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5 BELGIUM*

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A Privacy

1 *The right to privacy*

5.01 The right to privacy can be defined as the freedom to develop personal relations without any outside interference.¹ Privacy can also be defined in a negative way as 'anything that does not regard the public life of a person'. It implies the control of what a person wants to reveal about themselves.²

5.02 This chapter will develop the rules governing the right to privacy and then tackle some related practical issues. In Belgian law, the right to privacy of each individual is acknowledged by three fundamental texts (see para 5.04). Two specific Acts protect privacy against particular forms of interferences (see para 5.08).

5.03 Specific topics in connection with the right to privacy and personality will also be tackled: videosurveillance (see para 5.32); photographs of a person's assets (see para 5.38); biographical narratives (see para 5.46); use of name (see para 5.54); and finally, the right to image (see para 5.58).

2 *Arrangements regarding the right to privacy*

5.04 The right to privacy is founded upon two major international texts incorporated within the Belgian legislation:

- (1) Article 8 of the European Convention on Human Rights³ which states that:

* This chapter reflects the law in Belgium as at October 1998.

** The authors express their warmest acknowledgments to Professor Yves Poulet (University of Namur) for the submitted documentation with respect to the Personal Data Act and for his accurate suggestions concerning the privacy section of this chapter.

1 F Rigaux, *La vie privée, une liberté parmi les autres?*, Travaux de la Faculté de Droit de Namur, Brussels, (Larcier, 1992) at p 18.

2 F Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Brussels, Bruylant (1990) nr 684.

3 Incorporated in the Belgian law: cf Belgian State Gazette (*Moniteur Belge*), 19 August 1955.

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(2) Article 17 of the International Covenant on Civil and Political Rights (ICCPR)⁴ which states that:

'1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.'

5.05 The Belgian Supreme Court has ruled that any international Act ratified by the Kingdom of Belgium supersedes any related internal texts.⁵ The above-mentioned texts can therefore be pleaded directly in any proceeding.

5.06 Furthermore the Belgian Constitution, amended on 17 February 1994 states in its Article 22⁶ that:

'Everyone has the right to respect for his private and family life, except in the circumstances and with respect to the conditions determined by law. The law or the decree warrants the protection of this right'.

Up to now, two specific Acts have been enacted on the basis of this constitutional principle (see para 5.09).

5.07 In the event of any breach of a term of these general provisions, the injured party can initiate in the Belgian civil courts either a procedure on the merits of the case, or an interim relief procedure.

3 Specific Belgian laws relating to privacy

5.08 There are two relevant laws relating to privacy: first, the Act relating to privacy protection with regard to the processing of personal data⁷ (see paras 5.09–5.25); and second, the Act relating to the privacy protection against the monitoring of private communications and telecommunications⁸ (see para 5.26).

4 *Moniteur Belge*, 6 July 1983.

5 Cass, 27.05.1971, *Pas*, 1971, I, p886.

6 'Chacun a droit au respect de sa vie privée et familiale, sauf dans les cas et conditions fixés par la loi. La loi, le décret ou la règle visée à l'article 134 garantissent la protection de ce droit' (*Moniteur Belge*, 17 February 1994).

7 Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, *Moniteur Belge*, 18 March 1993, p 5801.

8 Loi du 30 juin 1994 relative à la protection de la vie privée contre les écoutes, la prise de connaissance et l'enregistrement de communications et télécommunications privées, *Moniteur Belge*, 24 January 1995.

4 The Privacy Commission

5.09 Before examining the material scope of the Personal Data Act (hereafter, 'PDA') it is necessary to specify the role of the Belgian 'Commission for the protection of privacy' ('the Privacy Commission').

5.10 The Privacy Commission is part of the Ministerial Department of Justice. Its composition reflects the socio-economic trends of Belgian society (PDA, Article 24). The Privacy Commission plays a triple role:

- (1) it receives the notifications from the data controller (PDA, Article 18);
- (2) it has an important consultative power regarding the PDA application and its improvement (PDA, Articles 29 and 30);
- (3) it can be notified by individuals in case of breach of the PDA. It acts as a mediator (PDA, Article 31) and denounces the PDA infringements⁹ to the Public Prosecutor (PDA, Article 32). The intervention of the Privacy Commission in litigation does not prevent recourse to the courts (PDA, Article 31, section 1).¹¹

5 Scope of the Personal Data Act

5.11 The material scope of the PDA is determined by two concepts:¹² that of 'personal data' and that of the 'processing' of such data.

