory licence: *cf. infra* Question 10.

10 For instance: different treatment of literary works according to whether they are works of fiction or academic works.

11 For instance: no possibility of substitution of a work marketed by only one of the right holders.

12 STROWEL (1991), 513 *et seq.*, especially 518.

13 According to the terms of Article 1(2) of the Act of 30 June 1994, the author "holds the right of respect for his work allowing him to oppose any changes to it".

14 Civ. Namur (int.), 31 March 2000 (De Vlaminck / Ville de Namur), unpublished (RG no. 896/99); Brussels, 23 February 2001 (de Cooman and Loicq / s.a. Pain Louise and s.a. Pain quotidien), *J.T.*, 2002, p. 171; Brussels, 21 March 2003 (Brodzki / s.c.r.l. Society for Worldwide Interbank Financial Telecommunication), *J.T.*, 2003, pp. 512 *et seq*., *J.L.M.B*., 2003, pp. 783 *et seq*., *A&M*, 2003, p. 366 *et seq*., note B. VINÇOTTE; Civ. Brussels (réf.), 25 October 2002, (Sofam / Nguyen - Chu and Sofam / de Kerchove d'Exaerde), *A.&M*., 2003/1, pp. 59 *et seq*.; compare Civ. Brussels, 3 June 1994, unpublished, with comments by A. BERENBOOM in "Chronique de jurisprudence – Droit d'auteur", *J.T.*, 1996, p. 789. For comments on these cases, *cf.* VANBRABANT (2005), 263 *et seq.*; VANBRABANT (*Rev. dr. ULg* 2005), 491 *et seq.*

2. Which of the following legal instruments are used by national copyright law[15] in order to achieve a "balance" of interests and to what extent are they used?

a) Specific preconditions or thresholds allowing a work's protection only above a particular degree of creativity

It is not simple to specify to what extent the law of Belgium retains the existence of "thresholds" to protect only works that show a certain level of creativity and, therefore, balance the author's right with industrial freedom. An examination of the case law, presented in our answer to question 6a), reveals a persistent temptation among judges to refuse to protect intellectual productions that are not "creative" enough. The *Cour de cassation*, Belgium's supreme court, nonetheless ensures that, in giving in to this temptation, tribunals are not transformed into art juries.

If the condition of originality somehow establishes a balance between the interest of the author and other sometimes conflicting interests, the other traditional condition for protecting literary and artistic works, i.e. the condition of *mise en forme*, appears in our view even more fundamental in achieving this balance; according to this principle, the subject matter of copyright is not raw information or ideas, but only the expression thereof. If the Copyright Act,[16] following the example of the Bern Convention,[17] fails to mention it, this principle is unanimously accepted by Belgian legal scholarship[18] and confirmed by the Supreme Court.[19] The exclusion of ideas from the protection by copyright is justified, in substance, by the fact that their appropriation would contradict the principle of free circulation of ideas and might curb creativity.

b) Period of protection

The *duration of protection* of the works is set uniformly at 70 years *post mortem auctoris*; no shorter duration is provided for particular works or because of interests that conflict with those of the author. Special rules for calculation are provided only for works of collaboration, anonymous works or works under pseudonyms and *"oeuvres posthumes"* (i.e. works published for the first time more than 70 years after the author's death) (Art. 2 Copyright Act).

---

[15] For the rules *outside* copyright law *see* Question 12.

[16] It is nonetheless established by the Computer Program Act: "the protection offered by this Act applies to all forms of expression of a computer program. The ideas and principles at the base of any element of a computer program, including those that are at the base of its interfaces, are not protected by copyright law" (Art. 2, para. 2).

[17] However, Article 9.2 of the TRIPs Agreement provides that "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".

[18] *Cf.* e.g. BERENBOOM (2005), 58 *et seq.*; CORBET (1991), 25.

[19] Cass., 19 March 1998, *A&M*, 1999, p. 229, note DAUWE. For recent applications, *cf.* for example Brussels (9th chamber), 4 May 2001, *J.L.M.B.*, 2001, p. 1444; Brussels (9th chamber), 27 April 2006 (*J.W. v. Université Libre de Bruxelles*), *A&M*, 2006, p. 333: it is not possible to monopolise the idea of devoting an education programme to a specific subject. Ideas are not protected by copyright.

c), d) and e) Specific user rights, free of charge, granted by the law in favor of third parties; specific user rights granted by the law in favor of third parties subject to the payment of a remuneration to the right holder(s); obligations to conclude a contract established by law to grant a third party specific user rights in return for payment of a fee (mandatory license)

To achieve a "balancing" of the interests at issue, Belgian copyright provides largely for *exceptions to the exclusive rights*, sometimes granted by the law without financial compensation,[20] sometimes using a levy intended to be redistributed to the right holders (*compulsory licences*).[21] The system of individual compulsory licences, postulating an obligation contractually to grant a third party some rights of use in exchange for payment of royalties, is by contrast practically not in use under Belgian copyright law: it is only found in one case that involves making an anthology of works intended for teaching following the author's death.[22]

f) Rules on misuse

Finally, if the Copyright Act contains no express reference to the notion of "abuse", the idea of a limitation on the authors' prerogatives by taking into account the effects that result for the users from the exercise of these rights can be read between some of its lines,[23] as can the idea according to which fair proportionality should be observed when implementing certain exceptions to copyright law – *cf.* for example the requirement that borrowing for the purposes of citation only take place "to the extent justified by the objective pursued" (Art. 21(1) Copyright Act). It should nonetheless be noted that case law chiefly applies the general theory of the abuse of a right to sanction the different forms of abuse of prerogatives that the copyright holder might commit.[24]

3. Does national law regulate the user rights pursuant to Question 2c) to e) abstractly (for instance using general clauses); concretely (for instance in the form of an enumeration); by means of a combination of the two?

Clearly, Belgian copyright law provides for authorisations for use in concrete circumstances. Section 5 of Chapter 1 of the Copyright Act, entitled "Exceptions to the rights", indeed contains a list of relatively precise hypotheses[25] in which the author

---

[20] Instrument subject of point c) of Question 2.

[21] Instrument subject of point d) of Question 2.

[22] Article 21(2), Copyright Act: following the death of the author, the beneficiary's consent is not required on condition that the choice of the excerpt, its presentation and its place respect the moral rights of the author "and that a fair remuneration is paid, to be agreed by the parties, or, failing agreement, to be set by the judge in accordance with honest practices".

[23] *Cf.* for example Article 79bis(4) of the Copyright Act, which specifies that the technical protection measures "may not prevent legitimate acquirers of the protected works and performances to use them in conformity with their normal purpose".

[24] *Cf. infra* Question 12d).

[25] Articles 21, 22, 22bis, 23 and 23bis of the Act.

may not prohibit acts (of reproduction or of communication to the public) that fall in principle within the author's exclusive rights. Under Belgian law, there are in general no exceptions formulated that follow the example of *fair use* in American law.

4. What is the role played by the "three-step test" in national law in connection with the user rights pursuant to Question 3, in particular

Has the three-step test been explicitly implemented in national law (legislation)?

The three-step test under Article 5(5) of (EC) Directive 2001/29 of May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society has *not* been transposed by a *general provision* in the Copyright Act. During the preparatory work on the law of 22 May 2005, which ensures transposing the directive into Belgian law and which amended the Copyright Act, the Minister for Justice declared that "the test addresses first and foremost the legislature" and that "it would be a poor sign if this test were taken up in the Act itself since one could conclude from this that the legislature is uncertain whether the national exceptions conform with the three-step test". In mentioning the test in the Recitals and not in the body of the law, "the government therefore wished to avoid creating a legal uncertainty".[26] The Minister added that inserting the three-step test in the Copyright Act could have the effect of reversing the burden of proof and obligate all persons taking advantage of an exception to demonstrate that the test is satisfied.[27]

Nonetheless, the test, or more precisely a part of the test, the second step, appears in the wording of *certain* exceptions provided for by the Copyright Act, the benefit of which is expressly subordinated to the condition that reproduction "does not prejudice normal use of the work".[28] Commentators did not fail to point out this inconsistency and the risk of the resulting *a contrario* interpretation.[29]

Has it played a specific role in the determination of the legal standards (limitations or exceptions)?

During preparatory work on the statute to transpose Directive 2001/29/EC into Belgian law, the Minister for Economic Affairs solemnly declared that "the emphasis [had been] placed on the balance sought between the interests of the right holders

---

[26] *Doc. parl*., chamber, 51st legislature, No. 1137/13, p. 15. *See also* amendments No. 79 (DOC 51, 1137/008) and No. 56 (DOC 51, 1137/004), which aimed at inserting the test into the Act. The discussion of these amendments (No. 1137/13, pp. 45 and 46) nonetheless concluded with their being rejected by 11 votes to 5. The imperative of legal certainty was also underlined by certain authors who did not favour the insertion of the three-step test into the legislation or its application by the courts and tribunals: *see* DUSOLLIER (*I.R.D.I* 2005), 215; LEONARD (2006), 76 *et seq.*; DELFORGE (2006–2007).

[27] *Doc. parl*., chamber, 51st legislature, No. 1137/13, p. 16.

[28] Article 22(1), (4), (4)bis, (4)ter, (4)quater, (8) and (11), Copyright Act; Art. 22bis(1) to (5) Copyright Act. See also *infra* Questions 6 and 8.

[29] *Cf.* in particular JANSSENS (2005), 482 *et seq.*, No. 6.

and those of the users of works and services, of the industry and intermediaries",[30] which suggests that today's exceptions as provided for under Section 5 of Chapter I of the Copyright Act, particularly those that were added or amended by the law of 22 May 2005, conform with the requirements of the three-step test. Nonetheless, commentators have highlighted the fact that this objective was not achieved.[31] Not only did the legislature refrain, for the most sensitive questions, from determining the balance – the relationship between technological measures and private copying, submission of computers to the levy regime – instead delegating this task to the executive power, which, unsurprisingly, was not much better at adjudicating.[32] In addition, the regime of exceptions appears in many ways unbalanced[33] and incoherent.[34] Several amendments were introduced to the conditions for applying exceptions that existed before the law of 22 May 2005. The most important of these, reprography, private copying and copying for the purposes of illustration for teaching and scientific research, seem to have been dictated only by the concern of conforming to the text of Directive 2001/29;[35] the legislature does not appear to have particularly examined whether the amended exceptions satisfy the requirements of the three-step test.

Is it directly applied by judicial practice?

Despite the rule of Article 5(5) of Directive 2001/29 not having been transposed into law, the dominant opinion in legal theory is that the courts may, even should, proceed according to the three-step test,[36] which others call into question.[37] To this day, this doctrinal controversy does not, however, appear to have had any repercussions in case law. We have no knowledge of decisions made by the courts at the *judiciary level* that would, in applying the three-step test and taking account of the particular circumstances of a case, have ordered an injunction against acts of reproduction or communication expressly and unequivocally exempt by the Copyright Act; conversely, no decision has been reported that would on principle reject calling into question a legal limitation to the exclusive rights of the author. In the case *Copiepresse v. Google,* which will be considered further in this report, the presiding judge in the Civil Court of Brussels only inferred from Article 5(5) of the Directive and the

---

30 No. 1137/13, p. 5.

31 *See* in particular DUBUISSON (2008), 90 *et seq.*; in the same vein: JANSSENS (2005).

32 DUBUISSON (2008), 112 et seq.

33 DUBUISSON (2008), 116 et seq.

34 DUBUISSON (2008), 120 et seq.

35 *Cf.* our answer to Question 6.

36 JANSSENS (2005), No. 7 and the references to the authors having expressed an opinion in this way before the Directive was transposed (note 29). Proponents of the application by judges of the three-step test put forward the need to interpret the Copyright Act in conformity with the Harmonisation Directive. They also put forward the assertion (at the very least ambiguous) of the Minister for Justice according to whom the fact that the three-step test is essentially aimed at national legislators "does not mean that it can't also serve as direction for the courts and tribunals in applying the law" (Doc. 51, No. 1137/13, p. 15).

37 DUSOLLIER (*I.R.D.I* 2005), 215.

declarations made by the Minister during the preparatory work that the principle of *restrictive interpretation of the exceptions provided* by the law had been confirmed, which led him to dismiss, in the case, the benefit of the exception for citation, and the exception for reporting news to the public.[38] Application of the "test" has thus not been carried out *against* the text of the law but with a view to limiting its range, to the extent permitted by its wording.[39] It should be observed that there is here a practice criticised by the "Declaration on a Balanced Interpretation of the 'Three-Step Test'" cited in the questionnaire.

Nevertheless, the Constitutional Court of Belgium recently rendered a particularly interesting decision by suspending, then quashing, *erga omnes*, a legal limitation on the author's exclusive rights. To understand fully the reach of this decision, a few explanations should first be given concerning the specific role this Court is likely to play, in copyright law as in any other matter, as regards the differences in treatment. Because its competence was until recently limited, or nearly, to monitoring the respect for two articles in the Constitution (Arts. 10 and 11) related respectively to equality of Belgians before the law and prohibition of discrimination,[40] the Constitutional Court had retained a broad conception of these notions: according to the usual pattern of the Court, the constitutional rules of equality and non-discrimination do not exclude the possibility that one difference in treatment is established between the categories of persons, insofar as it hinges on an objective criterion and

---

[38] "That Article 5.5 of Directive 2001/29 provides that the use of the exceptions to copyright must conform with the obligations in force internationally and that the exceptions and limitation *only* apply in certain special cases, which do not infringe normal use of the work, nor cause unjustified damage to the legitimate interests of the holder of the right (three-step test), which would seem to confirm the restrictive character of the exceptions (reference is made to preamble 44 of the Directive); That if it is correct that this test was not integrated into the Act of 22 May 2005, it is not because the legislator deemed it was not applicable but because he considered that this precept was known and was first and foremost addressed to the legislator, it being specified that this did not mean that this three-step test could not also serve as direction for the courts in applying the law."

[39] Favouring such a nuanced application of the three-step test by courts, *see* in particular BRISON/MICHAUX (2005), 216; DELFORGE (2006-2007).

