Belgium

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be interpreted in a strict manner; the analogous application of these provisions is, for example, not excluded.[18]

However, a somehow more generous approach was taken in regard to parodies in the Supreme Court case *Lieblingshauptfrau*,[19] effectively leading to a free use of a work, although the decision did not relate to a specific exception as the Austrian Copyrights Act does not provide for an exception for parodies or caricatures. In order to be permissible, the parody or caricature has to qualify as a "free adaption" of the parodied work. According to Section 5 para 2 of the Austrian Copyright Act, use made of a work in creating another work shall not make that other work an adaptation requiring the consent of the rights holder of the original if such work constitutes an independent new work in relation to the work used. This requirement was interpreted very generously by the Supreme Court in the case *Lieblingshauptfrau*, accepting that in case of parodies, a (significantly) lower threshold can be applied for the requirements that have to be met in order to qualify a work as an independent new work, i.e. a free adaption.

Free uses can theoretically—in the absence of an express provision stating otherwise—be ruled out by contract, provided this is possible according to general civil law, which is, however, only rarely the case.

14.10 Conclusion

The Austrian Copyright Law is determined in a relatively large amount by EU legislation and is a complex system of provisions balancing the rights of the copyright owner and the general public. The system is complex not least because of the lack of a catch-all clause; the Austrian Copyright Act—as described above—establishes very detailed exceptions that try to strike a fair balance in specific and sometimes also quite similar situations, resulting in complicated provisions and inconsistencies. Some of these issues are rooted in EU legislation, while others are due to the historic development of Austrian and EU Copyright Law.

As a result, the Austrian Copyright Act is in part quite complicated, leading to some amount of legal uncertainty for the user. This is especially true for the use in online situations, compounded by the fact that there remain some unanswered questions with regard to EU legislation in this area. A consolidation and simplification of the exceptions listed in the Austrian Copyright Act would be desirable, where possible within the framework of EU law.

[18] OGH 19 November 2002, 4 Ob 230/02f "*meischi.at*".

[19] OGH 13 July 2010, 4 Ob 66/10z "*Lieblingshauptfrau*".

Belgium

15

Manon Knockaert

15.1 Introduction

Copyright law protects literary and artistic works that reflect the personality of the creator for 70 years beyond his or her death.

Copyright law offers a monopoly to the copyright owner. Nevertheless, over the years, exceptions to this exclusive right increased in order to meet the general interest and respect fundamental rights. At the same time, the exceptions have become more complex. The information society and the Internet challenge the intellectual property law that oscillates between always more protection and the desire to grab these new tools to encourage creation.

In this report, we will try to bring some clarity. We will focus on the main exceptions to copyright and briefly address exceptions to the law of databases and computer programs.

As a first step, we will give a brief overview of the history of exceptions in Belgian law before presenting preliminary and general considerations of the exception regime. A specific section concerns the triple test. Then we will outline the various exceptions available under Belgian law. Finally, we will tackle technical protection measures and the exhaustion rule. We conclude with an explanation of counterbalance between fundamental rights and the exclusive rights enjoyed by the copyright owner.

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B. Kilpatrick et al. (eds.), *Antitrust Analysis of Online Sales Platforms & Copyright Limitations and Exceptions*, LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition,

15.2 Historical Development of Exceptions in Belgian Law

In Belgium, the first national law on copyright appears in 1886. Exceptions from quotations for the purpose of criticism, polemics or teaching, as well as the reproduction in a newspaper of an article taken from another publication, emerged. The following laws enriched the list of exceptions: the laws of 1958[1] and 1994[2] and the transposition law of the Directive on the legal protection of databases.[3] With the transposition of another Directive, Directive 2001/29[4] on the harmonisation of certain aspects of copyright and related rights in the information society, nine exceptions are added.[5] European Directive 2001/29 lays down a list of exceptions for the Member States. National legislators are free to transpose into their national law all exceptions or some of them. Only one single exception is obligatory for all Member States: the exception for temporary acts of reproduction. If the Member States have the choice of the exceptions proposed by the European Union, they may not go beyond the scope of the list in Article 5 of Directive 2001/29.

The Belgian provisions on intellectual property are contained in the Code de droit économique (Code of Economic Law, hereafter referred to as 'CDE'). It is important to note that recent amendments have been made by the Law of 22 December 2016.[6]

Belgian law expressly excludes from copyright protection speeches made in deliberative assemblies, public court hearings or political meetings and the official acts of the authority (legal texts and decisions of courts and tribunals).[7]

[1] Insertion of the exception for reproduction and communication to the public for news reporting purposes.

[2] Insertion of exceptions of execution in the family circle, reprography, private copying, parody and execution of works during a public examination.

[3] Directive 96/9 of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, JO 1996 L 77, p. 20.

[4] Directive 2001/29 of the European Parliament and of the Council of 22 May 2011 on the harmonization of certain aspects of copyright and related rights in the information society, JO 2001 L 167, p. 10.

[5] Insertion of exceptions for provisional copies, performance in the context of school activities, the communication of works for the purpose of illustrating teaching, reproduction for preservation purposes by the listed institutions, and the consultation in These same establishments, ephemeral recordings made by broadcasting organisations, exceptions for the disabled, reproduction and communication intended to announce public exhibitions and sales of artistic works as well as the exception of reproduction in favour of hospitals, penitentiary establishments and establishments for assistance to young people; S. Dusollier et M. Lambrecht, Les exceptions ont 20 ans: âge de raison ou de refondation?. In Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015.

[6] Law modifying some provisions from the Code de droit économique, M.B. 2016, n° 2016011538, p. 91843.

[7] Article XI. 172, 6 1 para 2 and § 2 of the Code de droit économique.

In addition, the Berne Convention states: 'The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.'[8]

The enumeration is not exhaustive. Belgian copyright law protects only literary and artistic works that are originals. The expression literary and artistic work excludes technical inventions, purely technical operations, sports performances, ideas, principles, theories, styles, themes and methods.[9]

15.3 General Considerations Relating to Exceptions

15.3.1 Lawful Publication Condition

In Belgium, all the exceptions to the reproduction right and communication to the public rights are subject to a first condition: the lawful publication. It concerns the application of the moral right of disclosure of the author. It is up to the author to decide if his or her work is finished and may be revealed.[10]

15.3.2 Type of Exceptions

In Belgian law, a distinction between two types of exceptions can be made. First, some of the exceptions contained in the list provided by the Code de droit économique are strict exceptions, while others are legal licences.

For this first category, the legislator, making a balance between different imperatives, considered that the monopoly of the copyright owner could not have the effect of preventing uses considered as legitimate by the legislator. The second category provides for compensation in favour of the copyright owner. The right to financial compensation supersedes the exclusive rights conferred upon the copyright owner.[11]

15.3.3 Closed and Mandatory List

The Code de droit économique provides for a closed list of exceptions. Any other use outside the list requires the express authorisation from the owner.[12] The exceptions are subject to strict interpretation. However, the Court of Justice of the

[8] Article 2.8 Bern Convention.

[9] Article 9 (2) of the TRIPs Agreement; S. Dusollier and A. De Francquen, Manuels de droits intellectuels, Anthémis, 2015, p. 60 and p. 66.

[10] Doc 54 2122/001, p. 7.

[11] S. Dusollier and A. De Francquen, Manuels de droits intellectuels, Anthémis, 2015, p. 102.

[12] Consequently, Belgium do not have a "catch all" exception such as fair use.