Personal data

5.12 'Personal data' is any data related to an identified or identifiable individual.¹³ The EU Personal Data Directive,¹⁴ which was transposed into Belgian legislation by a Bill of 11 December 1998,¹⁵ adds that: 'to determine whether a person is identifiable, account should be taken of all the means likely reasonable to be used either by the controller or by any other person to identify the said person'.¹⁶

5.13 The PDA does not define the concept of 'data'. According to the preamble of this Act, any sort of information could be regarded as data (eg, the

9 The so called 'Commission de la protection de la vie privée' or 'Commissie voor de bescherming van de persoonlijke levenssfeer'.

10 The infringements to the main PDA provisions are criminal offences (PDA, arts 37–43).

11 Cf para 5.22 below.

12 Cf G Baeteman and MJ Van Vlasselaer, *De bescherming van het privé-leven ten aanzien van de gegevensverwerking*, Antwerp (Kluwer, 1993).

13 PDA, art 1, s 5. See also art 2a of the EU Directive 95/46/EC.

14 'Loi du 11 décembre 1998 transposant la directive 95/46/EC du 24 octobre 1995 du Parlement européen et du Conseil relative à la protection des personnes physiques à l'égard du traitement de données à caractère personnel et à la libre circulation de ces données', Belgian State Gazette (*Moniteur Belge*), 3 February 1999, pp 3049–3065). About the application of the self-executive provisions of a Directive, see J Verhoeven, *Droit de la Communauté européenne*, Précis de la Faculté de Droit de l'Université Catholique de Louvain, Brussels (Larcier, 1996) at pp 261 ff.

15 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

16 26th Recitals of the EU Directive 95/46/EC, *JOCE*, 23 November 1995, L 281/31.

information contained in a picture or in a fingerprint).¹⁷ The PDA extends to personal data in both private and public sectors.¹⁸

Processing of data

5.14 Both manual files and automated processing of personal data are within the scope of the PDA.¹⁹

5.15 The maintenance of a manual file is defined as the compilation and the storing of personal data in a logically structured manner enabling systematic consultation (PDA, Article 1, section 4).²⁰ A difference has to be made between a file ('fichier' or 'bestand') and a record ('dossier'), the first one being more structured than the second. The distinction between these two concepts is rather unclear since it depends on the degree of structure permitting (or not) a systematic consultation of the data, although every record is, in principle, intended to be consulted.²

5.16 According to the Privacy Commission, one has to determine whether the data can be accessed and handled *rapidly*.³ The alternative criterion proposed by the Privacy Commission will be of little practical help since, like the legal criterion, it is subjective.

5.17 The automated processing of personal data covers any set of operations carried out wholly or partially by automatic means relating to the registration and storage of personal data, as well as to the modification, erasing, consultation or dissemination of such data (PDA, Article 1, section 3).⁴ The linking factor of the different operations mentioned by the definition must be found in the purposes of processing: all operations contributing to a common purpose constitute a 'set of operations'.⁵

5.18 Directive 95/46/EC adopts a broader approach to the concept of processing. Any operation, such as collection, recording or consultation, which is performed on personal data can be considered processing.⁶ Moreover, this approach could raise problems in the context of the Internet: any consultation of personal data, made available on the web, could be considered to be the

processing of such data. Such a view is in contradiction with the aim of the Directive which seems to apply to making personal data available for consultation, rather than the act of consultation itself.⁷

6 Data protection principles

5.19 The personal data protection instituted by the PDA is based on the purpose-limitation principle⁸ which, according to Article 5,⁹ covers two aspects: (1) the legitimacy of the processing; and (2) the conformity of the processing with the legitimate declared purposes.¹⁰

Legitimacy of processing

5.20 The principle of legitimacy implies that the purpose of the processing must be determined, declared and legitimate. The legitimacy of processing depends on its transparency (determination and prior information with regard to the processing purposes)¹¹ and the proportionality between the legitimate purpose of the processing and the need to attempt privacy.¹² The controller of the file ('maître du fichier' or 'houder van het bestand')¹³ has then to notify the Privacy Commission of the considered processing and its purposes.¹⁴ The subject of the data must be informed about the identity of the file controller, the purposes of this processing and their right to access and rectify the data related to them.¹⁵

17 MH Boulanger, C De Terwangne et T Leonard, 'La protection de la vie privée à l'égard des traitements de données à caractère personnel', *JT*, 1993, p 371. For the picture, cf paras 5.32 ff on videosurveillance.