[40] This limited power of control of the constitutionality of laws was attributed to the Court following the constitutional revision of 1988. The Court also had the mission of ensuring respect of the different legislative powers (Federal Parliament and assemblies of different regions and communities in Belgium) and of the rules of division of competence listed in the Constitution and in the institutional reform laws. This was moreover the raison d'être of the creation of this court, in 1980, on the occasion of the transformation of Belgium "united" in one Federal State (this is also why this court was initially called "Court of Arbitration": it acted as the arbitrator in conflicts of competence). It is only since 7 May 2007 that the competences of the court were extended to control of laws, decrees and orders as regards all of Title II of the Constitution (Arts. 8 to 32 on the rights and liberties of Belgians) as well as Articles 170 and 172 (legality and equality of taxes) and 191 (protection of foreigners); it was then that the court took the name "Constitutional Court", more in keeping with its new competences. However, in an intermediary period of nearly 20 years (between 1989 and 2007), the court has carried out a kind of generalised, though indirect, control of constitutionality through the "prism" of Articles 10 and 11 of the Constitution (principle of equality before the law).

is reasonably justified. Moreover, the same rules prohibit that categories of persons be treated identically to those found in situations that, in the eyes of the measure under consideration, are essentially different, unless there is a reasonable justification for this. The existence of such a justification should be appreciated taking account of the goal and the effects of the measure being examined as well as of the nature of the principles involved; the principle of equality is violated when it is established that there is no reasonable relationship of proportionality between the means employed and the goal pursued.

This extensive conception of the notion of discrimination – not limited to the differences in treatment founded on the "sensitive" criteria as addressed under Article 14 of the European Convention on Human Rights (nationality, race, religion etc.) – should logically lead the Constitutional Court to intervene in the issue of balancing copyright. The occasion arose when an extension was made to the exception of copying for the purposes of illustration for teaching or scientific research.

The objective of the contentious provision, adopted on 22 December 2008, was to authorise, when it was "made for the purposes of illustrating educational or scientific research material to the extent justified by the non-profit-making goal pursued and did not result in harm to the normal use of the work", the partial "*or full*" reproduction of (music) "*scores*". Before this amendment, point 4bis of Article 22 of the Copyright Act only authorised, under the same conditions, the reproduction of "*short passages*" of such works, whereas only "articles" and "plastic works" could be subject to complete copying.

A collective management society and various publishers of music scores applied to the Constitutional Court requesting the suspension and cancellation of this provision. In particular, they argued that it violated Articles 10 and 11 of the Constitution, in what they deemed an unjustified difference in treatment between on the one hand the music scores, which may be fully reproduced for use in teaching, and on the other hand other comparable works reproduced on graphic or analogue media, like books, of which only short passages may be reproduced.

The plea hit the mark: In its decision 69/2009 of 27 April 2009, the Constitutional Court suspended the contentious provision, before declaring it void in its decision 127/2009 of 16 July 2009.

In these decisions, the Court begins by noting that the categories in question (scores/books) are "sufficiently comparable", as regards the reproduction of the works that are saved on graphic or analogue media. Indeed, they are "works that are independent, that are marketed separately, and for which the revenue depends on the number of copies sold" (preamble B9).

The Court then examined the raison d'être of the character, both integral and fragmentary, of the authorised copy in the absence of the author's consent. In the light of the preparatory work for the Act of 30 June 1994, it observed that

> the prohibition in principle of reproducing works in their entirety is dictated by the desire not to conflict with the normal exploitation of these works, which constitutes, moreover, one of the criteria as regards which it would be proper to exercise control in accordance with international norms, when exceptions to copyright are being introduced…. Given that normal use of "articles" and of "plastic works" differs from that

> of other works that are saved on graphic or analogue media, like books, the legislature has reasonably deemed that reproduction in the entirety of these works, for purposes of illustration for teaching, does not, in principle, form an obstacle to its normal use (decision 29/09, B11).

The Court accepts that the difference in treatment in question, which results from the addition of sheet music in the line of works whose integral reproduction is authorised, is based on an objective criterion, that is, the nature of the work that is reproduced in illustrations for teaching or scientific research (B13). But is it reasonably justified? Analysing the preparatory work for the challenged legal provision, the Court observed that

> the legislature had, on the one hand, intended to remedy a legal uncertainty that flowed, for educational establishments and scientific research institutions, from the notion of "short passages" – does an excerpt from a score constitute a "short passage" of an individual musical work? – and, on the other hand, sought to put an end to the different treatment that existed between the music scores (capable of being reproduced only partially) and works of plastic art (the complete reproduction of which is allowed)
> (decision 29/09, preamble B14.2).

Nonetheless, the Court observed, "the desire to remedy an inaccuracy – or a legal uncertainty – cannot justify the introduction of a difference in treatment that is not reasonably justified" (decision 127/09, preamble B12). Now, this is indeed the case for the difference in treatment in question between, on the one hand, the music scores, which could be reproduced in their entirety, and, on the other hand, comparable works that are saved on graphic or analogue media, like books, from which only "short passages" may, as before, be reproduced. The preferential treatment – from the perspective of the users – of plastic works (and of articles) is justifiable, but not that of music scores. In fact,

> the reproduction in full of plastic works, for the purpose of illustration for teaching or scientific research, does not in principle compromise the normal use of these works, while this is the case for the reproduction in full of music scores, which are generally published on pages or in the form of brochures or books and may be reproduced very simply and at little cost. If the reproduction of a plastic work, for the purposes of illustration for teaching or scientific research, only has meaning when it is a reproduction of the entire work, this is not the case for music scores, short passages of which may be used for the purpose of illustration.[41]

Through its checking of equality before the law, the Constitutional Court, ruthless hunter of unjustified discrimination, appeared in this way in Belgium as the ultimate guarantor of the legislature's respect for the condition of normal use under the three-step test. The legislature thus cannot ignore this condition; when it comes to the (ordinary) judge, as will be shown, he is constrained to checking this condition only for certain exceptions.

---

[41] Decision 127/09, preamble B.13.2; compare preamble B.16.2 of decision 29/09 (wording, in the context of a *prima facie* appreciation, in terms of appearance of justification).

Is the "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" well known and if so what role does it play (legislation, judicial practice, academic discussion etc)?

Very little has come of this declaration in Belgium.

5. If categories of works are distinguished according to Question 1, to what extent do the legal instruments in Question 2a) to f) differentiate according to these categories?

As was noted in the answer to question 1, *originality*, although defined uniformly by certain legal provisions and by the Supreme Court, is perceived somewhat differently by the latter when the works in question are "informative" or "functional". In this case, indeed, the search for an author's "personal imprint" tends to translate into the simple search for an author's personal choices in the composition or the expression of the creation ("theory of choice").[42] For example, in a case that involved a photocopy of the translation of the instructions for use of a hi-fi system, it has been observed that, for the court of appeal, it being a matter of a work of applied literature (by analogy, applied arts), that is, a work whose degree of creativity is limited, it is the presence of a playground, opening up choices to the creator, that constitutes, in fact, the decisive criterion of the protection: "given that, if the content of a manual contains certain limiting requirements, it doesn't prevent different ways of presentation, publication, illustration, layout etc." In the hypothesis of a work that requires little creativity, like instructions for use, it is therefore the existence of alternative forms that show, negatively, the originality of the work in question.[43]

As regards the *exceptions*, which will be described in greater detail in the answer to question number 6, several factual criteria are used to determine their field of application or their range.

First, several exceptions are limited to *works of one or more specific genres* (the artistic or literary domain in question). It is a matter of exceptions formulated under Articles 6 and 7 of the Computer Programs Act, which only apply to *software*, and also of the exception known as *private copying*, that is, copies made for private purposes within the family circle, in principle on digital media. Under the current law, this is only permitted for "*audio and audio-visual works*". The law of 22 May 2005, transposing Directive 2001/29, provides for an extension of this exception to all types of works, but the provision in question has not yet entered into force, since the

---

[42] STROWEL (1991), 158. As regards the theory of choice, see in particular BUYDENS (1996), 383 *et seq*., which stresses that the mere existence of a choice is not enough to establish originality, the essential condition being that the author had at his disposal "a freedom that appeared as 'principal' in relation to the constraints that were on him" (p. 387). For photography, *cf.* for example, Brussels, 29 March 1991, *R.W.*, 1991–1992, p. 814; Mons (12th chamber), 8 March 2004, *J.L.M.B*., 2005, p. 1628; civ. Brussels (71st chamber), 20 April 2006, *A&M*, 2007, p. 356. The criterion of choice tends to prevail in the field of computer programs as well: *cf.* for example Brussels, 25 January 2002, *J.L.M.B*., 2003, p. 788; BERENBOOM (2002), 673 *et seq*.

[43] Brussels, 10 October 1997, *DAOR*, 1998, p. 64, *Annuaire des pratiques du commerce et de la concurrence*, 1997, p. 737, note STROWEL (1997), 809.

executive power failed to adopt the necessary execution measures. Similarly, the exception of *public lending* is concerned with literary works, databases, photographic works, musical scores, audio works and audio-visual works (*cf.* Art. 23 Copyright Act), which, it is true, probably make up the essence of the works for which lending is a form of use that would interest the public.

Sometimes the limitation is implicit, in particular, when a term specific to a particular type of communication to the public is used. This is true of the exception provided for accidental reproduction or communication of a work exhibited in a public space (sub-paragraph 1 of Art. 22(1) Copyright Act): the term "*exhibited*" suggests that the object of the reproduction or the communication should be a *plastic* work. Similarly, an exception was introduced for

> the free *execution* of a work being viewed in public, when the goal of the execution is not the work itself, but the evaluation of the performer or performers of the work with a view to awarding a qualification certificate, a diploma or a title in the context of a type of recognised education
> (sub-paragraph 7 of Art. 22(1) Copyright Act).

It is clear enough that this provision does not cover all types of works. These implicit limitations may be such as to create areas of legal uncertainty.[44]

At other times, the nature of the work is taken into consideration to set *the reach of the reproduction* that may be achieved without the author's agreement. Thus several provisions authorise, under specific conditions (citation, but strictly private, illustration for teaching etc.), the *complete* reproduction of *articles* and *plastic works* but not of *other works*, in particular, pieces of work from which only "*passages*" may be reproduced. In an interesting decision that has already been cited, the Constitutional Court related this difference in treatment to the notion of normal use of the work, and did not hesitate to sanction the legislature, which had neglected to take the normal use of sheet music into consideration.[45]

Other exceptions apply *a priori* to *all types of works*: those founded on freedom of expression – citation, parody, information on a current event – the exceptions for free and private execution carried out in the family circle or in the context of school activities (sub-paragraph 3 of Art. 22(1)) etc.[46]

6. Please cite and/or describe as completely as possible

a) The legal instruments and/or the relevant judicial practice concerning Question 2a)

Originality

The definition of the original work used in certain European instruments – "an intellectual creation by its own author" – is reproduced incidentally in the Copyright

---

[44] This indication is nonetheless contradicted by the preparatory work for the Copyright Act since it follows from parliamentary discussions that the work may fall under other genres, for example, the musical genre, the decisive element being that it be disseminated in a public place.

[45] Issue of reproducing music scores: *cf. supra* Question 4.

[46] *Cf. infra* Question 6b).

Act,[47] as well as in the Computer Program Act.[48] A wide margin for interpretation remains, however, for the judges in particular, because of the flexible character of the formula "intellectual creation by its author".

In its decision of 27 April 1989, regarding photographs of machines and products made for the benefit of a company, the Supreme Court ruled that, to benefit from the legal protection of copyright law, "it is necessary but sufficient" that a photograph "is the expression of the intellectual effort of the one who made it, which constitutes an indispensable condition for giving a work the individual character through which a creation exists".[49] This formula was taken up in other decisions of the Supreme Court,[50] which sometimes also invokes the criterion of "personal imprint of the author".[51]

As stated, the Court does not specify the importance of the "intellectual effort" needed to note the "individual character" of a production (the personal imprint) which confers on it its quality of "creation". At the very outset, one could say, following F. Gotzen, that this "effort" must be capable of being shown or demonstrated (*aanwijsbaar*), but not necessarily substantial (*aanzienlijk*).[52] In other words, if it is understood that the fruit of a work that manifests *no* creativity cannot be qualified as a literary or artistic work, it would not seem necessary to demonstrate a certain *level* of creativity.

From this approach, Belgian case law has sometimes been very quick to recognise the status of a literary or artistic work, to protect, in other words, the "small change" of artistic creation or, to borrow the expression of one author, "quasi-crea-

---

[47] It did so, on the one hand, when treating the duration of protection of photographic works (pursuant to Article 2(5), Copyright Act, which transposes Article 6 of the European Directive of 29 October 1993 on copyright duration, photographs are original in the sense that they are the author's "own intellectual creation"), and on the other hand, in the Section devoted to databases (Article 20bis(1): "Databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright").

[48] Article 2: "A computer program is protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection."

[49] Consequently, it quashed the ruling of the Court of Appeal of Liège (16 June 1987, *J.L.M.B.,* 1987, p. 1369) which held that, to be protected, a photograph "must be an artistic work, a personal production that reveals a preoccupation of art, an effort with a view to creating an ideal aesthetic" and held that the contentious photographs did not show "this aesthetic originality (feeling of the beauty and the sublime) that allowed placing them among the ranks of photographic works of art".

[50] Cass., 25 October 1989, *Pas*., 1990, I, p. 238; Cass., 2 March 1993, *Larcier Cassation*, 1993, p. 52; comp. Cass. 10 December 1998, *A&M*, 1999, p. 355, note IDE and A. STROWEL.

[51] Cass., 24 February 1995, *Pas*., 1995, I, 211 and *Rec. Cass*., 1995, p. 318, note BUYDENS; Cass., 10 December 1998, *Pas*., I, 516; The criterion of personal imprint is often used in case law: *cf.* in particular Ghent, 30 June 1993, unpublished (*Balta* case); Brussels, 23 February 2001, *J.T.*, 2002, p. 171; Brussels, 11 September 2001, *A&M*, 2002, p. 518; Brussels, 8 December 2006, *A&M*, 2007, p. 249; Brussels, 29 May 2008, *A&M*, 2009, p. 106.

[52] GOTZEN (1990), 161. For an application, *see* for example Namur, 17 March 2006, *JLMB*, 2006, p. 1872.

tions".[53] Some have lamented this tendency, saying that when anything and everything is protected the power of copyright is removed.[54]

Nevertheless, the case law has otherwise taken into consideration the weak extent of creativity to refuse the protection claimed.[55] It is true that the express reference to an insufficient level of creativity remains the exception; however, it cannot be ruled out that such is the – tacit – reason for which certain productions are denied the character of originality. To give legal justification to the decision, it appears in fact that it is sufficient for the court to avoid any reference to the "aesthetic" character or the "merit" of the object considered and to restrict itself to noting the absence of the "individual character that makes a creation unique". Thus in a decision of 25 October 1989 relating to a catalogue of a supplier of spare parts for electrical appliances, the appeal in cassation lodged against a decision with such grounds was rejected for reasons that the judges deemed lawful: that "the contentious catalogue was not marked by the personality of its author and, therefore, did not take on any original character".

b) The provisions covered by Question 2c) to e)

"User's rights" (or authorisations for use)

The exceptions to the exclusive rights are listed in Section 5 of Chapter I of the Copyright Act,[56] which includes 5 provisions (Arts. 21, 22, 22bis, 23 and 23bis). The exceptions listed under Article 22bis, which were introduced into the Act at the time of the transposition of the Database Directive, belong to this particular category of works;[57] similar (but not completely identical) to several exceptions provided for the other kinds of works, they are not reproduced in this report.[58] Article 23bis, which establishes the mandatory status of the exceptions, will be commented on in our answer to question number 9. Immediately below, the exceptions found

---

[53] BUYDENS (1993); *see* in particular pp. 67 *et seq*.

