

## RESEARCH OUTPUTS / RÉSULTATS DE RECHERCHE

### Implementation of directive 2001/29/EC in the member states of the European Union

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## BELGIUM

Benoit Michaux

LEGAL FRAMEWORK	4.001	3.5 Mandatory collective administration and extended collective licensing	4.062
1. THE EXCLUSIVE REPRODUCTION RIGHT	4.005	3.6 The freedom of speech	4.066
1.1 The mere confirmation of a broad notion	4.005	4. TECHNOLOGICAL MEASURES	4.069
1.2 The <i>Copiepresse v Google</i> case	4.009	4.1 Definition of technological measures	4.069
1.3 The exclusive distribution right and the exhaustion principle	4.021	4.2 Protection against circumvention	4.073
2. THE EXCLUSIVE RIGHT OF COMMUNICATION TO THE PUBLIC	4.024	4.3 Protection against preparatory acts	4.076
2.1 What is communication 'to the public'?	4.027	4.4 Intervention mechanism	4.080
2.2 Who makes a communication to the public?	4.032	4.5 Exclusion of interactive services from the intervention mechanism	4.083
2.3 What is an unauthorized act of communication to the public?	4.039	4.6 Remedies and sanctions	4.084
3. LIMITATIONS AND EXCEPTIONS	4.040	4.7 Playability	4.087
3.1 General principles	4.040	5. RIGHTS-MANAGEMENT INFORMATION	4.091
3.2 Implementation of Article 5(1) of Directive 2001/29/EC	4.047	6. SANCTIONS AND REMEDIES	4.093
3.3 Other exceptions	4.050	6.1 Injunctions in general	4.093
3.4 Public lending	4.058	6.2 Implementation of Article 8(3) of Directive 2001/29/EC	4.107
		6.3 Damages	4.119
		CONCLUSION	4.122

## LEGAL FRAMEWORK

The relevant legislative framework is contained in the 'Code of Economic Law' (CEL). The substantive provisions relating to copyright are set out in Book XI of the CEL dedicated to Intellectual Property, while the provisions concerning criminal, administrative and civil proceedings are enshrined respectively in Books XV and XVII of the CEL. These provisions have been **4.001**

introduced into the CEL mainly by the Law of 19 April 2014,<sup>1</sup> and, as regards specific procedural aspects, by the Law of 10 April 2014.<sup>2</sup>

- 4.002** Most of the copyright law sections of the CEL were adopted on 30 June 1994. However, the 1994 version has been adapted a number of times, *inter alia*, to transpose European Union directives into Belgian law.
- 4.003** Two main amendments must be mentioned. First, the 1994 Act was modified on 22 May 2005 in order to implement Directive 2001/29/EC<sup>3</sup> (hereinafter, 'the 2005 Act' or 'the Implementation Act'). Secondly, on 10 May 2007, to implement Directive 2004/48/EC<sup>4</sup> (hereinafter, 'the 2007 Act'<sup>5</sup>).
- 4.004** Moreover, Belgium has approved the WCT and the WPPT with the Act of 15 May 2006, which came into force on 30 August 2006.<sup>6</sup>

## 1. THE EXCLUSIVE REPRODUCTION RIGHT

### 1.1 The mere confirmation of a broad notion

- 4.005** Pursuant to a solid tradition that goes back to the previous Copyright Act, dating from 1886, the reproduction right always enjoyed a very broad scope.
- 4.006** Long before the implementation of Directive 2001/29/EC, it had been recognized that the term 'reproduction' was broad enough to cover both direct and indirect reproduction, and both permanent and temporary reproduction. In the period prior to the implementation of the Directive, it had also been accepted in case law that this notion included the distribution right, with reference to the parliamentary history of the 1994 Act.<sup>7</sup>
- 4.007** In addition, during the parliamentary discussions prior to the 1994 Act, some leading academic scholars stated that the reproduction right even embraced the so-called destination right, that is, the right which enables the rightholder

<sup>1</sup> *Moniteur belge*, 12 June 2014, p. 44352.

<sup>2</sup> *Moniteur belge*, 12 June 2014, p. 44358.

<sup>3</sup> *Moniteur belge*, 27 May 2005, p. 24997.

<sup>4</sup> *Moniteur belge*, 10 May 2007, p. 25704, err. *Moniteur belge*, 14 May 2007, p. 26121.

<sup>5</sup> But the 2007 Act also intended to implement Directive 2001/29/EC at least with respect to Article 8(3) thereof, see below.

<sup>6</sup> *Moniteur belge*, 18 August 2006, p. 41206.

<sup>7</sup> Parl.Doc.Ch.473/33-91/92, 63.

to oppose the use of an authorized copy where said use exceeds the limits of the rightholder's consent – even though not all scholars agreed.

As a consequence of this long-standing tradition, when the lawmaker decided to transpose literally the language of Directive 2001/29/EC<sup>8</sup> with respect to indirect reproduction, temporary reproduction and distribution rights, it emphasized that the language of the new law was a mere confirmation of what was already valid under the prior law, the 1994 Act. In so doing, the lawmaker excluded objections against applying the exclusive right to acts of temporary or indirect reproduction that pre-date the Implementation Act. Moreover, it assisted in the interpretation of contracts concluded before the Implementation Act in such a way that when such contracts use the term 'reproduction' they are considered to cover both permanent and temporary reproduction, and both direct and indirect reproduction. This ensured clarity in contractual matters.

### 1.2 The *Copiepresse v Google* case

The *Copiepresse v Google* case<sup>9</sup> has provided a much discussed<sup>10</sup> example of the application of the reproduction right in the digital environment.

In this case, the reproductions in dispute were limited to short parts of the plaintiff's copyright protected works, namely press articles. Moreover, these reproductions were cache copies, which suggested that they might be temporary<sup>11</sup> and that they might even benefit from the exception set forth in Article 5(1) of Directive 2001/29/EC.

The activity challenged in this case was *GoogleNews* service which enables users to search for news items on a specific topic and then to be presented with the headline (the title) and first few lines (snippets) of news reports from other websites, namely the websites of the press publishers concerned. If a user wants to read the full article he or she must click on the headline which

<sup>8</sup> The Directive has been transposed mainly by the Law of 22 May 2005.

<sup>9</sup> President of the Court of First Instance of Brussels, 13 February 2007, A&M, 2007, 107, note D. Voorhoof. An English version of this judgment is available at <http://www.copiepresse.be> (last accessed 30 October 2018).

<sup>10</sup> See Strowel, A. (2008), 'Google et les nouveaux services en ligne: quels effets sur l'économie des contenus, quels défis pour la propriété intellectuelle?', in Strowel A. and J.-P. Triaille (eds) *Google et les nouveaux services en ligne - Impact sur l'économie du contenu et questions de propriété intellectuelle*, Brussels: Larcier, p. 13; Triaille, J.-P. (2008), 'La question des copies cache', in Strowel, A. and J.-P. Triaille (eds) op. cit., p. 251; Turner, M. and D. Callaghan (2008), 'You can look but don't touch! The impact of the Google v Copiepresse decision on the future of the Internet', *EIPR* 30 (34).

<sup>11</sup> See, however, below about this false impression.

corresponds to a hyperlink and he or she will then be taken to the original publisher's website. The entire process is automated (that is the functioning of *GoogleNews* is the result of automatic indexing software<sup>12</sup>).

- 4.012** The press publishers were not happy with *Google's* activities, among other reasons because it made available for free a cache-copy of the full article during an indefinite time period while the article is no longer available for free on the original publisher's website.
- 4.013** Hence, they decided to file a court action through their rights management society, *Copiepresse*.
- 4.014** *Google* took the view that its service was merely a search engine, which means that it is the user who triggers the relevant third party news articles by conducting the search<sup>13</sup> and, as a search engine, it was not liable for potential copyright infringements by third parties using its service.
- 4.015** *Copiepresse*, on the contrary, claimed that *GoogleNews* was an information portal which infringes the copyright in the press articles, given that it makes reproductions of copyright protected headlines and snippets without authorization.
- 4.016** The lower court concluded that there were indeed copyright infringements committed by *GoogleNews*. To a certain extent the judge anticipated the *Infopaq* ruling of the Court of Justice<sup>14</sup> where it was considered that even short parts of press articles such as headlines or snippets may be original and therefore subject to the exclusive reproduction right. Moreover, the Court found that although the full text was not reproduced, said titles and snippets were copied in the memory of computers and thus reproduced. Furthermore the Court took the view that the reproductions at stake fell neither under the exception for quotation, news reporting or review nor under the right to freedom of speech as guaranteed by the European Convention on Human Rights.
- 4.017** On another note, the Court considered with respect to the 'cache' service of *Google* that content protected by copyright was actually stored and made available to the public without the rightholder's prior consent while such consent is required even if the content is stored in HTML code or converted into another computer language.

<sup>12</sup> Turner, M. and D. Callaghan (2008), op. cit.

<sup>13</sup> See also Turner, M. and D. Callaghan (2008), op. cit., p. 35.

<sup>14</sup> *Infopaq v Danske Dagblades*, Case C-5/08, ECLI:EU:C:2009:465.