18 C Van den Eynden, 'Data protection in Belgium', in *Business Guide to Privacy and Data Protection Legislation*, (1996) p 39.

19 PDA, art 1, s 1.

20 S Louveaux, 'Comments on the EU Data Protection Directive: the Belgian perspective', <http://lrc.law.warwick.ac.uk/jilt/dp/2louveau/default.htm>. See also: Cass, 16.05.1997, *JT*, 1997, p 779.

1 Cf Commission de protection de la vie privée, avis n° 7/92 du 12 mai 1992, *Doc Parl*, Chambre, sess Extr, 1991-1992, nr 413/12, pp 79-97.

2 M-H Boulanger, C De Terwangne et T Leonard, 'La protection de la vie privée à l'égard des traitements de données à caractère personnel', *JT*, 1993, p 371. *Adde* Commission de protection de la vie privée, avis n° 2/92 du 25 février 1992 concernant un projet d'arrêté royal relatif au traitement de données à caractère personnel en matière de crédit à la consommation, in *Rapport d'activités 1992-1993*, p 74.

3 Commission de protection de la vie privée, *note sur la distinction fichier-dossier*, 10/IP/96/189/048, nr 5.

4 Simple registration without storage does not constitute an 'automated processing'.

5 MH Boulanger, C De Terwangne et T Leonard, 'La protection de la vie privée à l'égard des traitements de données à caractère personnel', *JT*, 1993, p 371.

6 Cf art 2b.

7 MH Boulanger and C De Terwangne, 'Internet et le respect de la vie privée', in *Internet face au droit*, Cahiers du CRID, nr 12, pp 198-199. *Contra*, cf Projet de loi transposant la Directive 95/49/EC du 24 octobre 1995 du Parlement européen et du Conseil relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, *Doc Parl*, Chambre des Représentants, sess ord 1997-1998, nr 1566/1, Commentaire des articles, p 13.

8 This principle must be viewed as the cornerstone of each personal data protection law (cf CNIL, *Dix ans d'informatique et libertés*, Paris, Economica, 1988, p 81 ff).

9 'Les données à caractère personnel ne peuvent faire l'objet d'un traitement que pour des finalités déterminées et légitimes et ne peuvent pas être utilisées de manière incompatible avec ces finalités; elles doivent être adéquates, pertinentes et non excessives par rapport à ces finalités' (personal data can only be processed for determined and legitimate purposes and cannot be processed in a way incompatible with those purposes).

10 JP Buyle, L Lanoye, Y Pouillet et V Willems, 'Chronique de jurisprudence: l'informatique (1987-1994)', *JT*, 1996, p 233.

11 Cf T Leonard et Y Pouillet, 'Les libertés comme fondement de la protection des données nominatives', in F Rigaux, *La vie privée, une liberté parmi les autres?*, Travaux de la Faculté de Droit de Namur, Brussels, Larcier, 1992, p 232 ff. See particularly the PDA, arts 4 and 9 regarding the obligation of information of the data subject.

12 S Gutwirth, 'De toepassing van het finaliteitsbeginsel van de privacywet van 8 december 1992', *TPR*, 1994, p 1432. *Adde* MH Boulanger, C De Terwangne et T Leonard, 'La protection de la vie privée à l'égard des traitements de données à caractère personnel', *JT*, 1993, p 377.

13 See the PDA, art 1, s 6 which defines the 'maître du fichier' as the individual or legal entity who or which can decide on the purposes of the processing and the types of data to be processed.