European Union insists on the preservation of the effectiveness of the exceptions while remaining within the limits of the triple test.[13]

Furthermore, Belgian law has the particularity of expressly providing that all the exceptions are mandatory provisions. Consequently, there is no possibility of derogation by contract. The imperative nature of the exceptions is a major issue. Indeed, Directive 2001/29 encourages the use of contracts in the information society. The fear was therefore that copyright owners would abuse this possibility to prohibit, by contract, uses authorised by copyright. The Belgian legislator wished to avoid such practices.[14]

There is one restriction to this principle for computer programs. The Code de droit économique contains specific rules regarding the protection of computer programs. The Belgian law transposing Directive 2001/29 stipulates that exceptions for safeguarding, testing the program and decompiling are mandatory. On the other hand, the exception for normal use of computer programs is not imperative. According to Article XI. 299 § 1 CDE, the permanent or temporary reproduction of a computer program and the translation, adaptation, arrangement and any other alteration of a computer program shall not require an authorisation of the right holder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction. The same provision provides that this is only in the absence of specific contractual provisions.[15] Consequently, it is possible for the author to conclude a contract in which his or her authorisation is required for the accomplishment of acts necessary for the normal use of the computer program.

The Code de droit économique explicitly mentions that this list concerns exceptions to the economic rights of the author. As an example, some exceptions require a reference to the source and name of the author. This reflects the concern of the legislator to respect the paternity right of the author. The same is true in the precondition to the applicability of any exception to the lawful disclosure of the work.

The copyright owner retains the right to object to any modification of his or her work and to object to any distortion or modification of his/her work that would undermine his/her honour or reputation. While copyright permits the reproduction and/or communication of a work in some cases without having to obtain the authorisation of the right holder, the latter retains the right to claim his or her right to respect the integrity of his/her work. Directive 2001/29 calls for the maintenance of a fair balance of rights and interests between copyright owners and users.[16] In a

[13] S. Dusollier et M. Lambrecht, Les exceptions ont 20 ans: âge de raison ou de refondation?. In Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015, pp. 204–205.

[14] M.-C. Janssens, Les exceptions et restrictions au doit d'auteur en Belgique (Limitations and Exceptions to Copyright in Belgium) (1999). In The Boundaries of Copyright – Les Frontières du Droit d'Auteur, ALAI – Australian Copyright Council, 1999, p. 176. Available at SSRN: https://ssrn.com/abstract=2302525. Accessed 9 September 2017.

[15] S. Dusollier, Droit d'auteur et protection des œuvres dans l'univers numérique, Larcier 2005, p. 504.

[16] Recital 31; see CJEU, case C-467/08, *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, ECR 2010 I 10055; CJEU, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132. See also B. Michaux, L'impression 3D: un défi supplémentaire pour le droit d'auteur. In B Michaux, L'impression 3D: défis et opportunités pour la propriété intellectuelle, Larcier, pp. 104–105.

dispute concerning the parody exception, the European Court of Justice had the opportunity to point out that copyright owners have a legitimate interest in having their work not associated to racist or discriminatory messages,[17] despite the fact that all the conditions of the parody exception are satisfied in this case.

However, in order to avoid the undue invocation of the moral rights by the author to block the exception, there are some corrective mechanisms. This is of particular relevance as certain exceptions necessarily involve changes in the work, affecting the right to respect for the work of the author.

These mechanisms are the abuse of rights and the balance between various legitimate interests involved.[18]

For example, in a decision of 29 May 2008 of the Court of Appeal of Brussels, the exercise of the moral right of disclosure by the author (allowing him/her to decide sovereignly when his/her work is completed and can be known to the public) was found to be abusive. The Court of Appeal noted that the exercise of moral rights was, in this case, merely a means of negotiation with a view to obtaining more favourable contractual conditions.[19]

15.4 Triple Test

Directive 2001/29 reaffirms the triple test included in the Berne Convention for the Protection of Literary and Artistic Works of 1886. According to Article 5 (5), 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder'.

The Belgian legislator did not take the opportunity of a transposition law to implement the triple test in the set of copyright rules contained in the Law of 30 June 1994. The reason provided was that the triple test is a well-known disposition. The triple test is so notorious that it is part of the domestic legal order.[20]

Furthermore, during the discussion, one of the ministers refused to insert the triple test because it could be an open door to legal uncertainty with the belief that exceptions could be incompatible with disposition 5 § 5 of the Directive.[21]

If the triple test is mainly a tool for the legislator in order to decide to implement one of more exceptions from the list established by Directive 2001/29 regarding the national situation, the explanatory memorandum shed light on the relationship

[17] CJEU, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132, pt 31.

[18] M.-Chr. Janssens, Le droit moral en Belgique, Les cahiers de propriété intellectuelle 2013 (25), p. 106–107.

[19] Brussels, 29 May 2008, *A&M*, 2009.

[20] Exposé des motifs, Doc. Parl., Ch. Rep., sess. 2003–2004, n° 51-1137/1, comments on Art. 4.

[21] DOC 51 1137/013, p. 15.

between the triple test and the judge. It provides that courts and tribunals can use the triple test as a guideline.[22]

Nevertheless, it is controversial if the judge, using the triple test as a guideline, has to appreciate the exception raised by one of the parties, in *abstracto* or in *concreto*. If we are in favour of an *in concreto* approach, the judge shall decide if an exception established by Belgian law respects effectively the conditions of the triple test in the specific situation referred to him or her.[23]

The *in abstracto* approach affords the judge to use the triple test to determine if the exception could apply in certain cases. It would be particularly useful in the context of new technologies in which an exception could be in conflict with the normal exploitation of the work or causes an unreasonable prejudice to the legitimate interest of the right holder.[24]

It appears that the possibility for the judge of an appreciation *in concreto* receives a favourable opinion of the majority of the doctrine. We may found a beginning of solution in the Explanatory Memorandum of the Proposal: 'The triple test will serve as an important guideline for the definition *and application* of limitations'.[25]

15.5 Exceptions

The Belgian legislator implemented into national law 18 exceptions from the list established by the Directive. Classically, exceptions are divided into two categories. First, there are exceptions that are concerned with balancing fundamental freedoms such as the right to information, freedom of the press and respect for privacy. Second, certain exceptions take into account the general interest.[26]

15.5.1 Exception for Temporary Acts of Reproduction

This is the only exception made compulsory for all Member States, provided in Article 5.1 of Directive 2001/29.

[22] Exposé des motifs, Doc. Parl., Ch. Rep., sess. 2003–2004, n° 51-1137/1, comments on art. 4, p. 15; F. Brison et B. Michaux, La nouvelle loi du 22 mai 2005 adapte le droit d'auteur au numérique, A&M 2005, p. 216.

[23] S. Dusollier, Droit d'auteur et protection des œuvres dans l'univers numérique, Larcier 2005, pp. 438–439.

[24] S. Dusollier, L'encadrement des exceptions au droit d'auteur par le test des trois étapes, IRDI 2005, p. 216.

[25] We underline. On this topic, see L. Guibault, Pre-emption issues in the digital environment: can copyright limitations be overriden by contractual agreements under European law? https://pdfs.semanticscholar.org/0a58/e9793a91061ea49607519732a10cfaefda51.pdf?_ga=2.104309568.1980474753.1495201101-1174523319.1495195011. Accessed 16 May 2017.

[26] S. Dusollier, Les exceptions au droit d'auteur dans l'environnement numérique: évolutions dangereuses, Communication commerce électronique 2001(9).

According to Article XI. 189 § 3: 'the author may not prohibit temporary acts of reproduction which are transitory or accessory and constitute an integral and essential part of a technical process and whose sole purpose is to enable transmission in a network between third parties by an intermediary or a lawful use of a protected work, and which have no independent economic significance'.

A particular illustration of this exception is the Belgian case of *Google c. Copiepresse*.