[54] BERENBOOM (2008), 1 *et seq*.

[55] For example, in a decision of 1 February 2002, the Brussels Court of Appeal declared that "a work may be considered original if it is the result of intellectual effort and if this effort emerges on a unique form, marked with the seal of a personality" (Brussels (9th chamber), 1 February 2002, *A.J.T.*, 2001–2002, p. 748). According to the Court, a certain threshold of creativity must be achieved. In the case, the Court considered police uniforms as not possessing the necessary degree of originality to benefit from the protection of copyright law. Similarly: Brussels (9th chamber), 15 September 2000, *A&M*, 2001, p. 240, note HEREMANS. Comp: civil Namur (summary proceedings), 17 March 2006, *JLMB*, 2006, p. 1872.

[56] Where software is concerned, account should also be taken of the specific exceptions found under Articles 6 and 7 of the Computer Program Act: acts necessary to allow the person who has the right to use a computer program to use it in a way conforming with its purpose, including correcting errors; backup copy; reproduction to observe, study or test the operation of the program; exception for the purposes of interoperability.

[57] This provision concerns the exceptions to the rights of the authors of databases that are original in their structure; the exceptions to the *sui generis* right of the producer are listed in an *ad hoc* statute of 31 August 1998 (*Mon.* 14 November 1998, p. 36914).

[58] Except as regards Article 22bis(1)(5), which does not have a counterpart to Article 22.

under Articles 21, 22 and 23[59] are discussed; they have been gathered under different general categories according to the underlying protected interest or the purpose pursued.[60]

Freedom of expression and of information

The fundamental principle of freedom of expression forms the foundation of the classic exception of *citation* (Art. 21(1) Copyright Act), extended into Belgian law by a strange – because it only applies following the death of the author – exception for anthologies intended for teaching (Art. 21(2)). The same principle is also the incontestable ground for the exception of *parody* (sub-paragraph 6 of Art. 22(1)), as well as, from the perspective of its "right to communicate information", the exception that allows the press to relate *current events* (sub-paragraph 1 of Art. 22(1)), of which we are approaching a new exception intended to announce *exhibitions or sales of works of art* (sub-paragraph 12 of Art. 22(1)). Even though it is doubtless inspired as much by practical considerations as by the concern to preserve the freedom to communicate information, an exception will be mentioned here that is provided for the case in which a work is reproduced or communicated to the public fortuitously, secondarily, because it is in a *public space* (sub-paragraph 2 of Art. 22(1)).

Private sphere

As far as acts of reproduction or communication from the private sphere are concerned, three exceptions should be taken into account that apply respectively to *communication* of the work – its "execution" – (sub-paragraph 3 of Art. 22(1) Copyright Act), its reproduction in the *analogue* world (sub-paragraph 4 of Art. 22(1))

---

[59] Exceptions without fee, i.e. the exceptions for (i) citation, (ii) news reporting, (iii) accessory reproduction or communication to the public of a work exhibited in a public space, (iv) communication within the family circle or within the school, (v) execution of a work when taking a public examination, (vi) reproductions aimed at protecting scientific and cultural heritage, (vii) the reproduction on special terminals within cultural, scientific and teaching institutes, (viii) temporary recording by broadcasters of their own broadcasts, (ix) reproduction for the benefit of disabled persons, (x) the announcement of exhibitions or sales of works of art, (xi) the reproduction of broadcasts by social institutions for the use of their residents (those exceptions are provided for under, respectively, Art. 21, para. 1, and Art. 22, para. 1, 1°, 2°, 3°, 6°, 7°, 8°, 9°, 10°, 11°, 12° and 13°, Copyright Act). Another exception is limited to databases, regarding the reproduction or communication to the public for public security reasons or during administrative or judicial proceedings (Art. 22bis, 5°, Copyright Act), while four other exceptions are specific to computer programs (for normal use, back-up, decompiling and interoperability *cf.*, respectively, para. 1, para. 2, para. 3 of Art. 6, and Art. 7, Copyright Act).
Exceptions charged with a fee, i.e. the exceptions (i) for (digital) private copy (of audio and audiovisual works), (ii) reprography (for a private goal or for teaching or research purposes, of works fixed on a graphic or similar support), (iii) in case of (digital) copy and/or communication of works for teaching or research purposes and (iv) for public lending. Regarding the modalities for collecting and distributing the fees related to such exceptions, *cf.* our answer to Question 10.

[60] *See also* BUYDENS (2001), 429 *et seq*.

and its reproduction in the *digital* world (sub-paragraph 5 of Art. 22(1) Copyright Act).[61] The two exceptions related to reproduction are, moreover, scheduled to be changed, having been amended by the provisions of the law of 22 May 2005 that transposes Directive 2001/29, whose entry into force is subject to implementing measures (Royal Decrees) that have not yet been adopted.

In this new regime, the dividing line between the analogue copy ("reprographic copying") and the digital copy – in reality a relevant distinction as regards the modalities of the remuneration intended to compensate the author's loss of control – is no longer the medium of the "source" of the copy, but the reproduction technique and the medium of the copy that results. Moreover, the regime of the digital copy, today applicable only to audio and audio-visual works, is extended to the whole of literary and artistic creations.

It should be underlined that the extent to which these exceptions limit the author's exclusive rights is fundamentally different, in so far as they refer to the "*family circle*" (sub-paragraphs 3 [execution] and 5 [reproduction of audio and audio-visual works/reproduction of works on digital media] of Art. 22(1)) or to the "*strictly private objective*" (sub-paragraph 4 of Art. 22(1): reprographic copying). Contrary to what is suggested by common terminology, the "family circle" refers to a limited group of intimately related persons, between whom there are very close, quasi-family ties,[62] whereas the "reproduction carried out with a strictly private goal" extends to acts of reproduction carried out by *legal entities for their internal needs* (for example photocopies made within a commercial company or by a law firm).

Promoting teaching and research

To determine acts of use with an educational or research goal that are authorised, no fewer than eight exceptions should be taken into consideration, the interaction of which is far from clear: aside from the exception of citation (Art. 21(1) Copyright Act) and that for anthologies (Art. 21(2)) already mentioned, there are effectively four exceptions related to acts of communication/execution (sub-paragraphs 3, 4quater, 7 and 9 of Art. 22(1) Copyright Act) and two exceptions related to acts of reproduction (sub-paragraphs 4bis and 4ter of Art. 22(1) Copyright Act). Moreover, in the case of the latter, the Copyright Act is referring sometimes to the (reprographic) nature of the source for the copy (sub-paragraph 4bis), sometimes to the (digital) nature of the copy (medium) itself (sub-paragraph 4ter, as amended by the law of 10 December 2009), which makes it unclear whether a teacher is authorized, under these provisions, to simply print out a protected work from a digital medium. Finally, the exception brought under Article 6(3) of the Computer Programs Act that

---

[61] In a decision of 9 September 2005 that will be discussed below (the *Test Achats* case), the Court of Appeal in Brussels observes that the exception of private copying can be explained "by the fact that the violation of the author's rights caused by the private copy is negligible and difficult to control, and also by the right to respect the privacy of the beneficiary of the exception".

[62] *Cf.* for example Cass., 18 February 2000, *Pas*., 2000, I, 135.

allows decompiling a program for the purpose of study can also be related to the teaching and research exceptions.

Disseminating culture

Under this heading, we group the important exception for *public lending*[63] provided for since 1994 under Article 23 of the Act with other exceptions, brought into the Act later on when Directive 2001/29 was transposed into Belgian law, that aim at *preserving heritage*[64] and at *social integration.* The latter exceptions involve making access to works easier for disadvantaged or marginalised members of the population: the handicapped, hospitalised patients, prisoners, youths in difficulty (sub-paragraphs 11 and 13 of Art. 22(1) Copyright Act).

Proper use of technical works and proper functioning of modern communication techniques

Under this heading we first mention the provisions of the Computer Programs Act that are devoted to the limitations on copyright as regards these particular works, whose proper use involves various acts of reproduction. These exceptions concern, respectively, normal use of the program (technical reproductions) – including correcting mistakes – (Art. 6(1)), creating a "back-up" copy (Art. 6(2))[65] and the delicate exception for interoperability (Art. 7).

It is in our view a similar approach that led to the adoption of the compulsory exception provided for under Article 5(1) of Directive 2001/29, aimed essentially at allowing the transmission and normal use of works on the Internet (Art. 21(3) Copyright Act).

The latter exception may also be connected to another exception for "technical" reproductions, the goal of which is to allow broadcasting organisations to transmit broadcasts for which they have collected the required authorisations from the right holders (sub-paragraph 10 of Art. 22(1) Copyright Act).

Functioning and transparency of public powers

While it is worded as a limitation of the notion of literary work, the provision under sub-paragraph 2 of Article 8(1) and Article 8(2) of the Copyright Act may be considered as exceptions to copyright: "*Speeches* made at deliberative assemblies, in public hearings of courts or in political meetings may be freely reproduced and communicated to the public, but only the author retains the right to offprint. *Official acts of the authority* do not give rise to copyright."

A second provision with similar inspiration but somewhat different reach – also aimed at *public security* – relates to databases (sub-paragraph 5 of Art. 22bis(1) Copyright Act).

---

[63] *See* Art. 23, Copyright Act.

[64] Article 22(1), sub-para. 8, Copyright Act; Art. 22 bis(1), sub-para. 2, for databases.

[65] As far as computer programs are concerned, a fourth exception is provided for by the law, which we have related to the teaching and research exceptions (decompiling for the purpose of study; *cf.* above).

The relationship between *administrative transparency and copyright* was also taken into consideration in various regulatory instruments in Belgian law.[66] The object of the law was to ensure and organise transparency within the different administrations in the country, as a principle established by the Constitution.[67] Three rules are decreed[68] when a citizen applies to an administrative authority for disclosure of an administrative document that includes a copyright-protected work (like, e.g., architectural plans, environmental-impact studies and the like).[69] First, the permission of the author (or his legal successor) is not required for *on-site consultation* of a document or for obtaining *explanations* about it. In addition to its indicative properties – simply supplying a document to the public in a room of the administration does not in principle imply any act subject to the author's monopoly, less so providing an explanation[70] – the rule has the advantage of making it possible to consult administrative documents in *electronic* form, which implies, as is known, a temporary copy of a technical nature. It should nonetheless be underlined that such provision will only be possible on specific terminals located in the administration's rooms. Pursuant to the second rule, a communication in the form of a *copy* of a copyright-protected work is only allowed on *prior permission* from the author (or the person to whom these rights have been transferred). The application of this second rule of the regulations on administrative transparency, which simply reserves copyright, is *however* likely to be disregarded by competent *administrative commissions* to rule on applications for access: based on the consideration that copyright is susceptible to abuse,[71] a commission on access has thus agreed to balance the interests of the holder of the exclusive rights to oppose the reproduction against those of the applicant to obtain a copy of the document concerned, and decided in favour of the

---

66 We cite in particular the Act of 11 June 1994 on the administration's disclosure, applicable to acts of the federal administration (Gaz., 30 June 1994), the Act of 12 November 1997 on administrative disclosure in provinces and communes (Gaz., 19 December 1997), the Decree of the Walloon Region of 30 March 1995 on administrative disclosure (Gaz. 28 June 1995), the Decree of the French Community of 22 December 1994 on administrative disclosure (Gaz., 31 December 1994, Errat., Gaz., 21 March 1995) and the Order of the Brussels Capital Region of 30 March 1995 on administrative disclosure (Gaz. 23 June 1995). On the subject generally, see *L'accès aux documents administratifs* (ed. RENDERS), Brussels, Bruylant, 2008.

67 Article 32: "Every one has the right to consult any administrative document and to make copies, except in the cases and conditions established by law, decree or order [in the Brussels-Capital Region)".

68 See for example Article 9 of the Act of 11 June 1994. The other texts are nearly identical except notably the decrees of the Flemish Parliament, which do not specify any relationships between the law on transparency of acts of the administration and copyright and thus allow the common law to apply. For an analysis of the applicable texts, *see* in particular STROWEL/VAN DER MAREN (2008), 771 *et seq.*; STROWEL (1999a), 63 *et seq.*

69 As far as the administrative acts themselves are concerned, it has been shown that they are expressly excluded from the protection of copyright under Belgian law, whatever their "originality" (sub-para. 2 of Art. 8(1), mentioned above).

70 See however, for a different opinion, VERBRUGGEN/DE GRYSE (2003), 159.

71 Cf. *infra* Question 12d).

latter.[72] In such a case, the third rule will nonetheless apply, since, according to the regulation, in every case (simple consultation, explanations, copying), the authority must *specify that the work is protected* by copyright; the applicant is thereby reminded of the need to respect the author's rights in any further use he or she will make of the copy obtained.

c) Where appropriate, the relevant judicial practice concerning Question 2c) to e)

There is clearly a great deal of case law on the legal limitations of copyright. Two recent cases nonetheless are particularly noteworthy because of the media repercussions of which they were a subject. This media coverage is itself explained by the importance of the questions raised and their topical nature; they are at the heart of the issue of balancing copyright in the information society. The first case (*Test Achats v. EMI and others*) is related to the status of the private copy and its relationship with the protection of technological measures. A consumer association had in effect attempted, as had been the case in other countries, to challenge the legality of such measures; in the case under consideration, the mechanisms preventing the copying of music CDs. The decisions rendered in this case will be examined in our answer to question 9, related specifically to this issue.

The second case (*Google v. Copiepresse*) challenged the service offered by the American giant Google under the name "Google News". It is known that this service, which has been available in Belgium since January 2006, uses a specialised search engine that systematically indexes press articles disseminated over the Internet and classifies them according to a variety of categories (politics, economy, science etc.). These articles are referenced by Google robots ("Google bots") that are continuously scouring the Net. For every article referenced, Google News reproduces a few lines (generally the beginning of the article concerned), the source and the date added, as well as a hypertext link, itself made up of the title of the article, pointing to the site where the referenced information (the full text of the article) is found.