14 PDA, art 17.

15 PDA, arts 4 and 9 (right to information).

Conformity of processing

5.21 The principle of conformity implies that the content of the processing must respect the legitimate declared purposes which were assigned to it.¹⁶ It also implies that the personal data has to be adequate, relevant and not excessive in relation to the said purposes (ie the proportionality relationship between the data collected and processed, and the purposes of such processing).¹⁷

7 Interim rules

5.22 The PDA¹⁸ grants to every individual the right to specific recourse to 'interim relief' from the President of the civil courts.¹⁹ The ability to order payment of damages has been discussed.²⁰ In any event, this recourse does not affect the possibility of initiating an examination of the merits of the case, which permits the awarding of damages.

Up to now, case law on this area has been very limited since the vast majority of individuals either have no knowledge of their rights in these matters, or do not realise the practical implications of the unlawful use of data related to them.

8 Directive 95/46/EC and amendments to the Personal Data Act

5.23 The transposition of the Directive 95/46/EC implies an amendment of the present Belgian PDA. A new bill adapting the PDA is now under discussion at the Belgian Parliament.¹ The first version of the draft bill has been criticised by the Privacy Commission² since it did not fully make use of the manoeuvrability margin allocated to the Member States by the Directive.³

16 J-P Buyle, L Lanoye, Y Pouillet et V Willems, 'Chronique de jurisprudence: l'informatique (1987-1994)', *JT*, 1996, p 236.

17 Y Pouillet, 'Droits et devoirs du ficheur', in *Quelle Commission pour quelle vie privée?*, actes juridiques de la journée d'information du 3 mai 1993, Brussels, Presses du Moniteur belge, p 55.

18 PDA, art 14.

19 However, this procedure is for use in an emergency. The court President decides on the merits of the case.

20 Up to now, two decisions have awarded damages in case of PDA infringement: Civ Brussels (prés), 22.03.1994, *JT*, 1994, p 841; Civ Nivelles (prés), 15.11.1994, *J*, 1995, p 289. *Contra*: Civ Brussels, 12.04.1995, unpublished, RG nr 95/53/A.

1 Projet de loi transposant la Directive 95/49/EC du 24 octobre 1995 du Parlement européen et du Conseil relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, *Doc Parl*, Chambre des Représentants, sess ord 1997-1998, nr 1566/1.

2 Avis n° 30/96 du 13 novembre 1996 relatif à l'avant-projet de loi adaptant la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel à la Directive 95/46/EC du 24 octobre 1995 du Parlement européen et du Conseil relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données.

3 On the extent of that margin, cf Y Pouillet, 'The European Directive relating to the protection of physical persons with regard to the processing of personal data and its free circulation - a state of relative harmony', in *EC Data protection Directive: interpretation - application - transposition*, Darmstadt, STMV, 1997, pp 24 ff.

5.24 A sensitive question is the necessary reconciliation of the right to privacy with the freedom of expression. The Directive invites Member States to provide partial exemptions for journalistic purposes.⁴ The Privacy Commission considers that the PDA applies to the files maintained by journalists and thus recommends partial exemptions in order to preserve the freedom of expression and the principle of the secrecy of journalistic sources. The latter could have to be revealed in the absence of exemptions.⁵

5.25 The first version of the draft bill, which gave to the courts the task of finding a balance between the two fundamental rights, was severely criticised by the State Council ('Conseil d'Etat' or 'Raad Van State').⁶ So, the new version of the draft bill⁷ stipulates effectively exemptions relating to the processing of sensitive personal data⁸ provided relatively severe conditions are respected, particularly with regard to the public⁹ character of the processed data and the means reasonably used for the necessary prior verification of the data accuracy¹⁰ (Article 3, section 3(a) - new). Partial exemptions to the obligation of information of the data subject, to the right of access and rectification of said subject and to the duty of prior registration in order to protect the journalistic sources secret have also been provided (Article 3, section 3(b), (c) and (d) - new).

9 Monitoring of communications

Private communications

5.26 Wire tapping is regulated by the Act of 30 June 1994 relating to privacy protection against the monitoring of private communications and telecommunications.¹¹ All (tele)communications which are not intended to be heard by everybody have to be considered as 'private' (tele)communications, whatever means are used for the transmission, the place where the words are raised, or the type of content that is sent (images, digitalised data, etc).¹²

4 'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression' (art 9).

5 Avis n° 09/95 du 5 avril 1995 concernant l'application de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel par les médias, in *Commission de protection de la vie privée, Rapport d'activité 1994-1995*, pp 19-20, *Adde* Avis n° 30/96, op cit, p 6.