In 2003, the American company Google set up Google News. This service offers a selection of information from press articles. The mechanism is as follows: Google exploits the web servers of news organisations, copies and/or automatically summarises them in order to establish an information portal. This portal contains articles of the day or articles that correspond to the user's request in the search bar of the Google News service.

Google News only provides a few lines and the title of the article but then refers to the agency's own website through hyperlinks.

One important point is that the mechanism set up by Google also allows access to press articles that are no longer online on the agency's own website.[27] All those actions are done without any prior authorisation from the copyright holders.[28]

The collecting society, Copiepresse, intended to put an end to these acts.

In 2006, the President of the Tribunal of First Instance in Brussels did not retain any copyright exception and condemned Google.[29] The latter appealed against the decision by invoking, among other things, the exception of a provisional copy.

In 2011, the Court of Appeal of Brussels confirmed the infringement of copyright law.[30] Preliminarily, the judge noted that the Belgian law was applicable in this case.[31]

The judge considered the fact that Google takes portions of press articles from other sources, it constitutes an act of reproduction and communication to the public. The next step was to consider whether an exception to copyright applied in the present case. According to Google, the exception of temporary acts of reproduction applied. This argument did not convince the judge. He noted that Google was unable to demonstrate the technical necessity to ensure an effective transmission of the copy made by the company. Consequently, the third condition according to which reproduction must constitute an integral and essential part of a technological process was not met.[32]

[27] The functionality of the cache allows the link to be stored in a cache memory, which makes it possible to consult this copy at any time. You can see the appearance of an archive.

[28] Google's position to consider that nothing infringes copyright until the copyright holders are opposed cannot be followed. Copyright is conceived on the granting of a prior authorisation of the holders; Bruxelles (9e ch.), 5 mai 2011, *R.D.T.I.*, 44/2011, § 49.

[29] Pres. civ. Brussels, 13 February 2007, *A&M*, 2007/1–2, pp. 107 and seq.

[30] Brussels (9e ch.), 5 May 2011, *R.D.T.I.*, 44/2011.

[31] The judge based his decision on Article 5 (3) (a) of the Bern Convention and et Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[32] Brussels (9e ch.), 5 May 2011, *R.D.T.I.*, 44/2011, § 25.

In addition, the judge noted that the copy was not transitory or accessory in the present case.[33] The cached copy was not limited to what is technically necessary to ensure the proper functioning of the service because, in reality, the copy remained as long as the press article itself was accessible on the original site, and beyond.[34]

15.5.2 Social Institutions

The Belgian law authorises the reproduction of TV programmes for hospitals, prisons and youth care establishments or assistance for persons with disabilities. The exception requires the fulfilment of two cumulative conditions. These institutions may not pursue profit-making purposes, and the reproduction must be reserved for the exclusive use of the natural persons residing there.[35] The communication of the works is unauthorised.

There is no provision for fair compensation for authors.

15.5.3 People with Disabilities

This exception appeared in Belgian law in the context of implementation of Directive 2001/29.[36] The legislator authorises the reproduction and communication to the public of works for the benefit of persons with disabilities. The exception is highly circumscribed and subject to several cumulative conditions. Firstly, the reproduction and communication of these works cannot be of a commercial nature. Secondly, such acts must also be limited to the extent required by the disability. Finally, the legislator ensures that concepts of the triple test are included. The acts of reproduction and communication cannot prejudice the normal exploitation of the work or cause undue prejudice to the legitimate interests of the author.[37]

15.5.4 Libraries, Museums and Archives

Belgian law permits the limited reproduction of works, in order to preserve cultural and scientific heritage, by libraries accessible to the public, museums or archives. Again, the exception requires four cumulative conditions.

[33] Brussels (9e ch.), 5 May 2011, *R.D.T.I.*, 44/2011, § 26.

[34] Google has also advanced the exception of fair use (which does not exist in Belgian law and in Directive 2001/29), as well as exceptions for quotation and reporting of current events. Google also considered that, in fact, it did not commit any act of communication to the public. The Court of Appeal dismissed all of his arguments.

[35] Article XI. 190, 17° CDE.

[36] Article 5.3 b) Directive 2001/29.

[37] Article XI. 190, 15° CDE.

Firstly, the number of authorised copies is limited to the purpose of heritage preservation. This excludes the reproduction of all works held by libraries, museums or archives. Secondly, such acts of reproduction shall not pursue any direct or indirect commercial advantage. Thirdly, reproduction shall not interfere with the normal exploitation of the work and, finally, may not cause unreasonable prejudice to the legitimate interests of the authors.[38]

This exception is included in the list established by Directive 2001/29.[39] However, the Belgian transposition is not identical to the provision contained in the Directive. Indeed, the scope of the exception does not extend to educational institutions. The Belgian legislator considered that the exceptions for illustrating education were sufficient to allow the exploitation of the work necessary for the activity of these establishments.[40]

A second exception concerns acts of communication. Libraries, educational establishments and scientists, museums and archives may allow the visitors to consult online works of their collection not offered for sale or subject to the respect of licences. The exception pursues a specific objective: for the purpose of research or private study. The consultation may only occur through dedicated terminals in the premises of establishments.[41]

15.5.5 Education and Research Purposes

The Belgian legislator is sensitive to permit, in different cases, the utilisation of a protected work in order to spread the culture in educational establishments and during school activities.

The use of works in the framework of teaching or scientific research entails the payment of compensation. The legislator instructs the King to fix this remuneration, taking into account the objectives of promoting educational activities.[42]

Four exceptions permit the reproduction of works. This is the exception of quotation, anthology, reprography and copy. Two exceptions allow the communication of works. This is the exception of execution in the context of school activities and e-learning.

15.5.5.1 Exception of Quotation

Belgian law does not require authorisation from the author for quotations for teaching purposes or scientific research. Quotations shall, however, be made in

[38] Article XI. 190, 12° CDE.

[39] See Article 5.2, c) Directive 2001/29.

[40] S. Dussolier, Queen mary intellectual property research institute, p. 124. http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf.

[41] Article XI. 190, 13° CDE.

[42] It is regrettable that the legislator does not provide a more precise explanation of "the objectives of promoting educational activities".

accordance with honest practices and to the extent justified by the objective.[43] In the context of education, contrary to the general exception, the quotation shall be made in accordance with honest practices, and the legislator does not refer to the honest practices according to the profession. The exception of quotation for education or scientific purposes may occur outside a professional context.[44]

15.5.5.2 Confection of an Anthology

An anthology is a collection of selected pieces of works. The making of an anthology involves acts of reproduction. However, the making of an anthology for teaching purposes will not imply the need to obtain authorisation from the copyright holders upon the death of the author.[45]

Conversely, during the life of the author, obtaining his or her prior agreement is obligatory.

In order to benefit from the exception, the users may not pursue direct or indirect commercial or economic advantage. In addition, the choice of the extract reproduced in the anthology, the presentation and the place of it must respect the moral rights of the author. The legislator imposes the payment of an equitable remuneration.[46]

15.5.5.3 Exception of Reproduction

Belgian law does not allow the author of a literary or artistic work to oppose the reproduction made for the purpose of illustration of teaching or scientific research. Reproduction shall not be for profit, and the use shall not prejudice the normal exploitation of the work.[47]

The wording of the Belgian provision, like the European provision, contains an ambiguity. Indeed, it is not clear whether the condition of illustration, which must accompany the reproduction, is valid only for teaching or also for scientific research. In the first case, the exception applies only to acts of reproduction carried out for purposes of illustration of teaching and not for the purpose of illustration of scientific research.[48] The debate seems to be clarified with the explanatory memorandum

[43] Article XI. 191/1, 1° CDE.

[44] Doc 54 2122/001, p. 11.