Copiepresse, the copyright management company for Belgian publishers of French and German-language daily press, reacted quickly by summonsing Google before the presiding judge of the Brussels Court of First Instance, in summary proceedings, for a declaration that this service infringed the copyright of its affiliates and for an order to stop the service, under penalty. The expert appointed in the context of a descriptive seizure of evidence (*saisie-description*) had indeed confirmed the possibility of accessing, via Google News, several thousands of articles that had appeared on on-line information sites of the principal Belgian daily information newspapers (in the French press, approximately 500 sources of information were concerned).

---

[72] Commission de recours pour le droit d'accès à l'information en matière d'environnement, case no. 282, 23 May 2005, *Amén*, 2006, p. 35. It is true that, in this specific matter, Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 expressly provides that "in every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal to disclose", a provision that is nonetheless not reproduced in the transposition Act of 5 August 2006.

By judgement of 13 February 2007, the court confirmed the decision rendered earlier by default against Google that had allowed the action.[73]

Applying the rules of the Copyright Act rather rigorously, the Court held, after having acknowledged the interests of the applicants to react (various management companies for the rights of journalists and photographers were joined as parties to the action commenced by Copiepresse), that "in reproducing, on its Google News site, titles of articles as well as short extracts from the articles, Google is reproducing and communicating to the public works protected by copyright". The service, therefore, infringed both the right of reproduction and the right of communication to the public of copyright holders. That there had been reproduction and communication to the public was, in fact, not in dispute;[74] the more delicate issues to be decided in this case were, first, whether the elements taken up were protected, and second, whether the reproduction fell within the exceptions, in particular, the exceptions of quotation and of news reporting.

As for whether the elements reproduced on the Google News pages (the titles and the first lines of the articles) were protected, the Court considered that the title may be original and thus protected by copyright (even if many "purely descriptive titles" lack originality and are thus not protected); the same may be said of the extracts from the articles (in particular, since they reproduce the first few lines, thus the "lead-in" phrases).

As regards exceptions, which are of greater interest here, the Court also rejected Google's argument. By way of introduction, the judgement observed: "The purpose of the exceptions in particular is to balance copyright against other rights (like the right to information as argued by Google)". It also refers to the three-step test, which it deems could "be used by the courts for directions in applying the law".[75] The Court accepted that the general condition for the exceptions to apply, i.e. the condition of "lawful publication", was fulfilled in the case, "Google News pulling the extracts from newspaper articles published on the publishers' site."[76]

---

[73] Default orders of 5 and 22 September 2006. The judgement of 13 February 2007 was published in *A&M*, 2007, p. 107, note VOORHOOF, *I.C.I.P.,* 2007, p. 147, *I.R.-D.I.,* 2007, p. 157, note VAN ASBROECK and M. COCK, *R.D.T.I.,* 2007, p. 221, note LEFEBVRE, *R.D.C.,* 2007, p. 377, note VANDENDRIESSCHE. *See* also VOORHOOF (A&M 2007), 120 *et seq*.; DUSOLLIER (2007), 70–75; VOORHOOF (Mediaforum 2007), 81–84; VAN DEN BULCK (2007), 67–70; VAN ASBROECK/COCK (2007), 463–466; MORLIÈRE (2004), 7 *et seq.*; VANDENDRIESSCHE (2007), 394–410; JACOB/DUMONT (2006), 15–16.

[74] The court also held that there was an infringement of the moral rights of paternity (the name of the author and the articles are not mentioned on the Google News site) and of integrity (Google News operates a thematic classification of article extracts "of such type that the editorial or philosophical line to which the author adhered may be altered").

[75] On this issue, *cf. supra* Question 4.

[76] "That the circumstance that these articles would only be accessible, after a certain time, to subscribers has no direct impact to the extent that the term 'work lawfully published' has more to do with the author's right of disclosure…. That the publication of the work on the internet exhausts the right of disclosure, the author having chosen to make his work available on the internet…."

The Court however dismissed the regime of *citation* (quotation) because the automatic indexation should not be confused with the insertion of an extract created "for the purpose of criticism, argument, review,[77] teaching or carrying out scientific works pursuant to honest use in the profession and to the extent justified by the goal pursued".[78]

Similarly, Google could not, according to the Court, rely on the exception for *news reporting*,[79] which is an exception founded on the need for the press to react quickly to information and which is subordinated to the existence of a comment or report that should remain the main source;[80] there was a certain contradiction for Google to claim the exception for reporting, which established a connection between its site and an on-line portal, while otherwise Google underlined the automated nature of its Google News service.

The decision is interesting in another respect, which has not always been emphasised by commentators: according to the judge, copyright is not based on an *opt-out* system, in the sense that the holder should first make his or her objection known, but more on an *opt-in* system, which requires that the holder of the right give prior permission and that a request first be sent by the user. According to the Court, "copyright is not a right to object, but a right of prior permission; … this means that the permission must be obtained positively, prior to the contemplated use". Google argued that it would be enough for the publishers to state beforehand that they did not wish to be referenced (either by installing technical means to prevent referencing, or by stating their wishes). This reasoning is brushed aside by the Court, which thus confirms the model of licence at the heart of copyright. It is, of course, this fundamental requirement of the copyright system that slows the network effects produced by the possibility of automatically incorporating the contents (without prior permission).

---

[77] Quotation for the purposes of "review", introduced in the Copyright Act by the law of Act of 22 May 2005 was certainly the exception that had the greatest chances of being accepted. The court nonetheless rejected it, finding: "That it doesn't appear ... that the inventory of articles carried out by Google News can be qualified as 'press review'; ... That the [French dictionary] Larousse defines *review* as 'the action of examining carefully and methodically a group of elements', while a 'press review' is defined as 'a comparative report of the main newspaper articles on the same subject'; That this definition was confirmed in the law by the Dutch term 'recensie' or 'recension' in French, defined by the Larousse as: 'critical analysis and report of a work or a review'; That the object of the purpose of review does not appear to be the collection of elements intended to give a general survey of a theme but the commentary of a work; That in the case, Google limits itself to taking an inventory of the articles and classifying this automatically; that Google News is in no way carrying out analysis, comparison or critique of these articles that are in no way commented on".

[78] Article 21(1), sub-para. 1, Copyright Act; *cf. supra* Question 6.

[79] Article 22(1), sub-para. 1, Copyright Act; *cf. supra* Question 6.

[80] "That … if it could be considered that the activities of Google News falls in particular within a framework of information, it does not, nevertheless, appear that Google News in gathering various article titles around different themes offers a report on the news; That as stated above, no commentary on the news can be found, in effect, on the Google News site that is limited to reproducing extracts of articles grouped by theme; That moreover, and just as in the citation, it appears that the protected works can constitute nothing more than an accessory to the report and not its main object …."

7. Have certain legal instruments according to Question 2a) to f): only been introduced in the course of time; been repealed in the course of time; and if so why?

The issue of copyright exceptions (and legal licences) is one that has been revised the most, and sometimes substantially, by the legislature since the adoption of the Copyright Act in 1994. It is useful to recall that the old law on copyright of 22 March 1886,[81] which governed the matter for most of the 20th century, included only two or three exceptions,[82] even if it is true that the case law allowed some slack, for example, to exclude parody from the domain of unauthorised publication.

The great innovation of the Copyright Act (30 June 1994) was without doubt the introduction of legal licences for private copying (reprographic copying and copying audio or audio-visual works) and public lending of works. Other exceptions, unconnected to a right to remuneration, were also either confirmed (citation, but also, considering the previous case law, execution within the family circle and parody) or introduced (anthologies, news reports) by this law.

The matter was again reviewed quite substantially when the Database Directive was transposed into law (statute of 31 August 1998). Not only was Article 22bis added to Section 5 of Chapter I of the Copyright Act, which governed exceptions to databases, but also Article 22 was amended. The statute of 1998 in particular introduced significant exceptions for reproductions (reprographic copying or digital copying of works) intended to illustrate teaching or scientific research. It is also this law that added the very particular provision of Article 23bis, which declared all the exceptions of Section 5 mandatory.[83]

Finally, as has already been noted, the regime of exceptions was still one of the main subjects of the Act of 22 May 2005 that transposed Directive 2001/29 into Belgian law. There were three main changes made by this law. First, it inserted the compulsory exception provided in Article 5(1) of the Directive for temporary technical reproduction. Then, it reversed the criterion of distinction between reprographic copying and digital copying, which has not yet entered into force. Finally, it added new exceptions, selected from among the lists proposed by Articles 5(2) and 5(3) of Directive 2001/29: extension of the free and private execution in the school context; exception in favour of *e-learning*; preservation of cultural and scientific heritage of libraries, museums and archives; communication for the purpose of research or private studies of works that form part of collections of these libraries, museums or archives and teaching and scientific establishments using special terminals accessible in their premises; ephemeral recordings of works carried out by broadcasting organisations for their own broadcasts; exceptions for the benefit of the handicapped

---

[81] Gaz., 26 March 1886; *Pasin*., 1886, p. 98.

[82] Besides the quotation exception (Art. 13), the law presumed, though in a rebuttable manner, the consent of right holders in journal articles when they are repeated in other journals (Art. 14). Like Article 8 of the Copyright Act, a provision (Art. 10) also authorised reproducing speeches given in deliberative assemblies, in public court hearings, or in political meetings, while another (Art. 11) confirmed that official acts of the authority do not give rise to copyright.

[83] With regard to this provision, *cf. infra* Question 9a).

and of hospital, penitentiary and youth-assistance establishments; announcements of public exhibitions or sales of artistic works.[84] These new exceptions were brought into force on 27 May 2005.

On the whole, it is clear that the number and extent of the exceptions has continued to grow with the revisions of copyright legislation, even if for some of them the condition of the absence of infringement on the normal use of the work has been expressly provided.[85] It should also be noted that the amendments made in 2005 to the exceptions to reprographic copying (private and in the context of teaching or research) and "digital" copying (with the same objectives) were guided by the desire to fall in line with the system of Directive 2001/29 without real consideration of the effects of these amendments from the perspective of the right holders. One cannot cite any exception that has been repealed, besides the forced "repeal" (quashing by the Constitutional Court) that was set out in our answer to question 4 (reproduction in entirety of sheet music).

8. Are there rules that restrict the scope of the user rights according to Question 2c) to e), in particular: by laying down specific preconditions for the applicability of individual user rights; by laying down abstract preconditions for the applicability of individual user rights?

The exceptions (regardless of whether financial compensation is involved) presented in our answer to question 6 are in fact often accompanied by conditions for application that tend to limit their scope. The legislature resorts to both "concrete" and "abstract" conditions and combines them as necessary.[86]

a) Concrete conditions

The *purpose of the reproduction or the communication* plays a fundamental role in nearly all the exceptions.[87] Thus we find: the goal of teaching (and of scientific research) in no less than 6 exceptions (citation, anthologies of deceased authors, reprographic copying, digital copying, communication over intranet, consultation of private collections in museums, archives etc.); the goal of criticism, argument or review (citation); the goal of information as regards news events; the "strictly private goal"; the goal of humorous intent (caricature, parody, pastiche); the purpose of evaluating a recipient; the goal of preserving cultural or scientific heritage; the goal of offsetting a handicap; the goal of public security, administration or justice; the

---

[84] These different exceptions were raised in our answer to Question 6b).

[85] *Cf. supra* Question 4, especially p. 3, and *infra* Question 8b).

[86] The most meaningful Article on accumulation is certainly Article 21(1) of the Copyright Act on the *citation* exception: quotations, drawn from a work lawfully published, completed with the goal of critique, argument, review, teaching or scientific works, in accordance with honest uses of the profession and to the extent justified by the goal pursued, do not breach copyright. Quotations as understood under the preceding paragraph should mention the source and the author's name, unless this is impossible.

[87] Cf. *supra* Question 6.

purposes of correcting mistakes, saving and ensuring interoperability of software packages, and the goal of the proper technical functioning of the Internet.

It being a matter of the influence, on the exclusive right of the author, of the goal in which acts of exploitation are made, a decision rendered by the Constitutional Court on 18 April 2007 will be mentioned again.[88] Sued for payment of royalties owed because of the communication to the public of protected musical works, a CD shop owner had argued that there existed unwarranted discrimination (by identical treatment of non-similar situations) through the fact of the absence of an exception for the benefit of persons and organisations that disseminate music precisely in view of encouraging the sale of media and thus in the financial interest of the right holders.[89] Nonetheless, the Court rejected this proposal, stating, in substance, that

> if the author holds a property right in his or her creation and he or she consents to it being the subject of trade, it matters little that the rights he or she possesses depend on the involvement of one over another party to this commercial activity. Assuming the purpose to which we have just referred can justify a benefit to the vendors of musical works, this exception can only be implemented by provisions that, to avoid any abuse, should contain, regardless of the form, control measures aimed at preventing the suggested listening by the customer from becoming ambient music and therefore communication to the public. The legislature did not, in this way, disproportionately damage the rights of the interested parties, since the use of a headset moreover would allow its prevention, the act of listening to the work, whether to sell to the customer or for technical reasons or to allow the personnel to become familiar with the work for sale, becomes a communication to the public triggering the application of copyright law.

b) Abstract conditions

As was specified in the answer to question 4, the concern not to *prejudice the normal use of the work* is expressed as regards many legal exceptions to the exclusive rights of the author, but not all: reprographic copying for private ends; reproduction and communication in a closed network for the purpose of illustration in teaching or scientific research; reproduction and communication to the public of databases for reasons of public security or for administrative or jurisdictional purposes; preservation of the cultural and scientific heritage (exception for the benefit of handicapped persons).

Under the two last circumstances (only), the condition that there be no breach of normal use of the work is expressly combined with the requirement that the use "*does not cause unjustified prejudice to the legitimate interests of the author*".

---

88 Decree No. 59/2007.

89 One of the questions referred was worded as follows: "Are Articles 10 and 11 of the Constitution violated in that Article 22 of the Copyright Act, which provides the exceptions for the benefit of certain categories of persons and/or organisations that publicly distribute music because of their specific activity or the goal of the distribution does not grant an exception for shops that sell musical works while both the specificity of this activity and the goal of public distribution could justify a specific treatment identical to that of persons and/or organisations foreseen by Article 22 of the Copyright Act?"

The absence of a "*search for a (direct or indirect) commercial (or economic) advantage*" or, according to the more traditional formulation, though not quite equivalent, of the "*aim of making profit*" is also imposed by several provisions setting out the limitations to copyright (exceptions for anthologies, reproduction and communication through a closed network for the purpose of illustration in teaching or scientific research, preservation of cultural and scientific heritage, making the personal collections of museums, archives and so on available on terminals, exception to benefit handicapped persons and hospital establishments, penitentiaries and youth assistance, announcements for exhibitions or sales of artistic works).