6 Projet de loi transposant la Directive 95/49/EC..., Avis du Conseil d'Etat, *Doc Parl*, Chambre des Représentants, sess ord 1997-1998, nr 1566/1, pp 96 ff.

7 Projet de loi transposant la Directive 95/49/EC..., Texte de la loi du 8 décembre 1992 dans l'hypothèse où cette loi serait modifiée suivant le projet de loi transposant la Directive 95/46/EC du 24 octobre 1995 du Parlement européen et du Conseil, *Doc Parl*, Chambre des Représentants, sess ord 1997-1998, nr 1566/2, pp 33-34.

8 Personal data with regard to race, ethnic origins, sexual behaviour, beliefs, political opinions, ... (art 6) and medical data (art 7).

9 Data made public by the referred person or in relation with his public character or the public character of the event he is involved in.

10 It implicitly refers to an ethical obligation on the part of journalists.

11 HD Bosly and D Vandermeersch, 'La loi belge du 30 juin 1994 relative à la protection de la vie privée contre les écoutes, la prise de connaissance et l'enregistrement de communications et télécommunications privées', *Rev dr pén* (1995) p 340. See also T Henrion, 'Les écoutes téléphoniques', *JT*, 1995, pp 205 ff.

12 Exposé des motifs, *Doc Parl*, Sénat, sess Ord 1992-1993, nr 843/1.

5.27 The Act protects private information and data only during their transmission (Articles 90 *ter* to 90 *decies* inserted in the Belgian Criminal Procedure Code by the above-mentioned law).¹³

5.28 The tapping of private communications can only be carried out in particular conditions¹⁴ listed by the law and under the control of an investigation judge. The PDA should apply to the tapping of private communication as such an activity implies the processing of the personal data collected.¹⁵ The Privacy Commission considers the provisions of the PDA could offer a more flexible and appropriate solution in these matters than the specific law on wire tapping.¹⁶ Besides, the systematic recourse to an investigation judge imposed by the law is criticised by the investigation judges who are inundated with multiple requests.

5.29 The recording by individuals of private conversations without the consent of all the persons concerned infringes their right to privacy and makes the use of the tapes as judicial evidence unacceptable. This matter has been discussed by F Rigaux.¹⁷

Tracing of communications

5.30 A recent draft bill is aimed at relaxing the legal requirements regarding phone number tracing.¹⁸ It allows phone number tracing by the Public Prosecutor and, in emergency cases by police officers.¹⁹ Under this draft bill, three types of measures are distinguished according to the importance of the attempt to privacy, namely the identification of phone numbers, communication tracing and communication tapping.

5.31 The Privacy Commission criticises the new powers given to police officers in emergency circumstances.²⁰ It has also criticised the delegation to the government of the task of setting the technical means imposed to the telecommunication operators for permitting the tapping of private

13 T Henrion, 'Les écoutes téléphoniques', *JT*, 1995, p 209. About some questions relating to the application of the provisions of the law to the new technologies (e-mail, etc), see D Vandermeersch, 'Le droit pénal et la procédure pénale confrontés à Internet', in *Internet sous le regard du droit*, Brussels, Editions du Jeune Barreau de Bruxelles (1997) p 253.

14 Notably with regard to specific incriminations.

15 Commission de protection de la vie privée, avis n° 23/93 du 14 décembre 1993, *Doc Parl*, Sénat, sess ord, 1992-1993, nr 843/1. *Adde* Commission de protection de la vie privée, *Avis relatif au projet de loi concernant l'identification et le repérage des numéros de postes de communication ou de télécommunication et portant modification des arts 90ter, 90quater, 90sexies et 90septies du Code d'instruction criminelle*, p 2.

16 *Ibid*.

17 *La protection de la vie privée et des autres biens de la personnalité*, op cit, nr 139. *Adde* Corr Gent, 10-06-1988, *TGR*, (1989) p 27. *Contra*: J-P Masson et N Massage, op cit, p 729

18 C Du Brulle, 'Repérages téléphoniques: la Justice tend l'oreille', *Le Soir*, 5 October 1998, p 12.

19 Ministère de la Justice, *Projet de loi concernant l'identification et le repérage des numéros de postes de communication ou de télécommunication et portant modification des articles 90 ter, 90 quater, 90 sexies et 90 septies du Code d'instruction criminelle*, art 2.