[45] The copyright protection extends to the copyright holders for 70 years beyond the death of the author.

[46] Article XI. 191/1, 5° CDE.

[47] Article XI. 191/1, 3° CDE.

[48] Before the entry into force of the Law of 22 December 2016 amending the Code of Economic Law, the reproduction exception for purposes of illustration of teaching and scientific research was somewhat different: The fragmentary or integral reproduction of articles, works of plastic or graphic art, or that of short fragments of other works where such reproduction is effected on paper or on a similar medium by means of any photographic technique or any other method which produces a similar result, for the purpose of illustration of teaching or scientific research, to the extent justified by the non-profit-making aim pursued and which does not prejudice the normal exploitation of the work, provided that, unless this is not possible, the source, including the name of the author, is indicated. (Article XI. 190, 6° CDE).

of the Law of 22 December 2016. The exception concerns the illustration of teaching and illustration of scientific research.[49]

Therefore, copyright holders may not oppose such acts of reproduction but are entitled to obtain a fair compensation.

The user shall respect three conditions: first, the purpose of illustration[50] of teaching. This first condition introduces a first limitation to the use of the works by the professors. One can see there the concern to respect the exceptional nature of these provisions and to avoid that the use of literary and artistic works is the rule in education.

The reproduced work must be a useful and relevant support for the students. In other words, the reproduced work must serve as an accompaniment to teaching.[51]

Second, the reproduction shall be made to the extent justified by the non-profit-making purpose pursued.

The preparatory work for the law provides an important clarification. The activity must be non-profit. The organisational structure and the means of financing of the institution are not decisive factors.[52]

The non-profit does not necessarily mean that no price may be required. Indeed, a price may be imposed in order to cover the costs eventually generated provided it does not result in the realisation of a profit.

Third, the reproduction shall not prejudice the normal exploitation of the work.

For example, the reproduction of textbooks could impair the normal exploitation of the work more rapidly because the primary public is composed of teachers and students.[53]

The reproduction covers also the distribution. For example, it is possible for a teacher to distribute copies to the students. If the institution charges a fee for the copies, it might not be a way to receive profits.[54]

15.5.5.4 School Activities

The authors may not object to the cost-free execution in the course of school activities, which may take place both within and outside the educational institution.[55]

This exception is not included in the list of exceptions set out in Directive 2001/29. However, it may be justified by the application of Article 5 (3) of the Directive. It allows national legislators to permit uses of minor importance where exceptions or limitations already exist under national law, if they only concern

[49] Article 34 of Explanatory Memorandum.

[50] This term refers to the Bern Convention (Article 10, § 2) and the Directive 2001/29/EC (Article 5, §3 a).

[51] Ph. Laurent, Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning, A&M 2008(3), p. 184.

[52] Doc. parl., Chambre, sess 2003–2004, n° 1137/001, p. 11.

[53] Ph. Laurent, Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning, A&M 2008(3), pp. 182–186.

[54] Doc 54 2122/001, p. 12.

[55] Article XI. 191/1, 2° CDE.

analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this provision.[56]

Two notions are important to understand properly the scope of the exception: the terms 'execution' and 'school activities'.

First, it seems that, by using the term 'execution', the legislator sought to depart from the notion of communication to the public. In Directive 2001/29, the communication to the public must be understood as 'all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means. This right should not cover any other acts.'[57]

Therefore, the Directive only deals with communication to an audience not present at the place of origin of the communication.[58] By opposition, the term execution would then refer to a communication to the public present at the place of origin of the communication.[59]

In order to ensure proportionality in the scope of the exception, the legislator wished to limit it to a sharing specified by a physical place and a time period.[60,61]

For example, the exception authorises the projection of works, live or recorded, as well as the presentation of PowerPoint,[62] the projection of a film or the broadcasting of music during the break.[63]

15.5.5.5 E-Learning

The Belgian legislator has put in place an exception in order to promote distance learning.[64]

[56] Ph. Laurent, Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning, A&M 2008(3), p. 188; F. Brison and B. Michaux, La nouvelle loi du 22 mai 2005 adapte le droit d'auteur au numérique, A&M 2005(3), p. 125.

[57] Article 3 Directive 2001/29.

[58] Recital 23.

[59] B. Michaux, Etendue des droits: jurisprudence choisie de la Cour de cassation, A&M 2004(5), p. 475.

[60] Ph. Laurent, Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning, A&M 2008(3), pp. 187–188.

[61] However, some authors are of the contrary opinion. According to them, the term execution is a synonym for communication: H. Vanhees, Het 'publieke' karakter van een mededeling opnieuw het voorwerp van rechtspraak van het Hof van Cassatie, A&M 2006(2), p. 184. However, we disagree with regard to the definition of communication to the public at European level. Terms "in such a way that members of the public may access them from a place and at a time individually chosen by them", seem to be in contradiction with the requirement of a local communication.

[62] Ph. Laurent, Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning, A&M 2008(3), p. 187.

[63] S. Dusollier, Queen Mary Intellectual Property Research Institute, p. 125. http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf.

[64] Article XI. 191/1, 4° CDE.

The exercise of the exception requires the respect of several conditions. First, the exception for the communication benefits the institutions recognised or officially organised by the public authorities. Second, communication can only take place through a secure communication with appropriate measures. Before the modification by Law of 22/12/2016, the legislator imposed that the communication takes place through a closed transmission network.[65]

Third, the communication must be within the normal activities of the institution.

Then the classical conditions for teaching exceptions are also required for distance learning. The communication of works can be done only for the purpose of illustration of the teaching, without seeking a profit and without undermining the normal exploitation of the work.[66] Finally, the source and name of the author must be indicated unless this is impossible.[67]

If the exception applies only to establishments recognised by the Belgian authorities, this would pose certain difficulties with regard to the free movement of services and the single European market. Indeed, it is uncertain if institutions established in Belgium but subsidised or recognised by other states could benefit from the exception. The same interrogation applies to the training offered to Belgian students and researchers from other countries.[68]

15.5.5.6 Public Examination

Belgian law makes it possible to void the prior authorisation of the author for the execution of works in the framework of a public examination. This execution can take place inside the educational institution or outside.[69]

15.5.6 Current Events

This exception intends to achieve a balance between the exclusive right of copyright owners and freedom of expression and freedom of the press.

Aware of the needs and interests of the press to react and comment quickly on news, the legislator grants them a specific exception. Hence, journalists do not have to await the reception of the authorisation from the copyright owner. Belgian law authorises the reproduction and communication to the public of short fragments of

[65] For example: a network with which the teacher and students must have a password in order to benefit from the teaching; Doc. parl., Chambre, sess. 2°°3-2004, n° 1137/013, p. 34.

[66] The companies organising training for online teaching or any other institution other than pure educational or research establishment cannot benefit from this exception. On this topic, S. Dussolier, Queen mary intellectual property reseach institute, p. 127. http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf.

[67] Article XI. 191/1, 4° CDE.

[68] Ph. Laurent, Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning, A&M 2008(3), pp. 190–191.

[69] Article XI. 191/1, 2° CDE.

works or plastic or graphic work for the purposes of news reporting. The reproduction and the communication have to be justified by the information purpose. However, the exception does not exempt from mentioning the source, including the author's name, unless it turns out to be impossible.[70]

The legislator makes a distinction between two types of works. Works of plastic or graphic art can be reproduced in their entirety, unlike all other works. Moreover, no compensation is due to the copyright owner.

In the case *Google v. Copiepresse* mentioned previously, Google tried to justify its service Google News on this exception. The Brussels Court of Appeal rejected this argument. The Court observes that the reason to the exception is that the information media may not require authorisation from the copyright owner because of the need for prompt information. The judge also recalled the principle of strict interpretation concerning exceptions.