Although the Court did not systematically consider *Google's* acts of reproduction in the light of all the cumulative conditions set forth under Article 5(1) of Directive 2001/29/EC, at least it touched some of the said conditions. In particular the Court noted that 'if this reproduction constitutes an integral part of the technical indexation process of the pages, it is not in any event its sole use ... it is also used to allow the internet user to consult a document that is no longer available on the site of origin directly on the *Google* website'. Actually, it was apparent for that matter that the copies were made available for months on *Google* servers, and continued to be made available on these servers after they were no longer available for free on the original publisher's website. **4.018**

After the decision, some commentators have undertaken a more detailed analysis of the issues raised by *Google's* caching of protected content. They rightfully raised questions about the extent to which *Google* cache-copies met any of the cumulative conditions in the exception established by Article 5(1) of Directive 2001/29/EC, namely that the reproduction be 'transient', 'incidental', [made for the sole purpose of] a 'transmission between third parties by an intermediary', [with] 'no independent economic significance'.<sup>15</sup> In addition, like the court, but after more developed reasoning, they came to the conclusion that the conditions for a limitation of liability under Article 13 of Directive 2000/31/EC had not been fulfilled either.<sup>16</sup> **4.019**

*Google* filed an appeal against the abovementioned judgment. On appeal, the Court upheld the judgment of the lower court.<sup>17</sup> It dismissed the transient copy-defence in a slightly more explicit – albeit non-exhaustive – way. In particular, the Court of Appeal found that the copies made by *Google* were not proven to be necessary for a transmission in a network and that it was even less established that the copies were made for a limited amount of time that could be said to be required for such a transmission. Moreover, the Court of Appeal confirmed that the copies did not fall under the exceptions for quotation, news reporting or review or under the right to freedom of speech as guaranteed by the European Convention on Human Rights. Even more importantly, the Court of Appeal decided that contrary to what *Google* claimed, the rightholders were not under an obligation to use available technical tools to prevent *Google* from making copies of the works. *Google's* thesis in this respect has been deemed incompatible with the copyright system of the European Union. **4.020**

<sup>15</sup> Triaille, J.-P., op. cit., p. 257.

<sup>16</sup> Triaille, J.-P. op. cit., p. 259.

<sup>17</sup> Court of Appeal of Brussels, 5 May 2011, RG N° 2007/AR/1730.

## 1.3 The exclusive distribution right and the exhaustion principle

- 4.021** The exclusive distribution right and the related exhaustion principle which are both specifically provided for in the 2005 Implementation Act had previously been affirmed in a number of cases stretching back to 1996. This jurisprudence had accepted that the exclusive distribution right was part of the (broad) exclusive reproduction right.<sup>18</sup>
- 4.022** The 2005 Implementation Act does not clearly state that exhaustion occurs *only* if the copies concerned have specifically been authorized for distribution *within* the European Union.<sup>19</sup> However, the Belgian courts had already clarified, long before the *Laserdisken* decision of the European Court of Justice,<sup>20</sup> that the exhaustion is limited to the European Union, so that the rightholder can oppose the import of copies from third countries. This jurisprudence had also emphasized that the exhaustion only applies to those specific physical copies of the work which had been authorized for distribution within the European Union by the rightholder<sup>21</sup> and that, in principle, the burden of proof in this respect lies with the defendant.<sup>22</sup> In addition, the earlier national jurisprudence had stated that the exhaustion resulting from the first sale of a physical copy of the work does not give rise to exhaustion of the exclusive right of communication to the public.<sup>23</sup>
- 4.023** Moreover, at least according to the supporters of the destination right, the exhaustion principle does not preclude the rightholder from controlling certain uses of copies of his work even where said copies have been put on the market with his consent.<sup>24</sup> In line with this position, the Court of Appeal of Brussels has admitted that the rightholder can for example oppose the sale of copies to consumers where the copies are only intended to be distributed for free as advertising material.<sup>25</sup>

18 See above.

19 By contrast, the provisions regarding related rights do contain such a clarification.

20 *Laserdisken ApS v Kulturministeriet*, Case C-479/04, ECLI:EU:C:2006:549.

21 Court of Appeal of Antwerp 24 June 1996, *Belgian Anti-piracy Foundation v Opus I*, *A&M*, 1997, 176; Court of Appeal of Brussels 22 May 1996, *Copperhead v IFPI Belgium*, *A&M*, 1997, p. 178; Court of Appeal of Liège 8 December 1998, *Belgian Anti-piracy Foundation v Laserdisc*, *A&M*, 1999, p. 67.

22 Court of Appeal of Brussels 11 April 1997, *Horelec v Nintendo*, *A&M*, 1997, p. 265.

23 Council of State 19 January 1993, *Pas*, 1995, IV, 33.

24 Gotzen, F. (2012), *Hommage à Jan Corbet – La Loi Belge sur le Droit d'Auteur, Commentaire par Article*, 3rd edn, F. Brison and H. Vanhees (eds), Brussels: Larcier, p. 14.

25 Court of Appeal of Brussels 9 September 2002, *J & H v Universal Music*, *A&M*, 2004, p. 329, note F. Brison.

## 2. THE EXCLUSIVE RIGHT OF COMMUNICATION TO THE PUBLIC

Like the exclusive reproduction right, the exclusive right of communication to the public has always been construed in a very broad manner in Belgian jurisprudence. **4.024**

Therefore, when the 2005 Implementation Act mentioned the right of making available to the public as a part of the communication right – as in the Directive – it merely confirmed a solution that already existed under the 1994 Act.<sup>26</sup> **4.025**

The 2005 Implementation Act does not explicitly specify that the right of communication to the public is not subject to exhaustion, but this solution is definitely accepted as a result of Article 3(3) of the Directive.<sup>27</sup> **4.026**

## 2.1 What is communication 'to the public'?

The first controversial subject lies in the notion of public itself. The jurisprudence of the Belgian Supreme Court is not easy to follow when it comes to a communication that is intended for fairly small or closed groups of persons. **4.027**

In two cases, the Supreme Court decided that the communication was public, even though it was limited to a group of 35 members of a football team;<sup>28</sup> and, to a group of 23 co-workers and their close families,<sup>29</sup> respectively. In two other cases, the Supreme Court held that the communication was private, where it took place in a home for the elderly<sup>30</sup> or in a workshop used by a group of four co-workers who had close family ties.<sup>31</sup> Also, the 2005 Implementation Act has blurred the frontiers between private and public communications, where it stated that communications in the context of school activities must be regarded as private. Finally, the *Rafael Hotels* decision of the European Court of Justice<sup>32</sup> has apparently increased the confusion, at least in the view of some lower courts that incorrectly understood this decision as **4.028**

26 Visscher, F. de and B. Michaux (2000), *Précis du droit d'auteur et des droits voisins*, Brussels: Bruylant, p. 125, n° 149.

27 Visscher, F. de and B. Michaux (2006), '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.*, p. 133, spéc. n° 6.

28 Cass. (Supreme Court), 8 October 1999, *A&M*, 2000, 289.

29 Cass. (Supreme Court), 21 November 2003, *A&M*, 2004, 35, note H. Vanhees.

30 Cass. (Supreme Court), 18 February 2000, *A&M*, 2000, 290.

31 Cass. (Supreme Court), 26 January 2006, *A&M*, 2006, 180, note H. Vanhees.

32 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hotels SA*, Case C-306/05, ECLI:EU:C:2006:764, paras 37 and 38.

suggesting that the term 'public' necessarily requires an indeterminate if not a fairly large number of persons.

- 4.029** In a more recent decision, the *Bord de l'eau*<sup>33</sup> case, the Supreme Court had to determine whether the communication was made to 'the public' in a situation where the work at stake was made accessible through a hyperlink posted on a Facebook wall.<sup>34</sup> Arguably the accessibility of the link was limited to a group of friends, thus a 'private' group. However, the Supreme Court agreed with the Court of Appeal<sup>35</sup> which had decided that said friends could transmit it to other persons, so that ultimately the content of the linked book could be potentially disseminated among multiple internet users. More precisely, the judges concluded that the posting of a hyperlink allowing 'a large community of internet users' to download the protected work is a 'communication to the public' for which the author's consent is required, 'unless the work is freely accessible on another website'.<sup>36</sup>
- 4.030** Although the judgments of the Court of Justice are not mentioned, it can be presumed that the Belgian judges refer here to the *Svensson*<sup>37</sup> and *BestWater*<sup>38</sup> rulings. It could be deduced that, in line with said judgments, the Belgian Supreme Court considers that the provision of a hyperlink does not amount to a communication to the public when the linked work has previously been made accessible to the community of the internet users at large, in an unrestricted manner, *with the consent of the rightholder*.<sup>39</sup>
- 4.031** It could even be suggested that, conversely, the *Bord de l'eau* ruling seems to anticipate the *GS Media*<sup>40</sup> decision of the European Court of Justice where it indicates that when the linked work has been made available to the community of the internet users at large *without* the rightholder's authorization, there is a communication to the public for which the authorization of the rightholder is required. But to be fair, the Court's reasoning in this regard is limited, not to say almost subliminal.

33 This is the name of the publisher of the work at stake, who is to be considered the copyrightholder.

34 Cass. (Supreme Court) 24 June 2015, R.G. N° P.15.0194.F, *A&M*, 2015, 277.

35 Court of Appeal of Brussels, 13 January 2015, R.G. N° 2013/CO/499, *A&M*, 2015, 290.

36 *Ibid.*; Cass. 24 June 2015, *op. cit.*

37 *Nils Svensson, Sten Sjögren, Madelaine Sablman, Pia Gadd v Retriever Sverige AB*, Case C-466/12, ECLI:EU:C:2014:76.

38 *BestWater International GmbH v Michael Mebes and Stefan Potech*, Case C-348/13, ECLI:EU:C:2014:2315.

39 Apparently, this was not the case in this matter.

40 *GS Media BV v Sanoma Media Netherlands BV*, Case C-160/15, ECLI:EU:C:2016:644.