20 Commission de protection de la vie privée, *Avis relatif au projet de loi concernant l'identification et le repérage des numéros de postes de communication ou de télécommunication et portant modification des articles 90ter, 90quater, 90sexies et 90septies du Code d'instruction criminelle*, p 3.

communications.¹ In particular, concerning e-mails, the Privacy Commission fears the limitation of the encryption key size and/or the imposition of the recourse to key escrows. The Privacy Commission believes that this would constitute an excessive measure infringing Article 8 of the European Convention on Human Rights and in addition to this Article 22 of the Belgian Constitution requires the intervention of the Parliament to state any new limitation to the right to privacy.²

10 Videosurveillance

Possible applicability of the Personal Data Act

5.32 The first question to be addressed is whether this activity falls within the scope of the Personal Data Act. Images can constitute personal data in so far as they are related to an identifiable individual.³ The Privacy Commission refers to the definition of the 'processing' (PDA, Article 1, section 3) to exclude any system which does not store picked up images.⁴ The Privacy Commission also tries to limit the concept of personal data to the sole images systematically used to identify individuals.⁵ Strictly speaking, the purpose of most videosurveillance systems is not the identification of persons but the protection of given places against intrusion. Those systems should then be excluded from the field of the PDA provisions.⁶

5.33 The teleological criteria used by the Privacy Commission reduce the extent of the concept of 'identifiable' by replacing the criteria of the use of reasonable means with the criteria of the initial intention of the data controller.⁷ The implementation of the Directive 95/46/EC will supersede the restrictive vision expressed by the Privacy Commission.⁸

Possible implications of applicability of the Personal Data Act

5.34 The possible application of the PDA to the use of videosurveillance would have had dramatic implications, which it is believed will now be avoided for the reasons stated at the end of para 5.33 above. The principle of fair collection (legitimacy) requires, in particular, the prior information of the

1 *Ibid*, p 4. See also *Projet de loi concernant l'identification et le repérage des numéros de postes de communication ou de télécommunication...*, op cit, art 10.

2 Commission de protection de la vie privée, *Avis relatif au projet de loi concernant l'identification et le repérage des numéros de postes de communication ou de télécommunication...*, p 5.

3 Cf *Projet de loi relatif à la protection de la vie privée à l'égard des traitements de données à caractère personnel*, *Rapport fait au nom de la Commission de la Justice par Monsieur Vandenberghe*, *Doc Parl*, Sénat, sess extr, 1991-1992, nr 445/2, p 57. *Adde* Sénat, Questions et Réponses, nr 136, December 6, 1994, p 7133.

4 *Avis n° 14/95 du 7 juin 1995 relatif à l'applicabilité de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard du traitement de données à caractère personnel à l'enregistrement d'images et ses conséquences*, in *Commission de protection de la vie privée*, *Rapport d'activité 1994-1995*, p 31 (compare with art 2b of the Directive).

5 *Ibid*.

6 P De Hert, O De Schutter and S Gutwirth, 'Pour une réglementation de la vidéosurveillance', *JT*, 1996, p 573.

7 P De Hert, O De Schutter and S Gutwirth, 'Pour une réglementation de la vidéosurveillance', *JT*, 1996, p 575.

8 Cf O De Schutter, 'Vidéosurveillance et droit au respect de la vie privée', *Journ Proc*, 1996, nr 298, p 10. Cf also above with regard to the provisions of the Directive.

data subject.⁹ As a result, the processing of data collected by means of secret video systems should be regarded as illegal.¹⁰ The role of videosurveillance systems would then be merely dissuasive.

5.35 Collected images could also be considered as 'sensitive' data should the ethnic origins (PDA, Article 6) or the state of health (PDA, Article 7) of a person be inferred from such data. The processing of sensitive data, ie in practice virtually any image featuring a human being, is only permitted:

- (1) for the sole purposes laid down by or in implementation of the law (PDA, Article 6);
[The Privacy Commission curiously suggests the stipulation of a general authorisation for the processing of visual data.¹¹ This suggestion was criticised by the legal commentators since the role of the Commission is obviously not to reduce privacy protection.¹²]
- (2) with the prior written consent of the data subject or under the control and the liability of a practitioner of a medical profession (PDA, Article 7).