According to the judge, Google may not invoke the impossibility to obtain authorisation from the holder because the company referenced the articles during 30 days. Indeed, it would be enough for the American company to conclude general contracts authorising the reproduction of fragments of articles in Google News.[71]

15.5.7 Quotation

Belgian law allows quotations made for the purpose of criticism, controversy or review without the need to obtain the prior permission of the copyright owner.[72] However, this exception requires several conditions. Firstly, the person must pursue one of the purposes enumerated. Secondly, the quotation must be in accordance with the honest practices of the profession and to the extent justified by the aim pursued. Finally, the source and name of the author must be mentioned unless this is impossible.[73]

Again, in the case of *Google c. Copiepresse*, the judge rejected the application of this exception. Google's 'quotes' do not pursue a goal of criticism, controversy or review. The articles arranged by Google in an automated way are not there as a quote in order to support a statement or defend an opinion. Google News is only an information portal. In addition, the citation must be in accordance with the honest practices of the profession. The judge was sensitive to the need for advertising revenue for journalists and news organisations. Google News takes the main part of the information contained in the various articles and saves for Internet users to have to go on the web page of the article.[74]

[70] Article XI. 190, 1° CDE.

[71] Pt 37.

[72] In another legal provision, the legislator also authorizes quotation for teaching and scientific research purposes.

[73] Article XI. 189, §1 CDE.

[74] Pts 31–35 of the decision.

15.5.8 Parody

According to Article XI. 190, 10° CDE, the author may not prohibit caricature, parody or pastiche, taking into account honest practices. The terms are general, and it is not easy to determine the scope of this exception. For this reason, the Brussels Court of Appeal, hearing a case concerning the racist parody of a work, referred a question to the Court of Justice of the European Union.

In the *Deckmyn* decision,[75] the Court of Luxemburg gave a definition to the notion of parody. The Court considers parody as an autonomous concept of European Union law. Thus, it requires a uniform interpretation within the various Member States. The Court also observes that, in the absence of a legal definition, reference should be made to common sense, taking into account the context in which it is used and the objectives pursued by the rules.[76] As consequence, the definition of parody is as follows: 'the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery'.[77]

The Court of Justice rejects the other conditions set out in the Belgian case law, namely that the parody should have an original character on its own, other than that of showing noticeable differences with respect to the original parodied work; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work.[78] At present, only the two conditions are applicable to the exception of parody: the evocation of an existing work and the noticeable difference between the parody and the original work.

15.5.9 Privacy Purpose

15.5.9.1 Exception to Copyright Law

Belgian law[79] enables reproduction and execution in the family circle and reserved for it. However, the legislator excludes partitions from the scope of the exception.[80]

The notion of family circle is understood as a limited number of persons united by an intimate social relationship.[81] Consequently, it goes beyond the strict family

[75] CJEU, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132.

[76] Pt 19.

[77] Pt 20.

[78] Pt 21.

[79] Article XI. 190, 3° and 5° of the Code de droit économique.

[80] Prior to the entry into force of the Law of 22 December 2016, there was a distinction between works reproduced on paper or on a similar medium (known as the reprographic exception) and reproduction on any other medium than paper (private copying exception).

[81] During the discussion concerning the law of 22 December 2016 that amends the Code de droit économique, the Belgian legislator decided to maintain the use of "family circle" instead of the

context. For example, friends at a free-cost party reserved only to a small group fall within the notion of family circle.[82,83]

The Law of 22 December 2016 amends the Code de droit économique by amending the previous reprographic exception. Copyright shall not preclude the fragmentary or integral reproduction of articles, works of plastic or graphic art or that of short fragments of works fixed on paper or on any other similar medium where such reproduction is made on paper or on a similar medium. This exception applies to legal or natural persons for internal use in the course of their professional activities. Reproduction shall not prejudice the normal exploitation of the work.[84] This exception covers acts of reproduction and not communication to the public.

15.5.9.2 The Compensation

Before the Hewlett-Packard Belgium SPRL v Reprobel Decision

In order to minimise the financial prejudice for copyright owners, European Directive 2001/29 requires Member States to provide for a system of compensation in favour of right holders. We might see the influence of the triple test that prohibits exceptions from undue prejudice to copyright holders. Equitable compensation is an autonomous concept of EU law and receives the same interpretation throughout the European Union.[85] On the other hand, the form, methods of financing and level of compensation are at the discretion of the Member States.[86,87]

Equitable compensation in Belgium has been subject to a number of decisions handed down by the national courts. We will explain some of them below.

The system set up to ensure fair compensation to authors and publishers in Belgium was as follows. It was a dual compensation system. Manufacturers, importers or intra-community acquirers[88] of devices enabling the copy of the protected work paid a fixed remuneration.

European Union concept. The European definition is reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects (Article 5.2 b). The two main reasons were that the change could lead to a legal insecurity and that the concept of family circle has to be interpreted in accordance with the Directive. Doc 54 2122/001, p. 10.

[82] Cass., 26 January 2006, C.05.0219.N.

[83] Cass. (1 Ch.), 18 February 2000, *R.W.*, 2000, p. 908; Cass. (1 Ch.), 21 November 2003, *A&M*, 2004, p. 35; Cass. (1 Ch.), 26 January 2006, *NjW*, 2006, p. 168; S. Dusollier and A. De Francquen, Manuels de droits intellectuels, Anthémis, 2015, p. 105.

[84] New Article XI. 190, 5° CDE.

[85] CJEU, case C-467/08, *Padawan*, ECR 2010 I 10055 and CJEU, case C-435/12, *ACI ADAM*, ECLI:EU:C:2014:254.

[86] CJEU, case C-467/08, *Padawan*, ECLI:EU:C:2010:620, pt 37.

[87] A. Cruquenaire, F. Delnooz, S. Hallemans, C. Ker and B. Michaux, Chronique de jurisprudence, RDTI 2015, p. 52.

[88] The High Court of Belgium, Cour de Cassation, set aside a judgment from the Court of Appeal of Brussels. The Court of Appel decided that an occasional seller on DVD on eBay is not an intra-community acquire. Consequently, the Cour de Cassation has a broad interpretation of this notion

In addition, proportional remuneration was due by natural or legal persons that make copies of works. The legislator authorised, however, that the natural or legal persons that held a reproduction device at the disposal of others pay the sums. This proportional remuneration was determined according to the number of copies made. The legislator divided the remuneration equally between publishers and authors.[89]

In dealing with several cases, the Belgian courts and tribunals detailed the system.

On 18 April 2013, the Tribunal of First Instance of Liège had to settle a dispute between Auvibel and Amazon. Amazon complained that the Belgian system did not mention an explicit exemption for devices used exclusively for professional purpose. The judge, however, did not follow Amazon, pointing out that the Member States had a margin of appreciation.[90] The Court does not object to a system of financing that does not make any distinction between appliances put into circulation on a commercial or private basis. However, the system had to put in place a payback mechanism. The Court even allows Member States to establish a rebuttable presumption for private use.[91]

For the calculation of the compensation, Belgian law does not take into consideration any licence granted by the right holder. The Tribunal of First Instance of Brussels[92] did not find this incompatible with European law. The judge decided that, even if the author distributes his or her work under a free licence, he or she is entitled to receive fair compensation. Indeed, this distribution does not prevent the existence of an exception, in this case private copying. Consequently, users remain entitled to perform such acts, thereby prejudicing the interests of right holders. Fair compensation remains due, and the existence of a licence may not be taken into account when calculating the compensation.[93]

More fundamentally, a case between the Belgian collective management company Reprobel and Hewlett-Packard had a major impact in Belgium. An important decision from the Court of Justice invalidated several aspects of the Belgian system.