Other abstract conditions appear in some exceptions, that is, the *conformity to honest usage of the profession* (citation, anthologies, parody etc.) and the requirement of *proportionality* between the goal pursued and the extent of the reproduction (citation, reproduction and communication in a closed network for the purpose of illustration in teaching or scientific research, preservation of cultural and scientific heritage, exception for the benefit of handicapped persons, announcements for exhibitions or sales of artistic works, reports on news events). The exceptions are thus very controlled, though the control is not very well organised.

Finally, it will be observed that the application of all the exceptions is subordinated to the condition that the work reproduced or communicated has been "*lawfully published*". Most legal writers see here a reference to the right of disclosure rather than to the lawful character of the copy that serves if necessary as the source for the reproduction or communication to the public.

9. Are there rules to protect the existence of the user rights according to Question 2c) to e), in particular

What kinds of binding rules are there to prohibit the undermining of statutory user rights?

Under Belgian law, the legislature decided to recognise expressly the mandatory ("imperative") nature of (nearly) all the exceptions.[90] Article 23bis Copyright Act, inserted by the law of 31 August 1998, provides that "*the provisions of Articles 21, 22, 22bis and 23(1) and (3) are imperative*". This imperative character implies in particular that all contractual clauses that rule out the application of an exception, with the consent of the beneficiary of it, are likely to be declared invalid. Nonetheless, it will be a "relative" invalidation, in the sense that only the person whose interest is protected by the exception concerned has the option of relying on it in court.[91]

The principle was maintained when the Directive was transposed by the law of 22 May 2005, while some authors argued that a distinction should be made, depend-

[90] In software matters, Article 8 of the Computer Programs Act provides that the provisions of Article 6(2) (backup copy), (3) (decompiling) and (7) (interoperability) are compulsory. The exception for the normal use of computer programs is thus not contemplated.

[91] The beneficiary may also relinquish taking advantage of the nullity when a dispute arises; such would not be the case if the exceptions were recognised as of public policy. It is nonetheless a matter, in the present authors' view, of an essentially hypothetical situation.

ing upon the goal pursued by the law, between public policy limitations (those aiming at the protection of fundamental rights), mandatory exceptions (protection of private interests) and simple exceptions (those adopted for practical considerations).[92] A significant departure was nonetheless taken from the principle of the imperative nature of the exceptions,[93] aimed at favouring the use of works on the Internet.[94] Paragraph 3, new, of Article 23bis (transposing paragraph 4 of Article 6(4) of Directive 2001/29) provides indeed that "the provisions of paragraph 1 may be contractually waived when it involves works that are made available to the public pursuant to agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them".[95]

Another question that was raised, before Directive 2001/29 was transposed, was that of how to determine whether, considering in particular their imperative status, the exceptions to copyright did confer true subjective rights the respect of which may, if necessary, be imposed on the copyright holders by means of a court action, particularly if technological measures prevented users from benefiting from these exceptions. Not surprisingly, concerning the exception of private copying, this question was raised before the courts by a consumer association. This case is presented below.

How is the relationship between technical protection measures/DRM (digital rights management) and statutory user rights regulated?

The *Test Achats v. EMI et al.* case

In September 2003, the Belgian association for consumer protection Test Achats decided to initiate an action against EMI and other "major", producers of phonograms, in a bid to stop their use of technical procedures that blocked copying certain Compact Discs, which, according to Test Achats, infringed the "right" of the consumer to private copying. The question implicitly posed therefore revolved around the nature of the exception of private copying. According to the applicant association, the consumer draws from sub-paragraph 4 of Article 22(1) of the Copyright Act[96] a true subjective right to the private copy. The existence of this right may be inferred, on the one hand, from the fact that consumers pay royalties for private copies when they buy devices or media intended for copying,[97] and on the other hand, from European Directive 2001/29/EC of 22 May 2001.

---

92 *Cf.* in particular BUYDENS (2001).

93 For issues of software programs, see below.

94 *Doc. Parl*., Ch., session 2004–2005, No. 51-1137/013, p. 19. *Cf.* in particular LAURENT (2006), 75.

95 *Cf. Doc. Parl*., Ch. repr., session 2004–2005, No. 51-1137/013, p. 44; *see also* p. 45 and p. 90. For a commentary, *see* in particular DE VISSCHER/MICHAUX (2006), 133 *et seq.*; DUSOLLIER (2005), 503; LAURENT (2003), 29; BERENBOOM (2005), 166; HENROTTE (2004), 1157 *et seq*.

96 This provision is reproduced under our answer to Question 6b).

97 Articles 55 to 58 Copyright Act: *cf. infra* Question 10.

At first instance, the presiding judge of the court in Brussels declared Test Achats's action admissible but unsubstantiated, confirming clearly that the private copy was not a right enjoyed by the user but an exception to the exclusive right of the author; according to the judge, the existence of remuneration for private copy does not create a right to create such a copy.[98]

The appeal developed by Test Achats against this decision was rejected by the Brussels Court of Appeal.[99] However, the Court did not really make a statement on whether users in fact enjoy a subjective right to copy. It merely observed that sub-paragraph 1 of Article 87(1) of the Copyright Act, on which the consumer association founded its court action, gives the presiding judge of the court of first instance the power to note the existence and to order an injunction against "*any infringement of the authorship right or related right*"; according to the Court, this text "clearly indicates that the presiding judge of the court cannot order prohibition of an infringement to a right unless it is an authorship right or a related right". It may not take such measures to protect any other right that a natural or legal person would think it could draw on in the law of 30 June 1994 or, *a fortiori*, in other texts.[100] And yet, Test Achats "nonetheless does not demonstrate that this alleged subjective right to private copy is an authorship right or a related right".[101] The Court concluded that

> the finding that Test Achats does not demonstrate that the infringements of which it complains are infringements to an authorship right or related right is enough to conclude that its claim based on Article 87(1) of the law of 30 June 1994 is unsubstantiated. There is therefore no interest in examining the other means of defence developed by the respondents sustaining in particular that Test Achats did not have the

---

[98] Civ. Brussels, 25 May 2004, *A.&M.*, 2004, p. 338, note DUSOLLIER (2004), 1157, note HENROTTE, "Copie privée, une chose insignifiante dont la loi n'a pas à s'occuper: pas si sûr!". In her doctoral thesis on the issue of technological measures in copyright, DUSOLLIER also concluded that there was no "right" to the private copy *see* DUSOLLIER (2005), p. 485.

[99] Brussels (9th chamber), 9 September 2005, *A&M* 2005, p. 301, *D.C.C.R.*, 2006, p. 54, note LAURENT, *Juristenkrant*, 2005, p. 5, *I.R.-D.I.* 2006, p. 41, *J.T.* 2006, p. 528, *J.L.M.B.*, 2005, p. 1644, *NjW*, 2005, p. 106, *Ing.-Cons.*, 2005, p. 360, *R.D.T.I.*, 2005, p. 57.

[100] Moreover, the Court emphasises, citing sub-paragraph 5 of this provision, "the action is formed at the request of all interested parties, an authorised management company or a professional or interprofessional organisation with legal personality.... So that for the requested injunction to be acceded, Test Achats must prove that: – there is an infringement of copyright or a related right, – it is an interested party, an authorised management company or a professional or interprofessional organisation with legal personality, – it has the interest required to take legal proceedings. It is sufficient that one of these elements is not established for the action to be rejected. Since it is a derogating procedure in common law, its conditions for application should be strictly applied".

[101] In fact, the Court adds, "Sub-paragraph 5 of Article 22(1) cited above introduces an exception to the general principle presented by Article 1 of the Copyright Act according to which the author alone has the right to reproduce his or her work or to authorise its reproduction in any form. This article is situated in Section 5 of Chapter I of the Copyright Act, entitled 'Exceptions to the patrimonial rights of the author'. Copyright thus ends where reproduction of audio works within the family circle for their use only begins. An exception to copyright may not be in itself a copyright nor form the foundation for an injunction".

standing to act, that there is no subjective right to private copy and that the contentious CDs may be copied. The decision of the first judge declaring the action commenced by Test Achats as unsubstantiated can be upheld, although for other reasons.

Protection of technological measures and rights management information after the transposition of Directive 2001/29

Articles 6 and 7 of Directive 2001/29 were transposed, fairly literally, into Articles 79bis and 79ter, respectively, of the Copyright Act.

It will be observed that the act of circumventing effective technological measures, commercial acts carried out with a view to allowing such circumvention, the act of removing or modifying the information on the regime of rights and commercial acts that affect the works modified in this way are assimilated, subject to the moral element or circumstance provided by Directive 2001/29 being established, under piracy and consequently liable to penal sanctions. As for the rest, the Belgian legislature's main innovation consists of an explanation according to which "the technological measures contemplated under 1 may not prevent legitimate purchasers of the protected works and services from using these works and services according to their normal purpose" (Art. 79bis(4) Copyright Act).

Technological measures and exceptions: Transposition of Directive 2001/29 into Belgian law

In applying Article 6(4) of Directive 2001/29,[102] the Belgian legislature also introduced a "safeguard" mechanism intended to allow right holders of certain exceptions to exercise these, notwithstanding the existence of technological measures.[103] As provided by the Directive, this mechanism includes two phases: the copyright owners are first invited to, of their own initiative, take measures to ensure enjoyment of the exceptions; only if they do not is it possible to contemplate resorting to enforcement.[104]

Pursuant to sub-paragraph 4 of Article 6(4) of the Directive, the Copyright Act nonetheless does not impose adopting voluntary measures when there is access to works in the context of an on-demand service: by virtue of Article 79bis(3) "the second sub-paragraph does not apply to works and services that are available to the public on demand according to contractual provisions between the parties, such that members of the public may access them from a place and at a time individually chosen by them".[105]

---

[102] For commentaries on this provision in Belgian doctrine, *cf.* in particular DE VISSCHER/MICHAUX (2006), BUYDENS (2001), 217 *et seq*.; DUSOLLIER (2005); LAURENT (2003).

[103] *See* in particular STROWEL (2001), 90 *et seq*.

[104] *Cf.* Article 79bis(2), Copyright Act. The decision to defer beforehand to the market and to the voluntary measures adopted by the right holders, and thus to encourage the latter to ensure the enjoyment of the exception contractually has been criticised, in particular in Belgian doctrine: *see* in particular BUYDENS (2001), 226; LAURENT (2003); BUYDENS/DUSOLLIER (2001), 13 *et seq*.

[105] As regards this provision, *see* in particular LAURENT (2003), 76.

In the absence of the adoption of voluntary measures, the right holders may, in accordance with sub-paragraph 1 of Article 6(4) of Directive 2001/29, be *forced* to make it possible to reproduce or communicate as provided by the "privileged" exceptions. In Belgium, this limit takes the form of a *judicial* injunction. An injunction may be required, in the context of a summary judgement on the merits, not only by the interested parties but also by the legal persons defending the collective interests of these parties. This system is provided for under Article 87bis of the Copyright Act.[106]

Technological measures and private copying since Directive 2001/29 was transposed

It is known that sub-paragraph 4 of Article 6(4) of Directive 2001/29 gave Member States the discretion of whether to include the exception of private copying among those which the right holders cannot hinder by technological measures.[107] In Belgium, the legislature did not include this provision; as was seen, neither Article 79bis nor Article 87bis of the Copyright Act introduced by the law of 22 May 2005 refers in fact to sub-paragraph 5 of Article 22(1) of the Copyright Act establishing the private (digital) copy.[108] Nonetheless, the "right" to the private copy is not definitively condemned, because authorisation was given, with careful terms since it is subordinated to the three-step test, to the executive power: by virtue of sub-paragraph 2 of Article 79bis(2), the latter may extend to sub-paragraph 5 of Article 22(1) the list of "privileged exceptions" if this does not hinder normal use of the works or services nor cause unjustified prejudice to the legitimate interests of the right holders.[109]

If this extension did take place, the benefit of the injunction as provided under Article 87bis of the Copyright Act would automatically be extended to the interested parties,[110] which would reverse the *Test Achats* case law mentioned above.[111] If the government has not yet implemented the authorisation that has been conferred on it, it will be noted that many bills have since been submitted to "widen access to protected works" by including the private-copy exception in the list of privileged exceptions.[112]

---

[106] This provision, inserted by the Act of 22 May 2005 transposing Directive 2001/29 (Art. 30), was amended by an Act of 10 May 2007 (*Mon.,* 10 May 2007, p. 5694, Erratum, 14 May 2007, p. 26121), which transposes into Belgian law Directive 2004/48/EC on the enforcement of intellectual property rights.

[107] For a critical assessment of this (non-) choice, *see* in particular MAILLARD 2005, 69 *et seq*.; KOELMAN (2000), 30; STROWEL (2001), 93.

[108] *Doc. Parl*., Ch. repr., session 2004–2005, No. 51-1137/013, p. 80–82.

[109] See *Doc. Parl*., Ch. repr., session 2004–2005, No. 51-1137/013, p.70; *see and compare* STROWEL (2001), 94; LAURENT (2003), 76; JANSSENS (2005), 499; DUSOLLIER (2005), 538; DE VISSCHER/MICHAUX (2000), 33 and 40.

[110] *Cf.* sub-para. 1 of para. 1, *in fine*, of the provision, reproduced above.

[111] *Cf. supra* point b).

[112] Bill by WATHELET introducing certain technical changes to the Copyright Act and extending access to protected works, *Doc. parl*., Chambre, session 2005–2006, No. 2112/001 – p. 5.; bill by MONFILS and BACQUELAINE on the private right to copy, *Doc. parl*., Chambre, session 2005–2006, No. 2093/001.

Is there a decision (explicit or implicit) on the extent to which exclusivity rules to the benefit of the right holder, or access possibilities in favor of third parties, should enjoy priority in the event of doubt?

Pursuant to Article 3(1), sub-paragraph 3, of the Copyright Act, contractual provisions relating to copyright and to its modes of exploitation must be interpreted restrictively. Although the scope of application of this legal provision is limited to copyright agreements, the principle *in dubio pro auctore* was successfully invoked in the *Copiepresse* case, along with the three-step test, to dismiss Google's defences based on the citation and news-reporting exceptions.

10. Questions concerning user rights subject to remuneration or mandatory licence

a) How is the amount of the fee determined: basically; and in the event of conflict?

As regards the only "*compulsory*" *licence* provided by the Copyright Act (anthologies of deceased authors in the context of teaching), the law merely declares that equitable remuneration should be paid, "to be agreed by the parties or, failing this, to be set by the judge pursuant to honest usage". This provision was not subject to a specific implementing measure. In the event of a dispute, it is the courts with ordinary jurisdiction that may rule.