## 2.2 Who makes a communication to the public?

Another controversial subject concerns the question of *who* makes the communication to the public in a situation where different parties intervene in a transmission. **4.032**

In the last decade, Belgian courts have been at the origin of two significant ECJ judgments in this respect, namely in the *Airfield*<sup>41</sup> and the *SBS*<sup>42</sup> cases. Even if the *Airfield* case concerned a communication by satellite within the meaning of Article 2 of Directive 93/83/EEC, it contains relevant information for discussions in relation to Article 3 of Directive 2001/29/EC. **4.033**

In the *Airfield* case, the European Court of Justice decided that the authorization of the rightholder was required for the intervention of a satellite package provider in the direct or indirect transmission of TV programmes by a broadcasting organization. Admittedly the communication by satellite was triggered by the broadcasting organization, such that this organization was obliged to obtain the authorization of the rightholder. However, the Court went further, finding that through its intervention the satellite package provider rendered the protected content accessible to a public wider than that targeted by the broadcasting organization, with the result it was also required to obtain the authorization from the rightholder. That conclusion was guided by a number of factors, including the fact that the satellite provider supplied an autonomous service with the aim of making a profit. **4.034**

Nevertheless, after the issuance of this judgment by the ECJ, the referring court, namely the Court of Appeal of Brussels, took the view that the intervention of the satellite package provider was actually covered by the initial authorization which the rightholder had granted to the broadcasting organization.<sup>43</sup> The Court of Appeal considered that said intervention made the works accessible to a public which had already been taken into consideration by the rightholder when granting his authorization to the broadcasting organization so that no additional authorization was needed. **4.035**

In the *SBS* case, the ECJ ruled that Article 3(1) of Directive 2001/29/EC must be interpreted as meaning that a broadcasting organization does not carry out an act of communication to the public, within the meaning of that **4.036**

41 *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)*, C-431/09 and *Airfield NV v Agicoa Belgium BVBA*, C-432/09, ECLI:EU:C:2011:648.

42 *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*, Case C-325/14, ECLI:EU:C:2015:764.

43 Court of Appeal of Brussels, *Airfield v AGICOA*, 9 June 2015, *A&M*, 2015, 296.

provision, when it transmits its programme-carrying signals exclusively to distributors without those signals being accessible to the public during, and as a result of that transmission. However, the national court must determine whether the intervention of such distributors i.e., sending those signals to their respective subscribers so that they may watch those programmes, is merely technical, which it is for the national court to ascertain. In such a case, the broadcasting organization would be considered to be communicating to the public.

**4.037** Since this ruling, there have not been any relevant national decisions to report in this specific area. However, the decision of the Court of Justice has been used by the Belgian Supreme Court in another case, namely *Telenet v SABAM et al.*, which concerned direct injection of TV programmes, i.e., transmission of programme-carrying signals exclusively to a signal distributor without those signals being accessible to the public. In the latter case, the Supreme Court relied upon the *SBS* ruling of the Court of Justice to conclude that in case of direct injection, there is no initial broadcast (communication to the public) by the broadcasting organization, so that there can be no cable retransmission (by the signal distributor) within the meaning of Article 1, para. 3 of Directive 93/83.<sup>44</sup>

**4.038** In *SABAM v Proximus et al.*, the question at the centre of the dispute was whether internet service providers (ISPs) perform an act of communication to the public, when they transmit works over their networks. In one of the two proceedings, the Court of First Instance held that, contrary to what the rightholders (SABAM) claimed, the ISPs do not perform an act of communication to the public.<sup>45</sup> Relying upon the *UPC Telekabel* judgment of the Court of Justice,<sup>46</sup> the Court considered that ISPs merely make the transmission of works possible between their customers and third parties, without effectuating any act of communication to the public by themselves. As a result, the Court ordered SABAM, a music author rightholders' collective management organization (CMO), to discontinue its tariff directed at ISPs. On appeal, the Brussels Court of Appeal confirmed the order to cease the use of the tariff, but it did not rule on the substance of the question of whether ISPs perform an act of communication to the public. Rather, the Court of Appeal simply noted that the CMO was not entitled to impose unilaterally a tariff on the ISPs in a situation where the CMO had not concluded any contract with the ISPs or

<sup>44</sup> Belgian Supreme Court, *Telenet v SABAM et al.*, 30 September 2016, *Ac&M*, 2016, 339.

<sup>45</sup> Court of First Instance of Brussels (Pres.), *SABAM v Proximus et al.*, 13 March 2015, RG N° 13/12839/A.

<sup>46</sup> *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, ECLI:EU:C:2014:192.

accused the ISPs of having used the protected works without consent.<sup>47</sup> This decision has been upheld on appeal by the Supreme Court.<sup>48</sup> It is worth stressing that the Supreme Court also did not rule on the substance of the question as to whether the ISPs perform an act of communication to the public. Moreover, its decision does not affect the possibility for the rightholders to claim a payment assuming that a court would consider that there is an act of communication to the public.

### 2.3 What is an unauthorized act of communication to the public?

In the *VRT v Right Brain (Bhaalu)* case, the defendant was presented as a collaborative internet platform which enabled its users to share TV content and to secure access to that content from a place and at a time individually chosen by them i.e., on-demand. The rightholders claimed that the defendant was performing an act of communication to the public without their authorization. Admittedly the defendant's customers had a subscription with the distributor to watch the TV content, so that they lawfully received the TV programmes on their home television receivers. But the Court considered that the defendant's use was not covered by any authorization.<sup>49</sup> In line with the judgment of the Court of Justice in *ITV v TVCatchUp*,<sup>50</sup> the Court held that defendant was using a means of transmission that was different from the initial broadcast, and therefore this use was not covered by the first authorization. **4.039**

## 3. LIMITATIONS AND EXCEPTIONS

### 3.1 General principles

The CEL, as revised by the Law of 27 June 2016<sup>51</sup> and by the Law of 22 December 2016,<sup>52</sup> contains a list of exceptions that allow certain uses of works protected by copyright or subject-matter protected by a related right. **4.040**

This list is closed, which means that no exceptions can apply outside this statutory framework and that only the lawmaker can create new exceptions. However, the exercise of the copyright or related rights may be limited by **4.041**

<sup>47</sup> Court of Appeal of Brussels, *SABAM v Proximus et al.*, 3 June 2016, RG N° 2015/AR/810.

<sup>48</sup> Supreme Court, *SABAM v Proximus et al.*, 20 October 2017, C.16.0413.F/1.

<sup>49</sup> Commercial Court of Antwerp (Pres.), *VRT et al. v Right Brain*, 4 November 2014, *Ac&M*, 2015, 80.

<sup>50</sup> *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.*, Case C-607/11, ECLI:EU:C:2013:147.

<sup>51</sup> *Moniteur belge*, 5 July 2016, 41011.

<sup>52</sup> *Moniteur belge*, 29 December 2016, 91843.

external rules, such as the general principle regarding the abuse of right or competition rules, including the rules on the abuse of a dominant position.

**4.042** Traditionally, it is unanimously agreed that exceptions are to be interpreted restrictively and applied narrowly. Belgian copyright law in general does not permit interpretation by analogy, even in unforeseen situations. Nonetheless, in accordance with the jurisprudence of the Court of Justice, due regard shall be paid to the effectiveness of the exception and its purpose.<sup>53</sup>

**4.043** The statutory exceptions are subject to a number of general conditions.

**4.044** First, all the exceptions<sup>54</sup> are subject to the condition of a prior lawful divulgence of the work. In the past, the Belgian doctrine generally held that this condition does not refer to the 'legality' of the physical copies used for the exception (the 'lawful source') but only relates to the moral right of divulgence. According to this position, if the divulgence right has not been exercised, the exception concerned will not apply. Reciprocally, for the same scholars, once the work as such has been divulged with the consent of the rightholder, it is definitively eligible for any of the statutory exceptions, even though the rightholder did not authorize the specific physical copy used for the exception. However, there were dissenting opinions on this subject. More importantly, some legislative amendments and the recent jurisprudence have shed new light on this question. In particular, the Law of 22 December 2016 modified the provisions regarding the exceptions in order to take into account the judgment of the Court of Justice in the *Reprobel* case.<sup>55</sup> One of the objectives was to make clear that the exceptions do not allow the use of a copy from an illegal source. Moreover, in a judgment of 12 May 2017 handed down in the *Reprobel* case after the ruling of the Court of Justice, the Court of Appeal of Brussels decided that even under the previous version of the law it had to be understood that exceptions do not apply to copies from an unlawful source.<sup>56</sup>

**4.045** Secondly, in accordance with Directive 2001/29/EC (and international obligations), all exceptions are subject to the three-step test. The Belgian lawmaker declined to explicitly implement the test in national law, at least in

<sup>53</sup> *Joban Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, Case C-201/13, ECLI:EU:C:2014:2132, Case C-201/13, para. 23.

<sup>54</sup> But the exception transposing Article 5(1) of Directive 2001/29/EC and the exception for quotation, see below.

<sup>55</sup> *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, Case C-572/13, ECLI:EU:C:2015:750.

<sup>56</sup> Court of Appeal of Brussels, 12 May 2017, *Hewlett-Packard v Reprobel*, R.G. N° 2012/AR/3265, *A&M*, 2016, 427, para. 30.

general language.<sup>57</sup> This explains why, in doctrine, controversy subsists as to the question of whether the test can be applied by courts in concrete cases.<sup>58</sup> However, the majority of Belgian scholars admit at least that the judge shall interpret exceptions in accordance with the three-step test.<sup>59</sup>

A noteworthy feature of the Belgian CEL is laid down in Article XI.193 that provides that *all* exceptions are of a mandatory nature.<sup>60</sup> This provision, prohibiting contracting out of exceptions, was inserted in the Act that implemented Directive 96/9/EC on the legal protection of databases<sup>61</sup> in 1998. The lawmaker thereby sought to bring the traditional exceptions into alignment with the (mandatory) exceptions that were inserted for databases. A change had been introduced during the transposition process in 2005<sup>62</sup> to add a new provision prescribing preferential treatment for interactive on-demand services to the disadvantage of the exercise of exceptions. Simply stated, as a consequence of the change, in relation to on-demand services, all exceptions could be completely contracted out.<sup>63</sup> According to the Parliamentary documents, at that time there were two main reasons for this preferential treatment.<sup>64</sup> First, the Belgian lawmaker considered that the mandatory nature of the exceptions when applied to on-demand services might be contrary to Article 6(4)(4) of Directive 2001/29/EC. Secondly, it was concerned about the fact that the mandatory nature of the exceptions might be an obstacle for the new business models, in particular the 'online delivery' of copyright protected material. However, this specific regime introduced in 2005 regarding on-demand services was removed when the Belgian lawmaker adopted the CEL in 2014. The reasons for that removal remain unclear. The fact is that under the current CEL, the mandatory nature of the exceptions has thus been strengthened.