At stake was the proportion of the amount received as fair compensation that the author could pay to his or her publisher. Hewlett-Packard refused to pay the amounts due for reprography to the publisher. According to the company, only the author is the beneficiary of the fair compensation. The Tribunal of First Instance of Brussels[94]

and omit the fact that the Court of Justice limited the perception of a remuneration to merchants; A. Cruquenaire, F. Delnooz, S. Hallemans, C. Ker and B. Michaux, Chronique de jurisprudence, RDTI 2015, p. 56.

[89] See former Article XI. 235 ff CDE.

[90] Civ. Liège (7ème Ch.), 18 April 2013, *Auvibel c. Tecteo*, A&M, 2013/5, p. 387.

[91] See CJEU, case C-521/11, *Amazon c. Austro-Mechana*, ECLI:EU:C:2013:515, pts 24, 31–32; A. Cruquenaire, F. Delnooz, S. Hallemans, C. Ker et B. Michaux, Chronique de jurisprudence, RDTI 2015, p. 54.

[92] Civ. Bruxelles (réf.), 25 November 2013, *Auvibel c. Amazon*.

[93] CJEU, case C-457/11, *VG Wort*, ECLI:EU:C:2013:426, pt 37.

[94] Civ. Bruxelles, (16° ch.), 6 November 2012, J.L.M.B, 2013, p. 702.

upheld Hewlett-Packard's claim and decided that the national legal provision reserves half of the remuneration to publishers for works fixed on a graphic or similar support. On appeal, the Brussels Court of Appeal of Brussels decided to ask preliminary questions to the Court of Justice of the European Union.[95]

The Court of Justice delivered its judgment on 12 November 2015 and invalidated several aspects of the Belgian legislation.[96]

The Case Hewlett-Packard Belgium SPRL v Reprobel

The Court of Justice of the European Union begins by recalling a general rule. The level of prejudice for the authors is the core element for the determination of a fair compensation.[97]

Article 2 of the Directive does not identify publishers as the reproduction right holders. For this reason, they may not receive fair compensation under the exceptions of reprography and private copying. The Court based its decision on the factual circumstances of the case. In the situation, the compensation dedicated to publishers resulted in depriving right holders of reproduction rights of all or part of the fair compensation to which they are entitled. Moreover, there was no obligation for the publishers to ensure a direct or indirect benefit to the authors.[98]

Next, the Court rejects a compensation system that does not differentiate reproductions made from licit sources from those produced from illicit sources. Indeed, the Court excludes reproductions made from illicit sources from the scope of the exception. There is therefore no right to compensation for this second category.[99]

Finally, one of the questions asked was to determine the validity of a system combining two forms of remuneration. The first is a lump-sum payment upstream, calculated according to the maximum speed at which an apparatus performs reproductions. Next comes a proportional remuneration downstream varying according to the cooperation or not of the debtor of the compensation.

The Court of Justice, which is sensitive to the freedom left to Member States in determining the methods of financing and the collection of compensation, does not preclude a system of compensation upstream and downstream.[100] However, this system requires the respect of certain rules, with which Belgium does not comply. The Court specifies that upstream remuneration may be introduced only where it is not practicable to identify the users and therefore to assess the actual harm suffered by the holders of law. Upstream remuneration is therefore only an alternative. The

[95] Bruxelles (9° ch.), 23 October 2013, JLMB, 2014/10, p. 475.

[96] CJEU, case C-572/13, *Hewlett-Packard Belgium SPRL v Reprobel*, ECLI:EU:C:2015:750.

[97] The Court refers to recitals 35 and 38 of the Directive 2001/29.

[98] Pt 44.

[99] Pt 64.

[100] While it is in principle the persons who made the copies who are required to compensate the actual damage suffered by the right holders, the Court of Justice did not object to the fact that the costs for fair compensation are provided by persons with reproductive devices and supports. These can then pass on the cost of the user fee. The Court adopts this position with a view to efficiency and effectiveness.

Court condemns the upstream remuneration based on the reproduction speed of the apparatus. The reason is that the lump-sum right pays consideration to differences between users. Indeed, not all have the same needs, and not all exploit the devices to the same extent. The criterion employed, namely the maximum speed of the apparatus for producing the reproductions, does not take into account such a situation.[101]

Moreover, the Court condemns Belgium when it makes a distinction between the cooperation or not of the debtor, when determining the proportionate remuneration downstream. The Court points out that this does not change the level of the damage suffered and that, since the compensation was introduced with the precise objective of mitigating that damage, such a criterion is not valid.[102]

Finally, the law has to provide a mechanism of restitution in order to avoid and correct any situation of overcompensation.[103]

The Law of 22 December 2016 amended certain provisions of the Code of Economic Law in order to comply with the judgment of the Court of Justice. The Belgian legislator has decided to maintain the flat-rate remuneration for all private reproductions carried out in the family circle, whatever the medium is. This compensation shall be paid by the intra-community acquirer, manufacturer or importer of devices clearly used for reproduction.

Concerning the exception of reprography, the legislator retains only the proportional remuneration based on the number of reproductions actually made.

The Belgian legislator also points out that the Court of Justice condemns the payment of remuneration to publishers when the latter is deducted from the amount of the compensation due to the authors. According to the legislator, the Court does not condemn all types of remuneration for publishers. This right to remuneration shall be payable only for reproductions of works in paper or similar form to a paper or similar medium.[104] This compensation is in addition to the remuneration of the authors for the same acts of reproduction, without affecting it. This right in favour of publishers does not apply to digital reproductions.[105]

15.5.10 Panorama Exception

Belgian law has an exception for the reproduction and communication to the public of the work exhibited in a place accessible to the public, where the purpose of the reproduction or communication to the public is not the work itself.[106]

[101] Pts 65–88.

[102] Pt 79.

[103] Pt 85.

[104] Consequently, the remuneration to publishers does not apply for the exception of private copy. The Belgian legislator feared that it could be an infringement to the free movement of goods. See Doc 54 2122/001, p. 16.

[105] Articles XI. 229 CDE and following and Doc 54 2122/001, p. 4.

[106] Article XI. 190, 2° CDE.

15.6 Special Issues

15.6.1 Data Mining

Text and data mining is a mechanism for machines to read and analyse large quantities of digital content (texts or images). The aim is to analyse them in order to extract information. The usefulness of these tools is to allow analysing large amounts of data and in record time, thus exceeding human capacities.

In the field of copyright, this practice necessarily involves acts of reproduction of protected works because during their exploration, the computer tools make copies in order to be able to analyse the protected works adequately.

At present, there are no specific provisions in Belgian law concerning text and data mining. Therefore, it is necessary to consider what space of freedom the currently prevailing exceptions leave to the practices of text and data mining.

First is the exception for temporary acts of reproduction. As already discussed, Belgian law, following Directive 2001/29, allows temporary acts of reproduction that are transitory or accessory and constitute an integral and essential part of a technical process and whose sole purpose is to enable transmission in a network between third parties by an intermediary or a lawful use of a protected work and that have no independent economic significance. If nothing precludes the applicability of this exception to text and data mining, the need for vigilance remains. Indeed, in certain circumstances, the applicability of this exception seems uncertain. Depending on the technique used, the copies may be permanent.

Furthermore, it is not certain that the copy is free of any independent economic significance. Indeed, the copies made are inherent in the discovery of a new knowledge that could be exploited economically.

If the copy made during the exploration is a complete copy of the work in question, the exception of quotation could not be invoked either. The exception of illustration for scientific research is also inadequate. Indeed, text and data mining requires acts of reproduction to accomplish a research and not for its illustration.[107]

The European Union has put in place a directive on the intellectual protection of databases.[108,109] Databases may receive two protections through copyright and *sui generis* rights.