For *legal licences* (acts of reproduction authorised by the law for financial compensation),[113] *the law* provides the *principle of remuneration*, as well as *general rules* as regards the manner in which to calculate it, to impose it and to distribute it. Using authorisations, the legislature leaves it to the *executive power* (the "King", that is, the federal government) to set the *precise methods* of remuneration.[114] Various *committees*, comprising representatives of different interested parties, should nevertheless be consulted, a fact that has proved to be a stalling factor for implementing legal licence systems.

b) Are there particular procedural rules concerning the distribution of the burden of proof; provisional measures; other aspects?

There is no noteworthy rule in these respects in Belgian law.

c) How is the fee paid to the right holders by the party entitled to use?

Generally, remuneration of the right holders is paid by the management companies to whom they have given a mandate for representation, in proportion to the number

[113] Recall that such legal licences are established for: the private (digital) copying of works (and of performances); reproduction on graphic or analogue media for a private purpose or for illustration in teaching or in scientific research works; the (digital) reproduction and/or the communication of works (and services) for purposes of illustration in teaching or scientific research and public lending. These legal licences are governed, respectively, by Chapters IV, Vbis and VI of the Copyright Act.

[114] For details, see the full version of the report, available from the authors.

and the size of the works that they declare. For "digital copying" and "reprographic copying", the levying is carried out by an appropriate management company, appointed by the government, which then distributes the financial proceeds among the representative management companies according to distribution rates decided more or less precisely.

d) Does national law contain rules that regulate the distribution of fees between the various categories of right holders?

For audio and audio-visual copies, the remuneration is divided, in accordance with the will of the legislature, into three equal parts and distributed among the *producers* (which include the management companies Procibel, SIMIM, BAVP, Imagia), *authors* (SABAM, SACD, SCAM, SOFAM, SAJ/JAM) and *performers* (URADEX). The distribution within each category among the different representative companies is not defined in the law and proves to be the source of a great deal of friction.[115] It should also be noted that Article 56 of the Copyright Act[116] is limited to specifying, following the example of the Directive, that it should "be taken into account", when setting this remuneration, whether technological measures under Article 79bis are applied to the works or services concerned.[117] The manner of resolving the delicate problem of "double remuneration" is thus not defined by the law.[118]

In the context of the legal licence for "reprographic copying", carried out privately or for illustration in teaching or scientific research, the law provides that, subject to international conventions, the fixed and proportional remuneration is distributed equally among the authors, on the one hand, and the publishers, on the other (Art. 61(3) Copyright Act). In contrast, the legislature leaves it entirely to the King to determine the key of distribution among the members of both categories of right holders and among the categories of works (Art. 61quater(4) Copyright Act).

11. Does national law contain general rules based on a differentiation between different categories of right holders, in particular

a) Binding rules on contractual relationships between different categories of right holders (copyright contract)

Belgian law in effect offers extended protection to the creator of the work, the original copyright holder, by conferring prerogatives that belong only to him or her and

---

[115] *See* DELFORGE (2006-2007), 45.

[116] Paragraphs 9 and 13 of Article 56 of the Copyright Act as amended by Article 15 of the Act of 22 May 2005.

[117] *See* DUSOLLIER (2005), 546.

[118] According to the legislature, "this consideration, of whether technical protection measures are applied, does not mean that these technical safeguards will be a determining factor when fixing remuneration. It will only be one of the elements that will be taken into account. The author also has a right to remuneration if no technical protection measures have been taken. He or she cannot be criticised in the absence of technical measures" (*Doc. Parl.*, Chambre, session 2004–2005, No. 51-1137/013, p.68–69).

that can be invoked despite the transfer of the patrimonial rights. Three sets of rules are involved: moral rights,[119] mandatory rules related to contractual relationships and rights to equitable inalienable remuneration.[120]

The introduction of mandatory rules regarding contracts represents one of the major contributions of the 1994 copyright reform. Noting that authors appear most often to be the weaker parties in contractual relationships, the Belgian legislature introduced a series of mandatory rules with a view to at least partially evening out the bargaining positions. These rules, common to all contracts on the use of works,[121] appear under Article 3(1) and (2) of the Copyright Act. These rules are nevertheless relaxed when the creation or the service is carried out in the context of an employment agreement or when executing a commission contract (Art. 3(3) Copyright Act); in the particular fields of computer programs, databases and designs or models, the law goes even farther, by anticipating presumptions of transfer of rights for the benefit of the employer (and sometimes of the principal). The domain of audio-visual production is also governed by specific provisions, which tend to facilitate the use of the derived work while ensuring equitable remuneration for the author of the adapted work (Arts. 14 et seq.). In contrast, the rules of protection are reinforced in other sectors of artistic creation: publishing contract[122] and representation contract.[123] This variable intensity in contractual protection of the author constitutes an additional demonstration of the "balancing" of copyright.

It is unanimously accepted that, for the application of Article 3 of the Copyright Act, the term "*author*" should be understood restrictively, as only protecting the *creator* of the work; the ordinary rules of evidence regain their authority when the contentious contract is concluded between derivative right holders (an assignee and a sub-assignee, for example); moreover the original author can adduce evidence *against* others according to the modalities provided for by the Civil Code or the Commercial Code.[124]

---

[119] *Cf.* para. 2 of Article 1, Copyright Act. The moral rights acknowledged for the author of a literary or artistic work in Belgium go beyond the minimum provided by Article 6bis of the Berne Convention: not only does the author have a right of disclosure, but the right to respect for the work is more extensive than that recognised by the Union Convention.

[120] Article 55 Copyright Act provides that "when an author (or a writer and performer or performer) has relinquished his or her right to private copy of sound or audio-visual, he or she preserves the right to obtain equitable remuneration for the private copy. This right may not be renounced by the authors or artist and performers or performers". There is also a similar provision in matters of hiring sound or audio-visual works (Art. 24, Copyright Act). A "success" clause, guaranteeing the right to equitable remuneration, is moreover provided in matters of publishing contracts (Art. 26(2), Copyright Act) and representation contracts (Art. 32(2), Copyright Act).

[121] Recall that, as regards moral rights, "the general renunciation to future exercise of this right is null and void" (Sub-para. 2 of Art. 1(2) Copyright Act).

[122] Chapter I, Section 7, Copyright Act (Arts 25 to 30).

[123] Chapter I, Section 8, Copyright Act (Arts 30 to 32).

[124] *See* in particular DE VISSCHER/MICHAUX (2006), No. 393.

b) Differences with respect to the scope of statutory user rights

No differences are, by contrast, raised as regards the scope of the legal authorisations for use.

12. Which of the following legal instruments or mechanisms are used in national law outside copyright in order to achieve a "balance of interests"?

a) Fundamental rights

As elsewhere, Belgian scholarship has examined the relationship of copyright with other fundamental rights, in particular, the right to freedom of expression.[125] Among other ideas, it is suggested that the proportionality test be applied more strictly when the freedom to disseminate ideas is at issue than when it is simply a matter of access to information: a "balance for creation" should thus coexist, without being confused, with a "balance for access". As regards the latter element, it should also be stressed how insidious the concept of the "right to" information can be, often invoked but in reality not recognised legally, if this is only in exceptional situations.[126]

In case law, it is worth mentioning the *Biblo v. Index* decision of the Supreme Court, issued on 25 September 2003.[127] In this case, the publisher of two tax-law reviews (Biblo) alleged that a legal database (Index) was unlawfully reproducing summaries of court decisions that the former had published. On appeal, the judges agreed with the claim, holding that there had been a violation of the right to reproduce and rejecting the exception of citation. In its appeal to the highest instance, Index referred to the infringement, by the Court of Appeal, of not only the provisions of the Copyright Act but also the provisions of conventional law on freedom of expression, particularly Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 19 of the International Covenant on Civil and Political Rights.[128]

The Supreme Court acknowledged that these provisions "have a direct effect on the internal legal order and prevail over the less favourable provisions of internal law" and that they imply that "every person has a right to the freedom of expression", including "the freedom to defend one's opinion and the freedom to listen to or to broadcast any information or ideas, without fear of interference from the State and without restriction". Nonetheless, the Court continues that "the right guaranteed by these conventions is not an obstacle to the protection of originality according to

---

[125] *Cf.* in particular the collective work STROWEL/TULKENS (2006a).

[126] *See* in particular DUBUISSON (2006), 71 *et seq.*; STROWEL *(2008b)*, 61 *et seq.*, especially 65–66.

[127] Cass. (1st chamber), 25 September 2003, *Pas.,* 2003, I, 1471, *Arr. Cass*. 2003, p. 1733, concl. G. BRESSELEERS, *A&M*, 2004, p. 29, *I.R.-D.I.* 2003, p. 214, *RABG*, 2004, p. 205, note BRISON, *R.W.* 2003–2004, p. 1179, *R.D.C.* 2004, p. 55.

[128] Article 27 of the Universal Declaration of Human Rights and Article 2 of the International Covenant on Economic, Social and Cultural Rights. The Court nonetheless rules that the argument is inadmissible in that it was founded on these provisions, which are not of direct effect in Belgium.

which the author of a literary or artistic work expresses his or her ideas and concepts", in such a way that "the interpretation given by the appeal judges to the (Copyright Act) does not limit the right to freedom of expression, as guaranteed by the aforementioned conventions".[129]

In other words, relying implicitly on the second paragraph of Article 10 of the ECHR, which balances freedom of expression against, in particular, "the rights of others", the Court confirms that copyright forms one of the limits to this freedom.[130] It is observed that the test of proportionality required by this provision does not appear in the finding cited above, which is considered as regrettable by some.[131] Nonetheless, one should not lose sight of the fact that, in the answer to the second branch of the cassation plea, the Court checks the decision rendered by the lower court on the substance of the case in view of the internal legal provisions balancing the interests concerned (existence of a reproduction? Reproduction of original elements? Authorised citation?). Clearly because of this check the Court is justified in rejecting quite laconically the inferred plea of the infringement of the conventional provisions on freedom of expression. A different solution could, as we see it, be held to be about the fundamental freedoms or rights that are *not* integrated in the Copyright Act, for example, the individual's right to privacy.[132]

The risks associated with the approach of the Supreme Court as concerns preserving freedom of expression seem to us all the more limited because the Belgian Copyright Act provides for several exceptions the object of which is, precisely, preserving the core of this freedom: exception of citation with the goal (in particular) of review or of argument, of providing information on news events, that is, freedom of the press, parody[133] and so on.

b) Competition law

European case law has demonstrated that, in exceptional cases, competition law can alter the author's exclusive legal rights, in particular in case of refusal by an undertaking in a dominant position to grant a licence on functional or informative works.[134] An identical conclusion would prevail before the Belgian courts (as regards either Article 82 EC or Article 3 of the Belgian law on the protection of economic competition[135] to the effect that the behaviour concerned hinders exchanges

---

[129] It should be noted that the presiding judge of the civil court in Brussels referred to this case law of the *Cour de cassation* to reject the defence raised by Google from Article 10 ECHR in the *Google News* case raised above.

[130] *See also* STROWEL/TULKENS (2006b), 9 *et seq*.

[131] BRISON (2004), 216 *et seq*.; STROWEL/ TULKENS (2006b), 29–30.

[132] *Cf.* the *Promusicae* case of the Court of Justice of the European Union (decision C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU (Telefónica)* of 29 January 2008, *A&M,* 2008, p. 126, *R.D.T.I*., 2008, p. 63, note COUDERT and WERKERS).

[133] On the parody exception, *see* in particular STROWEL (1999b), 123 *et seq*.; VOORHOOF (2006), 39 *et seq*.

[134] *See* in particular HULL/STROWEL (2004), 491 *et seq*.

[135] Act of 15 September 2006 on the protection of economic competition, *Mon*., 29 Sept. 2006, p. 50613.

within the European market or the national market alone). Nonetheless, to the knowledge of these authors, there is no such case law on the issue. A decision rendered by the President of the Competition Council, it is true, found an abuse of a dominant position in the behaviour of an IT services company that, offering insurance and broker companies at once a specific communication network and an information exchange software package, hindered a competitor from making its own program "interoperable" with the network[136] but, just as in the case *European Commission v. Microsoft*, it appears that it was not so much copyright in the program that was at issue as the refusal of the undertaking concerned to supply, positively, confidential information (technical specifications of the network).

By contrast, the Brussels Court of Appeal has found on several occasions that SABAM, a dominant company in Belgium in the field of managing copyright for authors of musical works, had abused its dominant position by using tariffs that were either excessive or discriminatory *vis-à-vis* the users or categories of users.[137] The Court had in particular condemned variable and non-transparent tariff structures that consisted in awarding a 50% tariff reduction to undertakings that regularly organised performances over a period of three years, that paid a certain amount in royalties (12,394.00 Euros yearly) and that had not been in litigation or trial with SABAM.[138] In a decision of 4 March 2009,[139] the Brussels Court of Appeal confirmed, first, that SABAM holds a monopoly in fact in Belgium as regards payment and distribution of royalties to which the authors of musical works are entitled in consideration for the reproduction and communication of their works to the public, and, second, that abuse of a dominant position could result from the practice of either an excessive cost, without a reasonable connection with the economic value of the service offered (the mere fact of unilaterally fixing the amount of the remuneration does not constitute such an abuse), or a discrimination not likely to provide reasonable justification. A collecting society with a dominant position has a duty to set royalties for television broadcasts that are non-discriminatory. It must therefore use the same percentage, except where there is objective justification for a different treatment. A difference in treatment between private television broadcasting and public service companies is not an abuse, unless such a practice cannot be objectively justified and this difference disrupts competition.

---

[136] Decision of 14 February 2007 of the President of the Competition Council, *CRM v. Portima*. The decision was reversed by the Brussels Court of Appeal for procedural reasons (right of defence, insufficiency of evidence).

[137] For a general introduction, *see* CORNU (2003), 28 *et seq*.; DERCLAYE (2007).

[138] Brussels (9th bis chamber), 3 November 2005, *A&M* 2006, p. 50, *Annuaire Pratiques du commerce & Concurrence* 2005, p. 883, note PLATTEAU, *NjW,* 2006, p. 322, note DEENE, *R.D.C.* 2006, p. 681, *R.C.B.* 2006, p. 319, note GERARD and CHAMMAS. This abuse of dominant position, the Court rules, is in a position to affect considerably the structure of the Belgian market of the organisation of musical performances. The possibility of an abuse of dominant position by SABAM was already found in a previous decision where the Court assessed the legality of provisional measures ordered by the President of the Competition Council: *see* Brussels 4 September 1996, *A&M,* 1996, p. 420, note CORBET, *Ing.-Cons.,* 1996, p. 373, and *Annuaire Pratiques du commerce & Concurrence,* 1996, p. 740, note DE MEESE.