<sup>57</sup> The text of some of the steps is, however, included in some of the exceptions (for example, the education and research exception).

<sup>58</sup> See Janssens, M. C. et al. (2012), in Brison, F. and H. Vanhees (eds), *La Loi Belge sur le Droit d'Auteur, Commentaire par Article*, 3rd edn., Brussels: Larcier, p. 151.

<sup>59</sup> See M. C. Janssens (2012), op. cit., p. 151.

<sup>60</sup> Belgium is one of the few EU member states that provides for such a rule.

<sup>61</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 L 77/20.

<sup>62</sup> To transpose the rule laid down in Article 6(4)(4) of Directive 2001/29/EC.

<sup>63</sup> The full Article 23bis reads as follows: 'The provisions of Articles 21, 22, 22bis and 23(1) and (3) have a mandatory character. It is, however, possible to deviate from these provisions on a contractual basis in relation to works made available to the public on 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.'

<sup>64</sup> See Janssens, M. C. et al. (2008), op. cit., p. 168, and footnotes 7 and 8.

### 3.2 Implementation of Article 5(1) of Directive 2001/29/EC

- 4.047** The 2005 Implementation Act includes a literal transposition of Article 5(1) of Directive 2001/29/EC – that is the obligatory exception to the reproduction right for transient or incidental acts of temporary reproductions that are dictated by technology and have no separate economic significance – with regard to both copyright<sup>65</sup> and related rights.<sup>66</sup>
- 4.048** Notably, this exception is *not* subject to the condition that the work has been lawfully divulged. Apparently, the lawmaker's concern was to avoid imposing a general obligation of monitoring on ISPs,<sup>67</sup> at least in a situation where the purpose of the exempted act of temporary copying is to enable a transmission in a network between third parties by an intermediary.
- 4.049** Under Belgian law, it is worth recalling that the *Copiepresse v Google* decisions mentioned above reject the exception in that case, because the copies concerned remained accessible for weeks (and even months) so that they were not deemed 'transient or incidental'.<sup>68</sup> Also, the doctrine demonstrated in a convincing manner that *Google* cache-copies failed to meet any of the conditions required for the exemption of Article 5(1) of Directive 2001/29/EC, namely that the reproduction be 'transient', 'incidental', [made for the sole purpose of] a 'transmission between third parties by an intermediary', [with] 'no independent economic significance'.<sup>69</sup>

### 3.3 Other exceptions

#### 3.3.1 The successive revisions of the legal provisions regarding the exceptions

- 4.050** The provisions regarding the exceptions under Belgian law have been repeatedly revised over the last two decades. The 2005 Implementation Act was supplemented by the Laws of 19 April 2014, 27 June 2016 and 22 December 2016 which added a number of new exceptions<sup>70</sup> to the initial list, which were taken from Directive 2001/29/EC, in particular one exception that permits broadcasters to make temporary copies (ephemeral recordings) of protected works so that they can broadcast works covered by exclusive rights

<sup>65</sup> Article XI.189, §3 of the CEL.

<sup>66</sup> Article XI.217, *8bis* of the CEL.

<sup>67</sup> Janssens, M. C. (2012), *op. cit.*, pp. 142–144, with reference to Parliamentary documents.

<sup>68</sup> President of the Court of First Instance of Brussels 13 February 2007, *Google v Copiepresse*, confirmed by the Court of Appeal of Brussels 5 May 2011, IRDI 2011, 265, see above.

<sup>69</sup> Triaille, J.-P. (2008), *op. cit.*, p. 257.

<sup>70</sup> Apart from the exception which implements Article 5(1) of Directive 2001/29/EC, see above.

for authors and the compulsory licence (applicable to related rights),<sup>71</sup> one exception permitting the use for the purpose of advertising the public exhibition or sale of artistic works,<sup>72</sup> two exceptions that help the practice of teaching and research (use by communication for the purpose of illustration for teaching or scientific research,<sup>73</sup> and use for communication to dedicated terminals on the premises of publicly accessible libraries, educational establishments or museums<sup>74</sup>), two exceptions that serve social interests (uses for the benefit of people with a disability<sup>75</sup> and reproduction of broadcasts by social institutions such as hospitals and prisons<sup>76</sup>), and one exception regarding the freedom of panorama.<sup>77</sup>

The Act of 22 December 2008 had also introduced an additional exception, namely an exception to allow the reproduction of sheet music in its entirety for the purpose of illustration for teaching or scientific research. However, the Belgian Constitutional Court annulled this provision, because it unduly discriminated between the authors of musical works and the authors of other works that are fixed on paper or any similar medium, such as books. For the latter category, the exception does not allow an entire reproduction, but only a reproduction of short extracts. The Constitutional Court emphasized in this respect that for the two categories, an entire reproduction might conflict with a normal exploitation of the works, in violation of Article 5(5) of Directive 2001/29/EC.<sup>78</sup>

Furthermore, the 2005 Implementation Act and the subsequent laws maintained the exceptions that were already included in the 1994 Copyright Act. However, they modified their scope.

Four of these 'old' exceptions, dating from 1994, seek to guarantee the freedom of speech: these are exceptions in respect of quotations for purposes

<sup>71</sup> Article XI.190, 14° (copyright) and Article XI.217, 13° (related rights) of the CEL, which implement Article 5(2)(d) of Directive 2001/29/EC.

<sup>72</sup> Article XI.190, 16° (copyright) and Article XI.217, 15° (related rights) of the CEL, which implement Article 5(3)(j) of Directive 2001/29/EC.

<sup>73</sup> Article XI.191/1, §1, 4° (copyright) and Article XI.217/1, 4° (related rights) of the CEL which implement Article 5(3)(a) of Directive 2001/29/EC.

<sup>74</sup> Article XI.190, 13° (copyright) and Article XI.217, 12° (related rights) of the CEL which implement Article 5(3)(n) of Directive 2001/29/EC.

<sup>75</sup> Article XI.190, 14° (copyright) and Article XI.217, 14° (related rights) of the CEL which implement Article 5(3)(b) of Directive 2001/29/EC.

<sup>76</sup> Article XI.190, 17° (copyright) and Article XI. 217, 16° (related rights) of the CEL which implement Article 5(2)(e) of Directive 2001/29/EC.

<sup>77</sup> Article XI.190, 2°, 2/1°, of the CEL which implements Article 5(3)(h) of Directive 2001/29.

<sup>78</sup> Constitutional Court 16 July 2009, *Semu et al. v Flemish government et al.*, nr. 127/2009, *A&M*, 2009, p. 526; also available on <http://www.const-court.be> (last accessed 30 October 2018).

of criticism, discussion, review, teaching or in scientific works;<sup>79</sup> reproduction and communication to the public for the purpose of information in connection with the reporting of current events;<sup>80</sup> reproduction and communication to the public of works exposed in public places when the goal of the reproduction or the communication is not the work itself;<sup>81</sup> use for the purpose of caricature, parody or pastiche.<sup>82</sup> Four other exceptions may facilitate education and scientific research: communication in the course of school activities;<sup>83</sup> reproduction on paper or any similar medium and reproduction on any other medium, for the purpose of illustration for teaching and scientific research;<sup>84</sup> performance for free in the course of school activities, including during a public exam.<sup>85</sup> Three other exceptions concern private uses: performance within the family circle;<sup>86</sup> reproduction of works within the family circle;<sup>87</sup> reproduction on paper or similar medium of works that are fixed on paper or similar medium, for private use, subject to a number of conditions;<sup>88</sup> and one exception allows the preservation of the common heritage (reproduction by publicly accessible libraries or museums or archives<sup>89</sup>).

**4.054** Two exceptions under Belgian law might deserve special attention because they gave rise to judgments from the Court of Justice.

**4.055** The first is the exception of parody. In the *Deckmyn* case, the Court of Justice decided that this exception presents only two characteristics, namely the parody evokes an existing work, while being noticeably different from it, and secondly, it constitutes an expression of humour. According to the Court, it is not subject to further conditions, contrary to what was held by a significant part of the Belgian doctrine and jurisprudence. The ruling of the Court of

79 Article XI.189, §1 (copyright) and Article XI.217, 1° (related rights) of the CEL, which correspond to Article 5(3)(d) of Directive 2001/29/EC.

80 Article XI.190, 1° (copyright) and Article XI.217, 2° (related rights) of the CEL which correspond to Article 5(3)(c) of Directive 2001/29/EC.

81 Article 190, 2° of the CEL which is a mix of Article 5(3)(h) and (i) of Directive 2001/29/EC.

82 Article XI.190, 10° (copyright) and Article XI.217, 9° (related rights) of the CEL which corresponds to Article 5(3)(k) of the Directive 2001/29.

83 Article XI.191/1, §1, 2° and Article XI.217/1, 2° of the CEL, which goes further than Article 5(3)(a) of Directive 2001/29/EC, since it is not limited to communications for the sole purpose of illustration for teaching.