First, copyright protects databases, which, due to the selection or arrangement of their contents, constitute the author's own intellectual creation.

In addition, there is protection for databases, which have required a substantial investment in obtaining, verifying and/or presenting the data. Protection shall apply only to databases of which the producer is a national of a Member State of the European Union or has his or her habitual residence in the territory of the European Union.

Protection by the *sui generis* right allows the right holder[110] to oppose the extraction and/or reuse of quantitatively or qualitatively substantial parts of the database. It also makes it possible to oppose acts of extraction and reuse of non-substantial but repeated and systematic parts.

Text and data mining by copying and analysing the data contained in different databases could be considered as an unlawful extraction.[111]

The European Union is committed to amending Directive 2001/29. On this occasion, there is a clear desire to allow text and data mining. Indeed, in its proposal for revision, the European Commission intends to introduce a new mandatory exception for all Member States. This would allow public interest research organisations to apply text and data mining techniques to content that is legally available to them for scientific research purposes.[112]

Nevertheless, we can ask ourselves if this is the best solution. Indeed, there are some technical acts of reproduction. However, what is the most relevant in text and data mining is the information contained in the database and not the work itself.[113]

15.6.2 Big Data

Belgian law does not provide for an exception for big data activities. The *sui generis* right granted to the person taking the initiatives and bearing the risk of the investments authorises the latter to oppose any extraction and reuse of substantial parts[114] from the database. The law also prohibits the extraction or reuse of non-substantial but repeated and systematic parts. Those prohibitions in case of protected databases may hamper big data activities.

[107] C. Bernaut, Le cas particulier du text and data mining. In: C. Bernault (ed), Open access et droit d'auteur, Larcier 2016, pp. 180–186.

[108] Directive 96/9 of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, JO 1996 L 77, p. 20.

[109] Loi du 31 août 1998 transposant la directive 96/9 du 11 mars 1996 sur la protection juridique des bases de données, *M.B*, 14 November 1998, p. 36913.

[110] The producer of database, the person who supports the investment.

[111] C. Bernaut, Le cas particulier du text and data mining. In: C. Bernault (ed), Open access et droit d'auteur, Larcier 2016, p. 173.

[112] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Committee of the Regions, "Towards a modern, more European copyright framework", COM(2015) 626 final.

[113] S. Dusollier et M. Lambrecht, Les exceptions ont 20 ans: âge de raison ou de refondation?. In Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015, p. 209.

[114] Database right prohibits the extraction and reuse of substantial part, evaluated quantitatively or qualitatively. The expression "substantial part, evaluated quantitatively" refers to the volume of data extracted from the database and/or re-utilized, and must be assessed in relation to the volume of the contents of the whole of that database.

The expression "substantial part, evaluated qualitatively" refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation. A quantitatively negligible part of the contents of a database may in fact represent, in terms of obtaining, verification or presentation, significant human, technical or financial investment; CJEU, case C-203/02, *The British Horseracing Board Ltd and Others v William Hill Organization Ltd*, ECLI:EU:C:2004:695, pts 70–71.

15.7 Technical Protection Measures

Technical protection measures allow copyright owners to put in place computer tools to prevent users from performing certain acts that infringe their rights.[115]

Article 11 of the WIPO Treaty, Article 6 of European Directive 2001/29 and Belgian law provide legal protection for these technical measures.[116] Both the acts of circumvention of these measures and the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services in order to circumvent any effective technological measure are subject to criminal prosecution.

The WIPO Treaty defines the concept of technical protection measures by referring to any technique used by the copyright owner to prevent users from performing acts that he or she would not have authorised. The risk was then that the licensees would use this opportunity to prevent the performance of acts in principle subject to exceptions to the monopoly of the right holder.

This is the reason why Article 6.4 of Directive 2001/29 provides that, in the absence of voluntary measures taken by right holders, the Member States shall respond appropriately to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law the means of benefiting from that exception or limitation provided that the beneficiary has legal access to the protected work.

Belgian law has transposed this possibility.[117] However, at both European and national levels, there is an important exception for private copy. In other words, Member States must allow individuals with lawful access to the work to be able to perform acts authorised by national law, in accordance with European provisions, except for private copy.[118]

Belgian law set up a judicial remedy before the President of the Tribunal of Commerce or Tribunal of First Instance when technical protection measures prevent the benefit of an exception. This action is open to the beneficiaries of the exceptions, the Minister for Economic Affairs, professional associations and consumer associations.

However, this solution is limited, first, because it does not apply to private copy and, second, because it does not apply either to works made available to the public upon request in accordance with the contractual arrangements agreed between the

[115] Cryptographic mechanisms, anti-copy measures, for examples.

[116] Articles XI. 291 and following CDE.

[117] Article 291, § 2 CDE.

[118] Voluntary measures must therefore be taken for exceptions to the making of an anthology, reprography whether for educational purposes or for private purposes, a digital copy for illustration purposes only, E-learning, heritage preservation, ephemeral recordings by broadcasters, exceptions for disabled people, exceptions for social institutions.

parties in such a way that members of the public may access them from a place and at a time individually chosen by them.[119]

Under Belgian law, there is also the fact that technical protection measures shall not prevent the legitimate purchasers of works from using them in accordance with their normal purpose. Here, too, the same remedy is available to the President of the Tribunal of Commerce or the President of the Tribunal of First Instance. As opposed to the precedent, this applies to both offline and online works.[120]

15.8 Exhaustion of Copyright

Only the author has the right to authorise the distribution to the public of the original or a copy of his or her work.[121] This is the right of distribution. The Court of Justice of the European Union had the opportunity to specify that the right of distribution implies a transfer of ownership of the object distributed.[122]

The rule of exhaustion counterbalances the right of distribution in favour of the author. The first sale in the European community of the original of a work or copies thereof by the right holder or with his or her consent exhausts the right to control the resale of that object within the European community. However, this right is limited to the territory of the European Union.[123]

The rule of exhaustion limits the right of distribution owned by the author, but the rule of exhaustion is also limited: the copyright owner must always authorise online services. Consequently, exhaustion applies only to tangible goods and not to goods made available online.[124]

However, there is an exception to this virtual territorial limitation for computer programs. Directive 2009/24 on the legal protection of computer programs expressly provides for the applicability of the exhaustion rule.[125] The Court of Justice ruled on the licensing of computer programs.[126] The case before the Court involved Oracle, which develops and distributes computer programs and Usedsoft. Usedsoft acquires licences from Oracle's clients and sells them back, on CD-ROMs or on the Internet. However, Oracle's licence agreements specified that the right to use the programs was non-transferable. Against the practices of Usedsoft, Oracle invoked its right of reproduction. The Court of Justice therefore analyses whether the exhaustion rule applies to the present case. Several conditions apply. There must be a first sale

[119] Articles XI. 336 and XI. 291, §3 CDE; F. Brison et B. Michaux, La nouvelle loi du 22 mai 2005 adapte le droit d'auteur au numérique, *A&M* 2005, pp. 218–221.

[120] Article XI. 291 § 4 CDE.

[121] Article XI. 165, al. 5 CDE.

[122] ECJ, case C-456/06, *Cassina*, ECR 2008 I 2731.

[123] Article XI. 165, al. 6 CDE.

[124] See pts 7 and 60 of CJEU, case C-128/11, *Usedsoft*, ECLI:EU:C:2012:407.

[125] Article 4.2 of the Directive 2009/24/EC and XI. 298 c) CDE.