[139] Brussels 4 March 2009, *I.R.-D.I.,* 2009, p. 197.

In contrast, The Antwerp Court of Appeal held that, the author being in principle free to set the remuneration for use of his or her work, determination by SABAM of the amount of royalties according to advertising revenues from private broadcasters does not constitute an abuse of a dominant position.[140] In its above-mentioned decision of 9 March 2009, the Brussels Court of Appeal nevertheless qualifies this position: according to the Brussels judges, a calculation of the fees based on a certain part of the advertising revenues does not constitute an abuse of a dominant position if (i) this part is generally proportionate to the quantity of musical works in proportion to all the broadcasts and (ii) another method of identifying and quantifying more accurately the use of the works and the audience would lead to a disproportionate increase in charges. Minimal fees determined inclusively are equally justified, insofar as such fees are based on an objective analysis of the market.

c) Contract law

As indicated in the answer to question 11, one of the innovations of the 1994 Copyright Act consisted in the adoption of mandatory provisions the objective of which was to protect the author/creator in contractual relationships that he or she concludes with third parties, principally for the use of his or her work. It had indeed been observed that the application of the common law of contracts, in particular the freedom of contract, was often to the detriment of the author. Since then, the common law of contracts has not been observed to have mobilised much to balance copyright.

d) General rules on misuse

In Belgium, abuse of right is a theory from case law, founded in extra-contractual matters on the general standard of care (Article 1382 Civil Code: "every act by a person that causes damage to others obliges that person whose fault caused the damage to repair the damage"); in other words, the abuse of a right is a refinement of the notion of fault, postulating that the careful and prudent person exercises his or her rights in a well-considered and reasonable manner, without abusing them. The doctrine generally accepts several degrees in the abuse of a right, that is, many defective ways in which to exercise a right recognised by the law (or by a contact[141]). Historically, the main form of abuse recognised by case law was certainly that which consisted in exercising a right with the objective of harming another, to which it is certainly possible to connect the diversion of the purpose of a right (right-function). The connection between the abuse of a right and the notion of fault has extended the scope of the theory to (i) the fact of exercising a right without benefit to the right-holder and in a way that results in harm to another, (ii) the choice, from among several ways of exercising a right and to equal advantage, of the mode of exercising this right that is most prejudicial to others or (iii) the fact of causing damage through the exercise of a right that is disproportionate to the advantage drawn by this mode of use.

---

[140] Antwerp 27 March 1995, *A&M,* 1996, p. 36, note GYBELS.

[141] The abuse of rights in contractual matters is based on Articles 1134(3) and 1135 of the Civil Code (execution in good faith of agreements).

Since the *abuse of right* is sanctioned generally under Belgian law[142] and the category of "discretionary" rights, less and less "politically correct", seems to have shrunk,[143] the courts are not hesitating to limit the exercise of prerogatives recognised by the Copyright Act because of the abusive nature of their implementation.

This may be illustrated in many ways in the field of *patrimonial rights*. The classic criterion of the lack of proportionality between the inconvenience caused by the exercise of the right and the advantage that the holder of the right is likely to enjoy was found to exist, for example, in a decision by the presiding judge of the Civil Court of Brussels on 5 January 1996,[144] who, while prohibiting the distribution of the counterfeited material, refused in contrast to grant the requested injunction, as it was aimed at the catalogue in which this material was shown. According to the judge, if the reproduction of this material in the catalogue also definitely constituted an infringement of copyright, the withdrawal of the catalogue would result in an economic prejudice far greater than that resulting from its continued distribution; the requested measure was abusive if its effects clearly exceeded the limits of normal and reasonable exercise of copyright as regards the objective sought. The abuse of right was also found by the presiding judge in the Brussels Court of Commerce in a case in which one person claimed to use a logo in the context of an activity that competed with that of his former employer while he had authorised the latter to use said logo for more than 15 years.[145] Similarly, another case, between two choreographers, may be mentioned. In this case, one of the choreographers had plagiarised a scene from the other and the court held that there was an abuse of procedure because of the lack of due diligence on the part of the complainant in the exercise of his rights. He had indeed only introduced his case a few days before the opening night of the show containing the plagiarised scene. The presiding judge of the Brussels court held that even if the action could not be purely and simply rejected, the complainant's negli-

---

[142] *See*, in particular, the following studies: DALCQ, "Les causes de la responsabilité", *Novelles*, Droit civil, t. V, 1, Nos 558 *et seq*.; BERSAQUES, obs. sous Gand, 20 November 1950, *R.C.J.B*., 1953, pp. 272 *et seq*.; VAN OMMESLAGHE (1976), 303 *et seq*. We will restrict ourselves to recalling that, in extra-contractual matters, the abuse of rights is only in fact a specific product of fault-based liability and is, therefore, based on Article 1382 of the Civil Code; comp. STIJNS 1990, 33 *et seq*.

[143] STROWEL (2008a), 293 *et seq*., especially 297–298.

[144] *I.R.-D.I.,* 1996, p. 97 (summary).

[145] Pres. Com. Brussels, 26 May 1993, *R.D.C.*, 1994, p. 651, note DEHIN. By way of illustration, a judgement from the Court of First Instance of Brussels of 9 March 2005 can also be cited (*Ing.-Cons*. 2006, p. 135). It held that, after having handed DATs containing her work over to a third-party company, a professional from the music industry could not reasonably be unaware of the fact that the work would be adapted, nor that it would be used. Consequently, it was up to her to make it known within a reasonable time that she expected to insist on her copyright and ask for compensation for the use and adaptation of her work, and not allow significant arrears in damages to accumulate, as her work was being illegally used and adapted. Under these circumstances, commencing an action in damages after four years of silence is, according to the court, tantamount to abuse of rights. Nonetheless, there was no abuse of the right to require that any new adaptation be, pursuant to the law on copyright, subject to the authorisation of the author, as long as the use can retain the benefit of the adaptations of which the public has taken cognizance and that were used in the past in good faith.

gence in fact justified that the effect of the prohibition order be postponed to the date at which the programme of performances of the contentious show finished.[146] Other cases demonstrate that the courts refrain, when they establish a copyright violation, from giving a prohibition order if this measure appears abusive, disproportionate or used for purposes other than the strict respect of copyright.[147]

In cases in which the holder of a copyright in instruction manuals for electronic equipment claimed that parallel importers should be prohibited from using photocopies of such manuals, the Brussels Court of Appeal moreover considered the possibility of an abuse of the right to reproduce.[148] Nonetheless, this was dismissed *in specie* in the absence of proof of a systematic policy of barriers to parallel imports demonstrating the misuse of the purpose of the right.[149] In a similar case (*Bigg's v. Kenwood*), the Brussels Court of Appeal held that

> it is only if the official importer had refused to grant the authorisation to include, in the packages of the products concerned, instruction manuals in French and Dutch … created by the parallel importer, that he would commit an abuse of right, because [he] would use his copyright in such a way that it would contribute to artificially dividing the markets between the Member States.[150]

The appeal against this decision was rejected by the Supreme Court with a holding that, by the statements cited above, the Court of Appeal had not erred in law.[151] In contrast, the existence of an abuse of right was found by the presiding judge of the Brussels Civil Court in a case in which the party claimed protection of a logo, to oppose the parallel import of authentic products to which this logo had been affixed. The judge ruled that it was a matter of misusing the purpose[152] of the copyright law,

---

[146] Pres. Civ. Brussels, 27 February 1998, *A&M,* 1998, p. 143, *J.L.M.B.* 1998, p. 821, note DEHIN, *Journ. proc.* 1998, p. 28, note MICHAUX. Decision confirmed on appeal: Brussels, 18 September 1998, note CASTILLE.

[147] Brussels, 5 January 1996, *I.R.-D.I.*, 1996, p. 97; Civ. Brussels, cess. 22 January 1997, *I.R.-D.I.*, 1997, p. 39; Civ. Brussels, cess. 23 April 1998*, A&M*., 1999, p. 229; BERENBOOM (2005), 686.

[148] Brussels, 10 October 1997, *DAOR*, 1998, p. 64, *R.D.C.*, 1997, p. 809, *Annuaire Pratiques du commerce & Concurrence*, 1997, p. 737; *see also* STROWEL (1997), note under the decision, *Annuaire Pratiques du commerce & Concurrence,* 746 *et seq*.

[149] The Court adds that "it is incomprehensible that parallel import could escape the burden of publishing and translating a manual while the manufacturer and/or official distributors are so obliged". *See also* Brussels, 11 April 1997 *(A&M*, 1997, p. 265, note VANOVERMEIRE), where the Court considers that it cannot hold that there was an abuse of rights for not having included a manual published in every EC language, this not being in the nature of impeding the interpenetration of the markets.

[150] Brussels, 28 January 1997 Pas., 1996, II, 7, *I.R.D.I.*, 1997, p. 99, *A.&M.*, 1997, p. 262, and *Annuaire Pratiques du commerce & Concurrence*, 1997, p. 655, note DE SCHRIJVER).

[151] Cass., 12 June 1998, *Bull.,* 1998, 722, *A.&M.*, 1999, p. 59, *Ing.-Cons.*, 1999, p. 100.

[152] Such a "diversion" appears likewise to have been held in a case where a person took advantage of his copyright to hinder the smooth development of a court case (Civ. Bruxelles Pres., 27 October 1999, *The Belgian State v. I.P.I.*, unpublished, reported by BUYDENS (2001), 429 *et seq*., No. 36, and footnote 44). This suggests that the absence of transposition into Belgian law of some exceptions could be overcome by resorting to the theory of abuse of rights.

the claimant having been preoccupied not with ensuring the protection of the work, but rather with blocking parallel imports. The action for an injunction was declared inadmissible.[153] The interest of this case law lies in the conjunction of a traditional civil-law principle (abuse of right) and the considerations inferred from EU law (free circulation of goods).[154]

Despite reservations put forward by part of the doctrine on copyright,[155] the influence of the doctrine of abuse of rights has also affected the exercise of *moral rights*. Such a situation arises, for example, when the creator of an architectural work opposes, by virtue of the right to the integrity of the work, any change to it by the owner of the work when the latter is considering the change for understandable reasons of safety, hygiene or fitness given the use to which the building in question is to be put.[156]

Regardless of the prerogatives concerned, whether patrimonial rights or moral rights, regardless of its form, goal of damaging, misuse of purpose, exercise of the right with no advantage, or causing inconveniences that are disproportionate to the advantage sought,[157] the abuse of rights thus appears, under Belgian law, to be a means to balance copyright. For this reason, an eminent author also recently suggested resorting to it to overcome the absence of transposition into Belgian law of certain exceptions to the patrimonial rights authorised by Directive (EC) 2001/29.[158]

---

[153] Civ. Bruxelles (Pres.), 22 January 1997, *I.R.-D.I.* 1997, p. 39; *R.D.C.* 1997, p. 198, and *A.&M.,* 1997, p. 391, note DE KEERSMAEKER. It was decided, on the other hand, that, the exhaustion of the right to distribute having been limited to products marketed in the European Economic Area, the holder of the copyright does not commit an abuse of his right by opposing the import into Belgium of lighters, deemed original, that he marketed in Canada (Civ. Bruxelles, 12 June 1998, *Ing.-Cons.,* 1998, p. 262).

[154] On the issue of abuse of dominant position, *see infra* Question 12.

[155] *See* VAN BUNNEN, note under civ. Antwerp (int.), 19 December 1966, *J.T.*, 1967, p. 224; RENAULD/VAN BUNNEN (1968), 85, No. 4; VAN ISACKER (1963), Nos 27 and 248. The first hesitation was formulated on the occasion of an order of the presiding judge of the Court of First Instance in Antwerp who, before pronouncing judgement on the claim of Jean-Paul Sartre to prohibit the performance of his plays, first raised, to then dismiss *in casu*, the possibility of an abuse in the exercise of the moral right (Antwerp civ. (int.), 19 December 1966, cited above). By contrast, in favour of the application of the theory of abuse of rights, including in matters of moral rights, *see*, in particular, GOTZEN (1975), 130; VAN OMMESLAGHE (1976), 323 *et seq*., especially 324; DE VISSCHER/MICHAUX (2000), Nos 81 and 185; VANBRABANT (2005); BERENBOOM seems to have changed his point of view on the question: compare BERENBOOM (1984), 128–129, No. 111 and BERENBOOM (1994), 139, No. 103.

[156] *See* VANBRABANT (2005).

[157] On the relationships between this form of abuse of rights and the applied principle of proportionality, in particular, by the European Court of Human Rights, *cf.* STROWEL (2008a), especially 295.

[158] BUYDENS (2001), No. 36, as regards reproduction or communication to the public for purposes of public security or to ensure smooth running of administrative, judicial or parliamentary procedures, for purposes of demonstrating or repairing material or for purposes of reconstructing a building.

e) Consumer law

As yet, there has been no decision in Belgian case law on the balance between copyright and special consumer law (the Act on commercial practices and the information to and protection of the consumer of 14 July 1991, recently replaced by the Act on business practices of 10 April 2010). It will be recalled, nonetheless, that these are "consumer-oriented" claims, brought by a consumer protection association, that launched a judicial procedure aimed at devoting a "right" to the private digital copy (the above-cited *Test Achats v. EMI* case). The consumer lobby group had moreover clearly expressed itself on the occasion of parliamentary discussions on the transposition of Directive 2001/29. Certainly, the requirement of Article 79bis(4) of the Copyright Act, according to which "technological measures … may not prevent legitimate buyers of the protected works and services from using the works and services according to their normal purpose", and the associated action for an injunction (sub-paragraph 2 of Art. 87bis(1)) are the most remarkable demonstrations of the attempt at such a balance.

f) Media law

The relationship between copyright and media law was argued before Belgian courts in the context of a significant dispute that existed between cable distribution companies and the Belgian public broadcasting organisation (RTBF), of which it is not possible to recount all the developments here. It will be recalled that the inability to agree on the compensation due by virtue of the cable transmission of broadcasts, including the "direct injection", from the broadcasting organisation led the players to take the case to court.