84 Article XI.191, §1, 3° (copyright) and Article XI.217/1, 3° (related rights) of the CEL which is covered by Article 5(3)(a) of Directive 2001/29/EC.

85 Article XI.191/1, §1, 2° (copyright) and Article XI.217/1, 2° (related rights) of the CEL.

86 Article XI.190, 3° (copyright) and Article XI.217, 3° (related rights) of the CEL.

87 Article XI.190, 9° (copyright) and Article XI.217, 7° (related rights) of the CEL.

88 Article XI.190, 5° of the CEL.

89 Article XI.190, 12° (copyright) and Article XI.217, 11° (related rights) of the CEL, which correspond to Article 5(2)(c) of Directive 2001/29/EC.

Justice did not require any change in the national law. Simply, the local judges shall have to comply with the more liberal views of the Court in Luxembourg.

Second, the exception relating to reprography. In the *Reprobel* case, the Court of Justice raised a number of critical points regarding the compatibility of the Belgian legislation with EU law. After that decision, two distinct steps have been made by two different national authorities. On the one hand, the national lawmaker adapted the legal provisions on the subject in order to comply with the judgment. This was done through the law of 22 December 2016. On the other hand, the Court of Appeal of Brussels has handed down a decision on the merits of the case on 12 May 2017.<sup>90</sup> After consideration of all the points made by the Court of Justice, the Belgian judge considered that the 'previous' national legislation – i.e., the legislation applicable to the case submitted to the Court of Justice – could be interpreted in conformity with EU law. However, it would be beyond the scope of the present contribution to further comment on both the new provisions and the decision of the court of appeal.

### 3.3.2 *The Copiepresse v Google case*

In the *Copiepresse* decision, the first degree court ruled that the GoogleNews activities fall outside the exception of quotation for the purpose of criticism, debate, review, teaching or scientific research<sup>91</sup> because they did not have the necessary element of analysis, comparison or criticism.<sup>92</sup> The *GoogleNews* service is purely automatic and does not add any comment to the headlines and snippets. The court also refused to apply the exception for news reporting<sup>93</sup> because Google did not make any original comment, so that its activity could hardly amount to a reporting of the news.<sup>94</sup>

### 3.4 Public lending

The successive laws from 2005 through 2016 had no impact on the substance of the provisions with respect to the public lending provisions, which had been

90 Court of Appeal of Brussels, *Hewlett-Packard Belgium v Reprobel*, op. cit.

91 Article 21, §1 of the Copyright Act.

92 Court of First Instance of Brussels (Pres.) 13 February 2007, op. cit., confirmed by Court of Appeal of Brussels, 5 May 2011, *IRDI* 2011, 265; see also Turner, M. and D. Callaghan (2008), op. cit., p. 35.

93 Article 22, §1, 1° of the Copyright Act, which implements Article 5(3)(c) of Directive 2001/29/EC, permits the reproduction and the communication to the public, for the purpose of information, of short fragments of works on the occasion of the reporting of current events.

94 See also Turner, M. and D. Callaghan (2008), op. cit., p. 35.

adopted in 1994 in compliance with the Directive 2006/115/EC (at that time Directive 92/100),<sup>95</sup> at least as far as the audio and audiovisual works are concerned.

**4.059** According to the adopted provisions, rightholders cannot prohibit public lending,<sup>96</sup> which can be seen as a limitation of their rights. However, such lending may only take place six months after the first distribution of the work to the public. Moreover, rightholders shall receive remuneration.<sup>97</sup>

**4.060** In this respect, the Belgian lawmaker was forced to modify the level of the remuneration as a consequence of the judgment of the Court of the Justice in the *VEWA* case.<sup>98</sup> In this case, the Court observed that the remuneration may not be purely symbolic. In particular, when fixing the level of remuneration, the local authorities should take into account the number of works that are made available and also the number of borrowers. As a result, the Belgian state had to abandon its previous system, namely a flat-rate of 1 (one) EUR per year and per adult who was registered with the lending institution, which was insufficient to be deemed an equitable remuneration. The CEL now provides that the level of remuneration shall take into account the number of works and the number of borrowings.<sup>99</sup>

**4.061** Another issue which has been raised in judicial proceedings concerns the question whether a videogame is eligible for public lending, to the extent that this kind of work could qualify as software, while the software related copyright provisions do not foresee the possibility of public lending. In the *BEA v Bibnet* case, a representative organization for local distributors of films and videogames opposed the public lending of videogames by a library accessible to the public. They claimed that the public lending limitation was not applicable under the software regime, while videogames are subject to the latter legislation rather than the common copyright legislation. But the court of appeal rejected their position. Relying to a large extent on the *Nintendo* preliminary ruling of the Court of Justice,<sup>100</sup> the appellate judges considered that while both the common copyright regime and the software

<sup>95</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

<sup>96</sup> Articles XI.192 (copyright) and XI.218 (related rights) of the CEL.

<sup>97</sup> Article XI.243 of the CEL.

<sup>98</sup> *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat*, C-271/10, ECLI:EU:C:2011:442.

<sup>99</sup> Article XI.244 of the CEL.

<sup>100</sup> CJEU, 23 January 2014, *Nintendo*, C-355/12.

regime are applicable, the first one should prevail.<sup>101</sup> One of the main reasons for this solution is that the software component of the videogame is only a limited side element of the global object which is to be considered an audiovisual work. The judges concluded that the public lending limitation is therefore applicable.

### 3.5 Mandatory collective administration and extended collective licensing

The Belgian lawmaker made a literal transposition of Article 9 of Directive 93/83/EEC,<sup>102</sup> including the first paragraph which provides that 'the right to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society', and the second paragraph stating that 'where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights'.<sup>103</sup>

In the *Uradex v RTD* case, the Belgian Supreme Court made a reference for a preliminary ruling to the European Court of Justice. The question referred sought a clarification regarding Article 9(2) of Directive 93/83/EEC, in particular with regard to the exact scope of the mandate of the collecting society deemed to manage the rightholder's right. In its answer, the Court of Justice stated that this mandate is not limited to the management of the pecuniary aspects of the rights, but also includes the power to exercise the right to grant or refuse authorization to a cable operator for cable retransmission.<sup>104</sup>

At the same time, however, the Court of Justice observed that the rightholder may have lost his right, on the basis of a contract or by virtue of the law, which means that the society is then no longer deemed to manage the right. Articles 18 and 36 of the 1994 Belgian Copyright Act are of particular significance in this respect. They state that unless otherwise agreed, the author of a creative element that is incorporated in the film, with the exception of composers of music, and the performers of a performance that is incorporated in the film are considered to have assigned to the producer the exclusive right of audiovisual exploitation of their work, and their performance, respectively.

<sup>101</sup> Court of Appeal of Ghent, 19 May 2014, *A&M*, 2014, pp. 488–491.

<sup>102</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>103</sup> Article XI.224 CEL, formerly Article 53, §§1 and 2 of the 1994 Copyright Act.

<sup>104</sup> *Uradex SCRL v Union Professionnelle de la Radio et de la Télédistribution (RTD), Société Intercommunale pour la Diffusion de la Télévision*, Case C-169/05, ECLI:EU:C:2006:365.

**4.065** In its judgment of 14 June 2010,<sup>105</sup> the referring Court, namely the Belgian Supreme Court, applied the decision of the Court of Justice. On the one hand, the Supreme Court partially reversed the judgment of the Court of Appeal of Brussels to the extent that it unduly excluded the right to authorize the cable retransmission from the scope of the mandate of the collecting society. However, on the other hand, the Supreme Court validated the judgment of the Court of Appeal insofar as it is decided that the performers of the performances that are incorporated in the film had assigned their rights to the producer even though they had previously entered into a membership agreement with the collecting society. As a result, the Supreme Court referred the case to another Court of Appeal in order to decide whether the collecting society may oppose the cable distribution of a *non-audiovisual* exploitation (in particular a mere audio exploitation) of the performances made by its members (provided that the audiovisual exploitation of these performances belongs to the film producer).

### 3.6 The freedom of speech

**4.066** Traditionally, Belgian jurisprudence has been reluctant to hold that the fundamental right to free speech may constitute an additional argument, over and above statutory exceptions, to justify a restriction of the scope of copyright.<sup>106</sup> In the *Index v Biblo* case, the Belgian Supreme Court, staying in line with this tradition, confirmed that Article 10 of the European Convention on Human Rights does not conflict with a law that protects the original work of an author.<sup>107</sup>

**4.067** In the *Copiepresse* case, the judge in first instance appeared to say that Article 10 of the European Convention on Human Rights was not applicable because the *GoogleNews* service was entirely automated so that it did not express any ideas.<sup>108</sup> On appeal, the court took the view that in line with the jurisprudence of the Supreme Court (the *Index v Biblo* case), the protection of the copyright in this case was to be deemed an admissible restriction of the right to freedom of expression.<sup>109</sup>

<sup>105</sup> Cass. (Supreme Court), 14 June 2010, *RDC*, 2010, 807.

<sup>106</sup> See however criticisms by Voorhoof, D. note under Brussels 14 June 2007, *A&M*, 2007, p. 27, esp. p. 35; Michaux, B. (2009) 'La BD et la liberté d'expression face à la marque et au droit d'auteur des tiers', *Bande dessinée et droit d'auteur*, Brussels: Larcier, p. 100.

<sup>107</sup> Belgian Supreme Court, *Index v Biblo*, 25 September 2003, *A&M*, 2004, p. 29. For a comment, see Strowel, A. and F. Tulkens (2006), 'Équilibrer la liberté d'expression et le droit d'auteur', *Droit d'auteur et liberté d'expression*, Brussels: Larcier, p. 29.