[126] CJEU, case C-128/11, *Usedsoft*, ECLI:EU:C:2012:407.

within the European Union and with the agreement of the copyright owner. According to the Court, all the conditions were fulfilled in this case. In order for the relationship between Oracle and its customers to qualify as a sale, there must be a transfer of ownership. The Court considers that the concept of sale encompasses 'all forms of product marketing characterized by the grant of a right to use a copy of a computer program, for an unlimited period, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work'.[127] The distinction according to the medium, namely a sale by downloading on a website or by the transmission of a physical medium, is not relevant in the present case. As a result, the rule of exhaustion is applicable, thus preventing the copyright owner from objecting to the resale of copies of its programs.[128]

It is now necessary to remain vigilant to any questions that might be put to the Court of Justice concerning the right of exhaustion for digital goods other than computer programs and which would not comply with a particular directive.

15.9 Intellectual Property and Fundamental Rights

It is mainly the right to freedom of expression that challenges copyright the most. This right is enshrined in Article 10 of the European Convention on Human Rights and in Article 11 of the Charter of Fundamental Rights.

The right to freedom of expression extends to the right to receive and to have access to information.[129]

However, this right is not in itself absolute. Paragraph 2 of Article 10 of the European Convention on Human Rights states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Even if the Directive imposes to provide for a high level of protection of intellectual property, the Member States (including national courts) must balance different fundamental rights and different legitimate interests.[130]

[127] Paragraph 49.

[128] Nevertheless, the reseller has to destroy his own copy; CJEU, case C-128/11, *Usedsoft*, ECLI:EU:C:2012:407.

[129] D. Voorhoof, Copyright and the right to freedom of expression and information. In: Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015 p. 226.

[130] CJEU, case C-360/10, *Sabam v Netlog*, ECLI:EU:C:2012:85,and Recital 4 Directive 2001/29.

In 2011 and 2012, two Belgian cases[131] were brought before the Court of Justice of the European Union in that respect. In the two cases, the Belgian collecting societies, which represented authors, wanted to impose upon an Internet service provider and upon an online social networking platform a system for filtering. This filtering measure was intended to prevent any infringement of copyright, exclusively at the expense of the ISP or social platform and for an unlimited period. In its decision, the Court ruled that intellectual property rights are not absolute rights. On the contrary, they must be counterbalanced with other fundamental rights, such as freedom of business and respect for privacy and freedom to receive information. Consequently, the application and enforcement of copyright rules may not have the effect of imposing complicated and costly measures. Furthermore, the injunction would involve a collection and identification of users' IP addresses,[132] and the system might not distinguish between unlawful and lawful content.[133]

In 2014, another Belgian case allowed the Court of Justice to recall the need for respect for fundamental freedoms. The Court rejected all Belgian conditions in order to admit the parody exception. The underlying objective is to make this notion as broad as possible in order to promote freedom of expression, to the detriment of the author's monopoly.[134]

In a recent case, the promotion of the public interest and the dissemination of knowledge prevailed over the exclusive right of the copyright owner. The pre-existence of an exception permitting the communication or making available of works in their collection for the purpose of research or private study to private individuals by means of specialised terminals was decisive.[135]

The European Court of Human Rights also admits[136] that copyright law may restrict freedom of expression. Such a restriction can only be justified if it is provided by law, has a legitimate aim and is necessary in a democratic society. The national authorities have a margin of appreciation in that respect. However, Member States have a reduced margin of appreciation for political expression and opinions expressed in a satirical or ironic way.[137]

[131] CJEU, case C-70/10, *Scarlet Extended v Sabam*, ECR 2011 I 11959 and case C-360/10, *Sabam v Netlog*, ECLI:EU:C:2012:85.

[132] For a case in which the Court of Justice decided that copyright correctly balanced with personal data protection: CJEU, case C-461/10, *Bonnier Audio AB e.a. v Perfect Communication Sweden AB, ECLI:EU:C:2012:219.*

[133] See CJEU, case C-314/12, *UPC Telekabel*, § 47.

[134] CJEU, case C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132.

[135] CJEU, case C-117/13, *Technische Universität Darmstadt v Eugen Ulmer KG*, ECLI:EU:C:2014:2196. For a case where freedom of expression prevails: CJEU, case C-201/11, *UEFA v European Commission*, ECLI:EU:C:2013:519.

[136] ECtHR, *Ashby c. Donald et Neij Sunde c. Suède, 10 jan 2013, n° 367/69/08*; Bruxelles, 27 juin 1997, *I.R.D.I*, 1997, p. 270.

[137] D. Voorhoof, Copyright and the right to freedom of expression and information. In: Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015.

Competition law also permits, in certain situations, to rectify the position of the copyright owner through the abuse of dominant position. Depending on the position of the right owner, competition law may prohibit the improper exercise of his or her exclusive intellectual property right in certain circumstances.[138] The Court of Justice formulates three cumulative conditions. First, the refusal prevented the emergence of a new product for which there was a potential consumer demand. The second condition is the non-justification by objective considerations. Third, the refusal is likely to exclude all competition in the secondary market.[139]

15.10 Conclusion

The reason for the existence of intellectual property law is to stimulate creativity and to grant an appropriate remuneration for the authors.[140]

The exceptions to the exclusive rights of the authors exist in order to assure a social acceptability by the recognition of fundamental rights and general interest consideration. Nevertheless, the law is more and more complex with the negative consequence that exceptions create misunderstanding for citizens.[141]

The Europeanisation of the exceptions has the advantage of harmonisation between the various Member States. Nevertheless, the requirement of high level of protection for authors accompanied by a principle of strict interpretation for the exceptions of copyright law and the important decisions from the Court of Justice reduce the margin of appreciation for the Member States. This may lead to a disadvantage that limitations and exceptions do not coincide with the purpose and needs of a Member State. It seems that the complexity and rigidity of the system is the major challenge of copyright law. It has the consequence that a use may be a legitimate utilisation of the protected works but is rejected in order to respect the strict interpretation principle.[142]

Some authors of doctrine plead for reviewing the system. The idea is to abandon the system of a very detailed list of exceptions in order to adopt a categorisation of exceptions. Following this perspective, the European legislator would use categories of permitted use in order to counterbalance the monopoly of the authors with fundamental rights, such as teaching, culture access, freedom of expression, etc. When this categorisation is established, all the uses made in order to accomplish the purpose would be, in principle, valid. This has the advantage of permitting a

[138] ECJ, case C-238/87, *Volvo*, ECR 1998 6211; ECJ, case C-241/91, *Magill*, ECR 1995 I 743; ECJ, case C-418/01, *IMS*, ECR 2004 I 5039.

[139] B. Michaux, Le droit des bases de données, Kluwer 2005, pp. 69–82.

[140] See S. Dusollier and A. De Francquen, Manuels de droits intellectuels, Anthémis, 2015, p. 56ff.

[141] See S. Dusollier and M. Lambrecht, Les exceptions ont 20 ans: âge de raison ou de refondation?. In Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015, p. 219.

[142] S. Dusollier et M. Lambrecht, Les exceptions ont 20 ans: âge de raison ou de refondation?. In Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015, pp. 204–208.

dynamic interpretation by the judge and the preservation of the effectiveness of the exceptions. As a legal safeguard, the triple test could be a precious guide for the judge in order to decide if an act of reproduction or communication to the public is legitimate *in concreto*.[143] Perhaps this perspective is reflected in the recent reform of the Belgian law with the simplification of the reproduction exception for illustrating teaching and private copy by including all acts of reproduction on any medium.

[143] S. Dusollier et M. Lambrecht, Les exceptions ont 20 ans: âge de raison ou de refondation?. In Cabay, Delforge, Fossoul, Lambrecht, 20 ans de nouveau droit d'auteur, Anthémis 2015, pp. 213–219.