In a first case, brought before the interim injunction judge in Brussels, the cable distributors sought to obtain an order that, given the obligation that was imposed by legislation to (re)broadcast the shows of the public broadcasting organisations (the "must carry" principle), the organisations could not rely on their copyrights and related rights to seek to prevent, in the absence of an agreement, the said (re)broadcast. By its ruling of 4 July 1997, the presiding judge of the civil court rejected the claim on the grounds that urgency, a necessary prerequisite for obtaining an interim order, was lacking given the existence of (provisional) authorisations for rebroadcasting on the part of the RTBF. The court nonetheless specified that the decree of the French Community of 17 July 1987 on radio and television (and the equivalent Flemish decrees), which provided for the must-carry principle, contains an administrative obligation. This obligation, according to the interim injunction judge, *does not exempt* the cable distributors from the obligation, imposed by the Copyright Act, *to request the authorisation from the right holders and to pay the right holders compensation* for the distribution by cable of their works and broadcasts. The requirement of prior consent, civil in nature, accrues, without mutual contradiction, with the cable distributors' obligation to rebroadcast, which is administrative in nature.[159] Agreeing in part with RTBF's counter-action, the court further found

[159] Civ. Bruxelles (int.), 4 July 1997, *A&M,* 1997, p. 413, note REGNIER.

against the distributors and ordered payment of the amounts that were indisputably owed.

The freeze continuing at the level of negotiations, the RTBF then summonsed cable distribution undertakings before the court dealing with the substance of the case (the Civil Court in Brussels), seeking, on the one hand, an order for damages to repair the harm suffered from the illegal broadcasting of its shows since 1996 and, on the other hand, an order that the defendants seek prior authorisation before broadcasting its programmes, failing which a penalty would be imposed daily for unauthorised cable distribution. This action was decided by judgement of 27 January 2005.[160] Rejecting the defendants' argument, based again on the existence of a contradiction between the Copyright Act and the provisions on radio and television which should be resolved by an irrebuttable presumption of authorisation as regards programmes covered by the must-carry obligation, the Court agreed with the reasoning of the interim injunction judge, outlined above, which distinguishes the administrative obligation to broadcast from the civil obligation required for this broadcast.[161] The Court added that combining these provisions implies an obligation on the part of the cable companies to negotiate with the broadcasting organisations, obtaining the necessary authorisations to distribute by cable their programmes to the extent that these are covered by the must-carry rule, and that these provisions also have the consequence, from a civil point of view, that *refusal* by the broadcasting organisations *to grant their authorisation* or to grant it *under "fair" conditions* could, if necessary, be an element of *abuse of right* or an element in the *breach of competition law.*

This latter point leads to qualifying the assertion that the *must-carry* obligation does not damage how copyright is applied. It seems, in fact, that this provision of media law has the effect of weakening the exclusive nature of the right of communication to the public.[162] Certainly the exercise of this right is never completely discretionary; nevertheless, it is reasonable to think that the courts will be more prompt in holding that there has been an abuse of right when there is content that is subject to a must-carry obligation than when not obtaining the rights to broadcast has no effect on the administrative branch. The authorisation on which negotiations between the right holders and the distributors turn leaves the field of purely contractual licence and comes closer to an unnamed regime of compulsory licence.

---

[160] Civ. Bruxelles (71st chamber), 27 January 2005, *A&M,* 2005, p. 138.

[161] The obligation to distribute certain programmes does not exclude the application of the intellectual rights to these programmes and, therefore, of the price to pay in compensation for the use of these programs." In the same sense, *see also* Civ. Brussels (int.), 24 February 1999, *A&M*, 1999, p. 424.

[162] The evidence is such that, if the Civil Court of Brussels grants the RTBF's claim in damages, as well as the accessory claims for the evaluation of its damage, it "dismisses the remainder", that is, its claim for an injunction with penalty against the cable distributors to broadcast its shows without its prior express consent. In the same sense, *see* civ. Brussels (int.), 24 February 1999, cited in the preceding footnote, considering that the sanction for stopping broadcasts, against the cable distributors, is "disproportionate and difficult to apply".

g) Property law on the media of the work

As indicated in the answer to point d) of this question, while copyright should in principle be considered one of the legal limits to the power of the owner of works on media (originals or copies) to have and enjoy these, and the interests of the latter are considered by the Copyright Act (*cf.*, for example, the proprietary right with respect to a plastic work to "exhibit it as such, under conditions that do not harm the honour or the reputation of the author" or the rule of exhaustion of the right to distribute), case law has sometimes had to refuse the author the benefit of the exercise of his or her rights, in particular the moral right to the integrity of the work, in consideration of the need of the owner to be able to enjoy his or her property according to its normal use.

Abbreviations

BAVP	Belgian collecting society for producers (movies)
Imagia	Belgian collecting society for producers (videoclips)
Procibel	Belgian collecting society for producers (private copy)
SIMIM	Belgian collecting society for producers (music industry)
SABAM	Société Belge des Auteurs, Compositeurs et Editeurs (a Belgian collecting society for authors and editors)
SACD	Société des Auteurs et Compositeurs Dramatiques (a Belgian collecting society for authors – writers and composers)
SAJ/JAM	Société des Auteurs Journalistes (society of journalists)
SCAM	Société Civile des Auteurs Multimédia (a Belgian collecting society for authors – multimedia)
SOFAM	Société Multimédia des Auteurs des Arts Visuels (a Belgian collecting society for authors in the visual arts)
RTBF	Radio Télévision Belge Francophone (Belgian public broadcasting organisation)
URADEX	Uitvoerders Rechten Association Droits des Exécutants (collecting society for performers)

Bibliography

BERENBOOM, "La notion d'œuvre aujourd'hui: de la protection de l'originalité à celle de l'investissement" in: "*Le droit d'auteur adapté à l'univers numérique. Analyse de la loi belge du 22 mai 2005*" (Bruylant 2008)

BERENBOOM, "*Le droit d'auteur*" (Larcier 1984)

BERENBOOM, "*Le nouveau droit d'auteur et les droits voisins*" (Larcier 1994)

BERENBOOM, "*Le Nouveau droit d'auteur et les droits voisins*" 3ed. (Larcier 2005)

BERENBOOM, "Chronique de jurisprudence – Le droit d'auteur, 1994–2000" *J.T.* 2002, p. 673

BRISON, "Enkele basisbegrippen en dito principes uit het auteursrecht even op een rijtje gezet" *RABG* 2004, p. 205

BRISON/MICHAUX, "La nouvelle loi du 22 mai 2005 adapte le droit d'auteur au numérique" *A&M* 2005, p. 216

BUYDENS, "Droit d'auteur et droit voisin dans la société de l'information" *J.T.D.E* 2001, p. 217

BUYDENS, "La nouvelle directive du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information: le régime des exceptions*" A&M* 2001, p. 429

BUYDENS, "*La protection de la quasi-création"* (Larcier 1993)

BUYDENS, "Quelques réflexions sur le contenu de la condition d'originalité*" A&M* 1996, p. 383

BUYDENS/DUSOLLIER, "Les exceptions au droit d'auteur dans l'environnement numérique: évolutions dangereuses*" Communication – Commerce électroniqu*e 2001, chron. 22, p. 10

CORBET/CORNU, "*Auteursrecht"* (Story-Scientia 1991) "L'exercice du droit d'auteur ou des droits voisins, plus particulièrement par des sociétés de gestion de ces droits, peut-il constituer un abus de position dominante, et si oui dans quelles circonstances?" Belgian report for the International League of Competition Law, Ing.-Cons. 2003, p. 28

DE VISSCHER/MICHAUX, "*Précis du droit d'auteur et des droits voisins"* (Bruylant 2000)

DE VISSCHER/MICHAUX, "Le droit d'auteur et les droits voisins désormais dans l'environnement numérique: la loi du 22 mai 2005 ne laisse-t-elle pas un chantier ouvert?" *J.T.* 2006, p. 133

DELFORGE, "*Rémunération pour copie privée vs DRM. Une bataille? Quelle bataille?"*, Final dissertation, Katholiek Universiteit Brussel (KUB) (2006–2007)

DERCLAYE, "*Compulsory access to Intellectual Property and network facilities"* Belgian report to the conference held in 2007 at Catania by the International League of Competition Law, available on line at http://www.ligue.org/files/belgianreportdef_1_.qu.a.doc.

DUBUISSON, "*Le régime des exceptions au droit d'auteur après la loi du 22 mai 2005: la réalisation d'un juste équilibre?"* in: *"Le droit d'auteur adapté à l'univers numérique" (*Bruylant 2008)

DUBUISSON, "Quand le 'droit' du public à l'information rencontre les 'droits' sur l'information: vrai ou faux débat*?"* in: STROWEL/TULKENS (2006), p. 71

DUSOLLIER, "Copie privée versus mesures de protection: l'exception est-elle un droit?*" J.L.M.B*. 2004, p. 1157

DUSOLLIER, "*Droit d'auteur et protection des œuvres dans l'univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres"* (Larcier 2005)

DUSOLLIER, "Le géant aux pieds d'argile: Google News et le droit d'auteur*"* 4 *Revue Lamy droit de l'immatériel* 2007, p. 70

DUSOLLIER, "*L'encadrement des exceptions au droit d'auteur par le test des trois étapes" I.R.D.I* 2005, p. 215

DUSOLLIER, "*Les nouvelles dispositions belges en matière de protection technique du droit d'auteur et des droits voisins" A&M* 2005, p. 538

GOTZEN, "*Het bestemmingsrecht van de auteur"* (Larcier 1975)

GOTZEN, "*Het hof van cassatie en het begrip 'oorspronkelijkheid' in het Belgische auteursrecht"* 4 *Computerr* 1990

HENROTTE, "La copie privée, une chose insignifiante dont la loi n'a pas à s'occuper: pas si sûr*!" J.L.M.B*. 2004, p. 1157

HULL/STROWEL, "Compulsory Licensing of IP Rights: The ECJ's Judgment in the IMS Case and its Impact on the Microsoft Case*" A&M* 2004, p. 491

JANSSENS, "De uitzonderingen op het auteursrecht anno 2005 – Een eerste analyse*" A&M* 2005, p. 482

JACOB/DUMONT, "Google face aux éditeurs de la presse belge" 21 *Revue Lamy droit de l'immatériel* 2006, n° 21, p. 15

KOELMAN, "Hoe een koe een haas vangt – De bescherming van technologische voorzieningen*" Computerrecht* 2000, p. 30

LAURENT, "La copie LAURENT, "Protection des mesures techniques et exception de copie privée appliquée à la musique. Un conflit analogique-numérique*" Revue Ubiquité – Droit des technologies et de l'information* 2003, p. 29

LEONARD, "Le test des trois étapes confié au juge: la mise à mort du droit d'auteur et de ses exceptions?", note under Cass. fr., 26 February 2006, *RTDI* 2006, p. 76
MAILLARD, "Mesures techniques de protection, logiciels et acquis communautaire: interfaces et interférences des directives no. 91/250/CEE et 2001/29/CE*"* 5 *Revue Lamy Droit de l'immatériel* 2005, p. 69
MORLIÈRE, "Les articles de presse à l'ère du numérique – Le cas de Google Actualités*" I.R.D.I.* 2004, p. 7
RENAULD/VAN BUNNEN, "Droit d'auteur et Dessins et modèles (Examen de jurisprudence 1964–1967*)" R.C.J.B.* 1968, p. 85
STIJNS, "Abus, mais de quel(s) droit(s)*?" J.T.* 1990, p. 33
STROWEL, "De 'l'abus de droit' au principe de 'proportionnalité': un changement de style? Réflexions sur l'écriture juridique et les principes du droit à la lumière de quelques affaires en droit d'auteur*"* in: *Liber Amicorum Michel Mahieu,* Larcier 2008 (Strowel 2008a), p. 293
STROWEL, "*L'abus du droit d'auteur et les manuels d'utilisation" R.D.C* 1997, p. 809
STROWEL, "L'émergence d'un droit d'accès en droit d'auteur?" in: "*Le droit d'auteur adapté à l'univers numérique. Analyse de la loi belge du 22 mai 2005",* p. 61, Bruylant 2008 (Strowel 2008b)
STROWEL, "La protection des mesures techniques, une couche en trop? – Quelques remarques à propos du texte de Kamiel Koelman*" A&M* 2001, p. 90
STROWEL, "*L'originalité en droit d'auteur: un critère à géométrie variable" J.T.* 1991, p. 513
STROWEL, "Publicité de l'administration et droit d'auteur*" Rev. dr. communal* 1999, (Strowel 1999a)
STROWEL, "Some Reflections on the Parody Exception*"* in: "*ALAI Study Days – Journée d'Etude de l'ALAI, The Boundaries of Copyright – Les Frontières du Droit d'Auteur"*, Australian Copyright Council 1999, (Strowel 1999b)
STROWEL/TULKENS*, "Equilibrer la liberté d'expression et le droit d'auteur. A propos des libertés de créer et d'user des œuvres",* in: "*Droit d'auteur et liberté d'expression. Regards francophones, d'Europe et d'ailleurs*", ed. Strowel and Tulkens,,Larcier 2006, p. 9
STROWEL/VAN DER MAREN, "*Publicité de l'administration et exception en faveur du droit d'auteur: état de la question et revue de jurisprudence"* in: "*L'accès aux documents administratifs"* Emile Bruylant 2008, p. 771
VAN ASBROECK/COCK, "Belgian newspapers v. Google News: 2.0*" J.I.P.L.P.* 2007, p. 463
VAN DEN BULCK, "Copiepresse contre Google: les limites du caching*?"* 4 *Revue Lamy droit de l'immatériel* 2007, p. 67
VANBRABANT, "Corpus mechanicum versus corpus mysticum: des conflits entre l'auteur d'une oeuvre et le propriétaire du support*" Rev. dr. ULg*. 2005, p. 263
VANBRABANT, "Le droit d'auteur comme limite aux prérogatives du propriétaire immobilier*"* in: "*Contrainte, limitation et atteinte à la propriété"*, Larcier, 2005, p. 491
VANDENDRIESSCHE, "Internet-zoekmotoren en online-kranten: 'The page cannot be found'*" R.D.C*. 2007/4, p. 394
VAN ISACKER, "*De exploitatierechten van de auteur"*, Larcier 1963
VAN OMMESLAGHE, "Abus de droit, fraude aux droits des tiers et fraude à la loi*" R.C.J.B*. 1976, p. 303
VERBRUGGEN/DE GRYSE, "Het recht op toegang tot milieu-informatie in verhouding tot het recht op geheimhouding van industriële – en bedrijfsinformatie en de intellectuele eigendomsrechten*"*, in "*Dix ans d'accès à l'information en matière d'environnement en droit international, européen et interne: bilan et perspectives"* Bruylant 2003, p. 159
VOORHOOF, "Google News: informatievrijheid vs. auteursrecht*?" Mediaforum* 2007, p. 81
VOORHOOF, "La liberté d'expression est-elle un argument légitime en faveur du non-respect du droit d'auteur? La parodie en tant que métaphore*"* in: "*Droit d'auteur et liberté d'expression? Regards francophones, d'Europe et d'ailleurs"*, Tulkens/Strowel, Larcier 2006, p. 39 et s.
VOORHOOF, "*Slecht nieuws voor Google News" A&M* 2007, p. 120