<sup>108</sup> See also in this sense, Turner, M. and D. Callaghan (2008), op. cit., p. 35.

<sup>109</sup> Court of Appeal of Brussels, *Copiepresse v Google*, 5 May 2011, RG N° 2007/AR/1730.

In the *Sabam v Tiscali (Scarlet)* case, the President of the Court of First Instance of Brussels refused to find that a filtering system which could result from an injunction ordering an internet access provider to prevent the sharing of unauthorized music files through *peer-to-peer* would violate the freedom of expression.<sup>110</sup> However, in the same case, the Court of Appeal of Brussels referred a question to the European Court of Justice, asking, *inter alia*, whether such a measure is compliant with Article 10 of the European Convention on Human Rights.<sup>111</sup> In its judgment, the Court of Justice decided that the filtering system was of such a nature that it could infringe the fundamental rights of the internet users to receive and impart information, which right is (also) safeguarded by Article 11 of the Charter of Fundamental Rights of the European Union.<sup>112</sup>

## 4. TECHNOLOGICAL MEASURES

### 4.1 Definition of technological measures

The Belgian lawmaker took over, nearly literally, the definition of 'technological measures' mentioned in Article 6(3) of Directive 2001/29/EC.<sup>113</sup>

The question has been raised whether the protection applies only to those measures that prevent unauthorized acts which are restricted under the Copyright Act or also to those measures that prevent unauthorized acts which are not restricted under said Act.

According to the broad and unambiguous terms of the legal definition, it appears that the latter solution shall prevail.<sup>114</sup>

As under the Directive, the measures must be effective, which means, according to the Parliamentary documents that they must be 'serious' enough, even though they do not need to be infallible.<sup>115</sup> The Belgian lawmaker

<sup>110</sup> President of the Court of First Instance of Brussels, *SABAM v Scarlet (Tiscali)*, 29 June 2007, *A&M*, 2007, p. 476.

<sup>111</sup> Court of Appeal of Brussels, *SABAM v Scarlet*, 28 January 2010, *A&M*, 2010/2.

<sup>112</sup> *Scarlet Extended v Société Belge des auteurs, compositeurs et éditeurs*, Case C-70/11, ECLI:EU:C:2011:771, para. 52.

<sup>113</sup> Article 191 CEL, formerly Article 79bis, §1, fourth subparagraph of the 1994 Copyright Act.

<sup>114</sup> See however the hesitations of Dusollier, S. (2012) *Hommage à Jan Corbet – La Loi Belge sur le Droit d'Auteur, Commentaire par Article*, Brison, F. and H. Vanhees (eds), Brussels: Larcier, 3rd edn., p. 546, with reference to the Parliamentary history.

<sup>115</sup> Ibid.

transposed literally the presumption of effectiveness mentioned in Article 6(3) of the Directive.<sup>116</sup>

#### 4.2 Protection against circumvention

**4.073** The 2005 Implementation Act provides for criminal sanctions against the person 'who carries out the circumvention of any effective technological measure in the knowledge or with reasonable grounds to know that he or she is pursuing that objective'.<sup>117</sup> This wording is exactly the same as that of Article 6(1) of Directive 2001/29/EC.

**4.074** The 2005 Act, however, establishes an additional condition for (criminal) sanctions that does not appear in the Directive. More precisely, the infringer is liable to criminal sanctions only if he acts in the knowledge or with reasonable grounds to know that the circumvention could facilitate infringements of a copyright or a related right.

**4.075** Yet, the mere awareness that an infringement is likely to take place as a result of the circumvention is sufficient. Moreover, the additional condition is further neutralized by providing that the circumvention is deemed to facilitate such infringements when it concerns technological measures that are applied pursuant to or in compliance with the Copyright Act.<sup>118</sup>

#### 4.3 Protection against preparatory acts

**4.076** The Belgian lawmaker made a nearly *verbatim* transposition of Article 6(2) of Directive 2001/29/EC with regard to preparatory acts that fall within the scope of the protection of technological measures.<sup>119</sup> Said acts are punishable with criminal sanctions.

**4.077** In the *Sony et al. v Vandebeeck* case, the Constitutional Court had to decide whether the Belgian Constitution and the European Convention on Human Rights permit a statutory provision that incriminates the traffic in devices, products, components or services that 'have only a limited commercially significant purpose or use other than to circumvent'.

116 Article XI.291 CEL, formerly Article 79bis, §1, fifth subparagraph of the 1994 Copyright Act.

117 Article XI.291 CEL, formerly Article 79bis, §1, first subparagraph of the 1994 Copyright Act.

118 See Visscher, F. de and B. Michaux (2006), *op. cit.*, p. 133, esp. n° 35.

119 Article XI. 291 CEL, formerly Article 79bis, §1, second subparagraph of the 1994 Copyright Act.

The key issue was whether these terms, in particular the term 'limited', were sufficiently precise to enable a person to assess the legal consequences if he or she decides to adopt a particular behaviour. **4.078**

The Constitutional Court answered positively. It considered that even though the judge on the merits has some liberty when applying the provision at stake in a concrete case, this does not mean *per se* that the provision is insufficiently precise. Moreover, the Court noted that the provision is intended for people who are perfectly aware of technological evolutions, so that they may be expected to be cautious when assessing the illegal character of their behaviour.<sup>120</sup> **4.079**

#### 4.4 Intervention mechanism

Pursuant to Article 6(4) of Directive 2001/29/EC, the 2005 Implementation Act introduced an intervention mechanism intended to ensure that despite the technological measures and notwithstanding their legal protection, the beneficiaries of certain exceptions could obtain the effective means to benefit from said exceptions. **4.080**

Under the 1994 Copyright Act, there was no such mechanism. In the *Test-Achats v Sony Belgium et al.* case, a consumer organization had nevertheless tried to obtain an injunction against producers of phonograms. It argued that the anti-copy systems applied by producers prevented consumers from making private copies although they were beneficiaries of the private copy exception provided by the 1994 Copyright Act. The Court of Appeal of Brussels denied the injunction, because the consumers were merely beneficiaries of an exception and not the owners of a copyright, so that they were not allowed to bring a court action that was based on the alleged infringement of a copyright.<sup>121</sup> In other words, the consumers had no standing to bring the action. The 2005 Implementation Act provides that the rightholders shall take 'adequate' measures, on a voluntary basis, 'within a reasonable timeframe' (which is not defined by law), including through agreements with the other parties concerned, in order to provide the beneficiaries of the exceptions at stake with the means necessary to benefit effectively from said exceptions.<sup>122</sup> Only those beneficiaries that have legal access to the protected work or subject-matter concerned are eligible. The law contains a list of the relevant **4.081**

120 Constitutional Court, 12 November 2009, n° 182/2009, available on <http://www.const-court.be>. (last accessed 30 October 2018).

121 Court of Appeal of Brussels, *Test Achats v Sony Belgium et al.*, 9 September 2005, *A&M*, 2005, p. 301.

122 Article XI. 291 CEL, formerly Article 79bis, §2, subparagraph 1 of the 1994 Copyright Act.

exceptions, which includes, mainly, reproduction on paper or a similar medium for private use, the exception for the purpose of illustration for teaching or scientific research, the exception granted to libraries and other establishments for preservation and archiving, ephemeral recordings by broadcasting organizations, the exception for the benefit of people with a disability, and the exception for the benefit of social institutions. The exception for the reproduction of audio and audiovisual works for private use is not included in the list, but the law provides that it may be added to the list at a later stage by Royal Decree, subject to the condition that it does not conflict with a normal exploitation of the work and it does not unreasonably prejudice the legitimate interests of the rightholders.<sup>123</sup>

- 4.082** If the rightholders fail to take measures in favour of the beneficiaries of the exceptions concerned or if the technological measures do prevent the purchaser from using the work or other subject-matter in conformity with its destination, they are exposed to injunctions.<sup>124</sup> However, after more than five years, there has been no judicial decision in this respect.

#### 4.5 Exclusion of interactive services from the intervention mechanism

- 4.083** The law provides, in compliance with Article 6(4)(4) of the Directive that the obligation for rightholders to take measures does not apply to works or other subject-matter made available to the public on 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.<sup>125</sup>

#### 4.6 Remedies and sanctions

- 4.084** The CEL provides for criminal sanctions against the individuals or the legal entities who commit acts of circumvention or preparatory acts within the meaning of the law.<sup>126</sup>
- 4.085** There is some criminal case law with regard to technological measures, in particular in the field of interactive games that are protected by copyright. However, with regard to this last type of work, the judicial decisions are mostly based on other legal provisions regarding technological measures, namely on those provisions that transpose Directive 2009/24/EC on the legal

<sup>123</sup> Article XI.291 CEL, formerly Article 79*bis*, §2, subparagraph 2 of the 1994 Copyright Act.

<sup>124</sup> Article XI.336 CEL, formerly Article 87*bis* of the 1994 Copyright Act.

<sup>125</sup> Article XI.291 CEL, formerly Article 79*bis*, §3 of the 1994 Copyright Act.

<sup>126</sup> Article XI.291 and Article XV.104 CEL.

protection of computer programs,<sup>127</sup> although the provisions of Directive 2001/29/EC may also be applied.<sup>128</sup>

Apart from the sanctions mentioned above, the offender is exposed to civil actions that may seek for damages and/or an injunction aiming at the termination and prevention of the acts under penalty.<sup>129</sup> These actions include the *ad hoc* procedure on the merits (aiming at a permanent injunction, see below) that is conducted in the form of a summary procedure.<sup>130</sup> When the infringer is prosecuted in a criminal court, the prejudiced rightholders who want to seek damages do not need to institute an additional procedure in a civil court: they may file a claim for damages in the same criminal procedure. Yet, if the rightholders choose to file an application for the *ad hoc* injunction provided by Article XVII.14 CEL (see below), they will cause the criminal proceedings to be suspended until a final judgment on the *ad hoc* injunction.<sup>131</sup> Moreover, this last procedure does not allow for the awarding of monetary damages.

#### 4.7 Playability

In the period prior to the 2005 Implementation Act, the Copyright Act did not include any provision that would be intended to ensure the playability of physical copies of works or subject-matter protected by a related right, such as DVDs.

During that period, in the *Test-Achats v Sony Belgium et al.* case, a consumer organization nevertheless tried to obtain an injunction against producers of phonograms based on the Copyright Act. It argued that the consumers were entitled by the Act to ensure the playability of sound recordings. However, the Court of Appeal of Brussels dismissed the claim. It considered that even under the assumption that technical failures would impact the playability of the sound carriers, consumers were not entitled to file a claim based on the Copyright Act because the non-playability does not infringe any copyright that would belong to consumers.<sup>132</sup>

<sup>127</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version).

<sup>128</sup> See, for example, Constitutional Court 12 November 2009, *Sony v Vandebecck*, n° 182/2009, available on <http://www.const-court.be> (last accessed 30 October 2018).

<sup>129</sup> Dusollier, S. (2012) op. cit., p. 546 with reference to Parliamentary documents.

<sup>130</sup> Article XVII.14 CEL, formerly Article 87, §1 of the 1994 Copyright Act, see below.

<sup>131</sup> Article XI.293 CEL, formerly Article 80, sixth paragraph of the 1994 Copyright Act.

<sup>132</sup> Court of Appeal of Brussels, *Test Achats v Sony Belgium et al.*, 9 September 2005, *A&M*, p. 301. N.B. The litigation was subject to the Copyright Act in its pre-2005 version only.

**4.089** One could think that after this decision this topic would definitely revert to its natural legal area, namely the laws on consumer protection. Yet, quite unexpectedly, when the intervention mechanism in relation to the benefit of the exceptions in the 2005 Act was introduced, the Belgian lawmaker also added a specific provision regarding playability, although there was no corresponding provision in Directive 2001/29/EC.<sup>133</sup> The new provision states that technological measures may not prevent the legitimate purchaser of the carrier from using the work or the subject-matter protected by a related right in conformity with its normal use.<sup>134</sup>

**4.090** Moreover, the 2005 Implementation Act states that in the case of non-compliance with the playability provision, the legitimate purchaser may apply for an injunction against the rightholders, for example the producers of phonograms.<sup>135</sup> The injunction may impose on them an obligation to take appropriate measures in order to ensure the effective playability, this despite the fact that the producers may have no technical possibility of ensuring playability as this may lie with the manufacturer of the relevant equipment. On the date of the present contribution,<sup>136</sup> no such action had been brought in court yet.

## 5. RIGHTS-MANAGEMENT INFORMATION

**4.091** The 2005 Implementation Act made a quite literal transposition of Article 7 of Directive 2001/29/EC with regard to rights-management information. The definition of the expression 'rights-management information' is exactly the same as under Article 7(2) of the Directive,<sup>137</sup> and the restricted acts as well as the conditions related hereto<sup>138</sup> are identical to those mentioned in Article 7(1) of the Directive.<sup>139</sup>

<sup>133</sup> However, Recital 48 provides that the technological measures may not prevent the operation of electronic equipment and its technological development.

<sup>134</sup> Article XI.291 CEL, formerly Article 79bis, §4 of the 1994 Copyright Act.

<sup>135</sup> Article XI.336 CEL, formerly Article 87bis, 61, 2° of the 1994 Copyright Act.

<sup>136</sup> 10 May 2018.

<sup>137</sup> Article XI.292 CEL, formerly Article 79ter, §2 of the 1994 Copyright Act.

<sup>138</sup> More precisely, the condition that the offender knows or has reasonable grounds to know that by committing the restricted acts he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law.

<sup>139</sup> Article XI.292 CEL, formerly Article 79ter, §1 of the 1994 Copyright Act.

As in the case of technological measures, the Belgian lawmaker opted for a legal protection through criminal sanctions. These sanctions are exactly the same.<sup>140</sup> However, the jurisprudence in this respect, if any, seems to be very limited. **4.092**

## 6. SANCTIONS AND REMEDIES

### 6.1 Injunctions in general

The CEL provides for an *ad hoc* injunction procedure in order to terminate and/or prevent copyright infringements<sup>141</sup> which is quite successful, *inter alia*, because of its speed. **4.093**

Article XVII.14.§3 CEL reads as follows: 'The President of the Court of First Instance and the President of the Commercial Court in matters which are respectively the jurisdiction of those courts, shall establish the existence and order the termination of any infringement of copyright or related right (...)'. **4.094**

The procedure is conducted as in summary proceedings, but the judge rules on the merits,<sup>142</sup> which means that he can issue a *permanent* injunction.<sup>143</sup> **4.095**

Moreover, the law provides that his decision is automatically enforceable and not stayed by any appeal and, unless otherwise provided by him,<sup>144</sup> without providing any security. **4.096**

The injunction may be requested by the rightholder, a collective management society, a professional organization representing rightholders or other interested parties or any other interested party. **4.097**

The judge can order both the termination of an actual infringement and/or the prevention of a threatened infringement.<sup>145</sup> His order can allow the protection of either one single work or of any work that belongs to the repertoire of one rightholder, all the members of a professional organization or all the members **4.098**

<sup>140</sup> See above.

<sup>141</sup> The name of this court action is 'action en cessation' (in French) or 'vordering tot staking' (in Dutch).

<sup>142</sup> Moreover, urgency is not a requirement.

<sup>143</sup> He can issue provisional injunctions as well.

<sup>144</sup> The obligation to provide security is very exceptional.

<sup>145</sup> In other words, the injunction may be ordered prior to the initiation of an infringing conduct.

of a rights management society.<sup>146</sup> As a consequence, the judge may order the termination of infringements that have already taken place in relation to a series of specific works and by the same token to prevent any infringement in relation to any other work from the claimant's repertoire.

**4.099** In the past, the question of whether the court may or must detail the concrete measures that have to be taken in order to comply with the injunction has been discussed in different ways. In *Sabam v Scarlet (Tiscali)*, the judge in first degree appointed an expert to verify the availability of technical means that would enable an internet access provider to filter out any unauthorized music transmitted through its servers via *peer-to-peer* software.<sup>147</sup> In its later decision which was taken after the expert's report, the judge concluded technical means were indeed available and as a consequence it ordered *Scarlet* to prevent the copyright infringements at issue.<sup>148</sup> In *The Pirate Bay* case, the Court of Appeal of Antwerp decided that it was up to the judge to determine the concrete measures aiming at discouraging the infringements, i.e., how the injunction had to be implemented as a technical matter.<sup>149</sup> However, the question is whether this last decision is still valid in light of the *UPC Telekabel* judgment of the Court of Justice which seems to indicate that the specific measures may be determined by the addressee of the injunction.<sup>150</sup> The latter is indeed best placed to implement measures which are optimally adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.<sup>151</sup>

**4.100** In most cases, non-compliance with the injunction of the court is subject to a recurring penalty payment, with a view to ensuring compliance. In addition, the judge may order, at the expense of the defendant, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part.

146 President of the Court of First Instance of Brussels *SAJ et al. v Central Station*, 16 October 1996, *A&M*, 1996, 426, confirmed by Court of Appeal of Brussels, 28 October 1997, *A&M*, 1997, 383.

147 President Court of First Instance of Brussels, *SABAM v Scarlet (Tiscali)*, 26 November 2004, *A&M*, 2005, 46.

148 President Court of First Instance of Brussels, *SABAM v Scarlet (Tiscali)*, 29 June 2007, *A&M*, 2007, 476. This decision was appealed. The Court of Appeal then referred a question to the Court of Justice which concluded that the measure sought was contrary to EU law (see above *Scarlet Extended*).

149 Court of Appeal of Antwerp, 26 September 2011, *BAF v Proximus et al. (The Pirate Bay)*, *A&M*, 2012, pp. 216–221.

150 *UPC Telekabel v. Constantin Film*, para. 52.

151 *UPC Telekabel v. Constantin Film*, para. 52.

In the era predating the *Scarlet* and other subsequent decisions from the Court of Justice, it was generally held that if the judge finds an infringement, he must issue an injunction as a rule. At that time, the order was considered neither conditional nor optional.<sup>152</sup> However, even in that period, it was admitted that the judge could refuse the injunction under exceptional circumstances, namely if he found an abuse of right on the part of the claimant.<sup>153</sup> In the field of architectural works, the case law has repeatedly rejected applications for an order that seeks to preclude the owner of the building from modifying the building where the modifications are necessary.<sup>154</sup> Since the *Scarlet* judgment of the Court of Justice, it seems reasonable to say that when appropriate, the judge has to strike a balance between the different rights at issue. That being said, the result of this balancing exercise may perfectly well go in favour of the rightholders.<sup>155</sup>

No liability of the defendant needs to be established,<sup>156</sup> neither is it a condition to show an (irreparable) injury to the plaintiff. The claimant is also not under an obligation to demonstrate that monetary damages are inadequate to compensate for that injury. Moreover, there is no need to show that the case is urgent since the urgency is presumed in the context of this *ad hoc* procedure.

The injunction shall be issued even if the infringing conduct was terminated, as long as a reasonable possibility of recurrence is present.

The *ad hoc* procedure, even though extremely efficient and rapid, does not allow monetary recovery.

Only an ordinary procedure on the merits will enable the claimant to obtain compensation for the harm suffered. Of course, a permanent injunction is also available under the ordinary procedure.

The *ad hoc* procedure is without prejudice to preliminary proceedings that enable the obtaining of a temporary injunction.<sup>157</sup> In particular, when the matter is urgent, the president of the court may issue an interlocutory injunction intended to prevent or to forbid the continuation of copyright

152 Michaux, B. et al. (2008), in Brison, F. and H. Vanhees (eds) op. cit., p. 487.

153 Visscher, F. de and B. Michaux (2000), op. cit., p. 506, n. 635.

154 For example, Court of Appeal of Brussels 21 March 2003, *A&M* 2003, 366, note B. Vinçotte.

155 See, e.g., Court of Appeal of Antwerp, 26 September 2011, *BAF v Proximus et al. (The Pirate Bay)*, *A&M*, 2012, pp. 216–221.

156 *Ibid.*, pp. 216–221.

157 Even though, according to the law, the *ad hoc* procedure is conducted 'as' in summary proceedings, in practice it might last longer than preliminary proceedings.

infringements, on a provisional basis and subject to a recurring penalty payment. The law provides that his decision is enforceable even in the event of an appeal. However, on the other hand, the issuing of an injunction in the context of summary proceedings requires that the traditional conditions be met, namely the urgency, a probable success on the merits, the possibility of a serious harm and a balance of hardships in favour of the claimant.

## 6.2 Implementation of Article 8(3) of Directive 2001/29/EC

- 4.107** Article XVII.14, §4 of the CEL which confirms the powers of the court vis-à-vis intermediaries reads as follows: ‘They<sup>158</sup> may also issue an injunction against intermediaries whose services are used by a third party to infringe a [copyright or related right].’
- 4.108** This subparagraph was introduced by the Act of 10 May 2007, which entered into force on 1 November 2007.
- 4.109** The Parliamentary history of the 2007 Act indicates that subparagraph 2 is intended to implement explicitly Article 8(3) of Directive 2001/29/EC and Article 11 of Directive 2004/48/EC. In fact, these provisions were taken in literally.
- 4.110** The Parliamentary history of the 2007 Act also makes clear that subparagraph 2 is of a declaratory nature<sup>159</sup> in that the solution it provides was already accepted under the original wording of the 1994 Act, that is, prior to its being expressly enunciated by the national lawmaker.
- 4.111** Moreover, at the time of the 2005 Implementation Act, the Belgian lawmaker had observed that this solution was already applicable under the 1994 Act: ‘The Commission takes the unanimous view that Article 87 of the Copyright Act, which provides an injunction for any infringement of copyright or a related right, must be read as meaning that the procedure under this article may be applied against intermediaries whose services are used by a third party to infringe copyright or related rights’.<sup>160</sup>
- 4.112** In addition, the Parliamentary history of the 2007 Act confirms that in case of absolute necessity, the injunction directed at intermediaries may be granted on

<sup>158</sup> This is the President of the Court of First Instance and the President of the Commercial Court.

<sup>159</sup> Doc. Parl. 51-2943/1 and 2944/1, pp. 45–46. With reference to the case *Sabam v Scarlet (Tiscali)*, 26 November 2004 (see above).

<sup>160</sup> Doc. Parl. 51-1137/13, p. 87.

an *ex parte* request, ‘in order to comply with Article 8(3) of Directive 2001/29/EC’.<sup>161</sup> Although there is no authoritative case law on this specific procedural issue yet, it might be anticipated that the jurisprudence will follow the standard set forth in Article 9(4) of Directive 2004/48/EC, which states that the *ex parte* procedure is appropriate when ‘any delay would cause irreparable harm to the right holder’.

Although Recital 59 of Directive 2001/29/EC states that the conditions and modalities relating to injunctions should be left to the national law of the member states, the Belgian implementation law (the 2005 and 2007 Acts) did not provide any language in this respect. *A fortiori*, the 2005 and 2007 Acts do not contain any indication with regard to requirements or standards which would have to be applied for the issuing of an injunction directed at intermediaries. **4.113**

In particular, Belgian law does not include criteria such as whether the injunction would significantly burden either the provider or the operation of the provider’s system or network, and the magnitude of the harm likely to be suffered by the rightholder if steps are not taken to prevent or restrain the infringement. **4.114**

Moreover, the 2005 and 2007 Acts did not provide for the availability of an alternative to the injunction, such as pecuniary compensation. **4.115**

The notion of ‘intermediary’ is broad. It includes various kinds of operators, such as an internet access provider,<sup>162</sup> a provider of services in relation to domain names,<sup>163</sup> or an internet collaborative platform enabling users to share and get an access to TV content.<sup>164</sup> **4.116**

The fact that the intermediary is not responsible for the infringing content is irrelevant.<sup>165</sup> *A fortiori*, the circumstance that the intermediary is not the infringer does not matter. Also, the plaintiff is under no obligation to act in the first place against the infringer prior to bringing a lawsuit against the intermediary.<sup>166</sup> There is no such a thing as a subsidiarity rule. **4.117**

<sup>161</sup> Doc. Parl. 51-2943/1 and 2944/1, pp. 45–46.

<sup>162</sup> Court of Appeal of Antwerp, 26 September 2011, *BAF v Proximus et al. (The Pirate Bay)*, *A&M*, 2012, pp. 216–221.

<sup>163</sup> Court of First Instance of Brussels (Pres.), 9 May 2013, *BAF v DNS Belgium*, *A&M*, 2013, pp. 499–508

<sup>164</sup> Commercial Court Antwerp (Pres.), *VRT et al. v Right Brain*, 4 November 2014, *A&M*, 2015, pp. 80–92.

<sup>165</sup> Court of Appeal of Antwerp, 26 September 2011, *BAF v Proximus et al. (The Pirate Bay)*, *A&M*, 2012, pp. 216–221.

<sup>166</sup> *Ibid.*

**4.118** It may be worth mentioning that the injunction allows preventing indirect copyright infringements as well. In the *Belgian Anti-piracy Federation v downloadgratisfilms* case, the judge ordered the operator of a website to disable the access to its website which offered hyperlinks to unauthorized movie files located on other websites.<sup>167</sup> In this case, at least at the time of the ruling (which predates the *GS Media* judgment of the Court of Justice),<sup>168</sup> the defendant was not considered a direct infringer, but he was deemed facilitator of copyright infringements. Moreover, even though the court decision is not explicit in this respect, the defendant might be considered as an information society service provider within the meaning of Directive 2000/31/EC,<sup>169</sup> whose services are used by a third party to infringe a copyright or a related right in the sense of Article 8(3) of Directive 2001/29/EC and Article 11 of Directive 2004/48/EC.

### 6.3 Damages

**4.119** In the context of the ordinary procedure on the merits (as opposed to the ad hoc procedure for an injunction, see above), the judge may order the infringer not only to discontinue or to prevent the infringement, but also to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.<sup>170</sup> When the lawmaker implemented Directive 2004/48/EC through the Law of 10 May 2007, he confirmed, in accordance with the traditional position under Belgian law, that an infringement of an intellectual property right constitutes a wrongful act per se.<sup>171</sup> As a consequence, the infringer may be ordered to pay damages even though he did not knowingly, nor with reasonable grounds to know, engage in an infringing activity.<sup>172</sup>

**4.120** The judge may set the damages as a lump sum. Also, as a compensation for the damage, he may order that the infringing goods and materials and equipment which directly served to commit the infringement be handed over to the plaintiff.

<sup>167</sup> Court of First Instance of Brussels (Pres.) 14 January 2008, n° 07/15931/A.

<sup>168</sup> *GS Media BV v Sanoma Media Netherlands BV*, 8 September 2016, C-160/15, ECLI:EU:C:2016:644.

<sup>169</sup> See Article 2(a) and (b) of Directive 2000/31/EC which refer to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.

<sup>170</sup> Article XI.335 of the CEL.

<sup>171</sup> See the Parliamentary history, Chamber of Representatives, 2006–2007, documents 2943/1 and 2944/1, p. 28.

<sup>172</sup> Ronse, C. comment under Liège 29 February 2008, *AS&M*, 2008, p. 211.

Where the infringer knowingly engaged in an infringing activity, the judge **4.121** may order the recovery of profits. In addition, without prejudice to any damage due, he may order that the infringing goods and materials and equipment which directly served to commit the infringement, or the value thereof, be handed over to the plaintiff.

### CONCLUSION

The flexible language and the broad concepts which characterized the 1994 **4.122** Act allowed Belgian copyright law to anticipate a significant number of the key provisions contained in Directive 2001/29/EC (indeed even certain elements of the 1996 WIPO Treaties). In particular, at the time of the 2005 Implementing Act, Belgian copyright law had already integrated the broad reproduction right that encompassed concepts of temporary and indirect reproduction, the distribution right and the doctrine of Community-wide exhaustion as well as the right of making available to the public.

Also with regard to civil procedure, the language of the 1994 Act was **4.123** sufficiently supple to permit the Courts to grant injunctions against intermediaries whose services are used to infringe a copyright or a related right, before the explicit mentioning thereof in the 2007 Act.

The guidance by the Court of Justice has nevertheless had a major impact on **4.124** some local traditions. In particular, in the field of enforcement proceedings against intermediaries, the national judges are now forced to take into consideration not only the protection of copyright, but also other fundamental rights, including the right of freedom to conduct business and the right of freedom of expression.

Moreover, today the Belgian system is still insufficient in the field of **4.125** exceptions. The lawmaker did not fully clarify its objective when it decided in favour of the mandatory nature of the exceptions. It might have overlooked some consequences of its (notable) choice in this respect. Moreover, it might improve the logical structure of this Chapter as well as the wording of certain provisions therein to address the practical suitability of the permitted uses in the online environment. At the same time, the Belgian lawmaker might consider whether and how it could ensure a more effective compliance with the three-step test.