The images from an illegal video system cannot be used as evidence and must be rejected by the courts.¹³

5.36 The Privacy Commission has recently issued a positive opinion with regard to a monitoring system of the Saint-Gilles prison (Brussels) visitors, for security purposes.¹⁴

B Publicity and personality

1 Photographs of a person's assets

5.37 The question of the use of an individual's physical appearance will be examined in paras 5.58 ff.¹⁵

5.38 The owner of an asset can forbid anybody from taking or using a photograph of his asset if such an action would infringe his right to privacy (see para 5.39). The rightholder of a work of art, and in certain circumstances the owner of a work of art, can also forbid the taking and use of a photograph of the said work of art (see para 5.40). Aerial pictures require in any event a special government licence.¹⁶

- 9 The Privacy Commission (avis n° 14/95, op cit, p 32) suggests the hanging of a clearly visible written notice near the video system.
- 10 P De Hert, O De Schutter and S Gutwirth, 'Pour une réglementation de la vidéosurveillance', *JT*, 1996, p 573.
- 11 Avis n° 14/95, op cit, pp 32-33.
- 12 P De Hert, O De Schutter and S Gutwirth, 'Pour une réglementation de la vidéosurveillance', *JT*, 1996, p 573.
- 13 HD Bosly, 'La régularité de la preuve en matière pénale', *JT*, 1992, p 122.
- 14 In *Journal de droit des jeunes*, nr 178, October 1998, pp 21-22.
- 15 Cf infra, s 7.
- 16 Cf Arrêté royal du 21 février 1939 réglementant la prise de vues aériennes au dessus du territoire national et le transport d'appareils photographiques à bord d'aéronefs, *Moniteur Belge*, 16 March, 1939.

2 Fixing and reproduction of private assets

5.39 The fixing and reproduction of an image of a private asset is forbidden where it results in privacy infringement.¹⁷ The possible occurrence of a privacy infringement depends on the viewable character of the assets involved: if the assets are not viewable without the consent of their owner, they relate to their owner's privacy and cannot then be photographed without his/her consent.¹⁸ Such authorisation is required, for example, if it is necessary to enter a private property to view the assets.¹⁹ Failing that, the owner could also use their right to respect for their home to sue the photographer.²⁰

3 Reproduction of works of art

5.40 The author has an exclusive right to authorise the reproduction of his or her works (in whatever form, or on whatever medium).¹ He/she also has a moral right to the respect of the integrity of his or her work.² There are some exceptions to the patrimonial rights of the author, like the quotation right, which has a narrower scope than the fair use concept prevailing in the US. The new author's right law³ permits, without prior consent of the author, the reproduction of short quotations of any artwork for critical, scientific, controversial or teaching purposes.⁴

5.41 The issue of quoting from an artistic work remains controversial. The majority of the authors pursuant to French case law consider that a full reproduction of an artistic work, even at a reduced size, cannot be regarded as a short quotation.⁵ According to the French Supreme Court, a reproduction of an excerpt of an artistic work, which fits the concept of a short quotation, breaches the moral right to respect the integrity of the artistic work and is thus unlawful.⁶

5.42 In view of the fact that the new Belgian author's right law is not limited to short quotations from literary works but refers explicitly to artistic works, it should be considered, in order to enable short quotations from artistic works, that the Belgian legislative power admits in this case a limited attempt to respect the integrity of the primary artistic work. This interpretation of the Belgian author's law has not yet been discussed by any published relevant case law. According to the authors of the present chapter the social necessity of quoting from any artistic work associated with the

17 T Gr Inst Paris, 11-07-1996, *Juridata*, 050277.

18 P Kayser, 'L'image des biens', *Dalloz*, 1995, Chron, p 292.

19 T Gr Inst Paris, 27-09-1976, *RIDA*, July 1977, p 158.

20 ECHR, art 8 and art 15 Belgian Constitution.

1 Article 1, s 1 de la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins (cf infra).

2 On the moral right to integrity, cf art 1, s 2 AL.

3 Loi du 30 juin 1994 sur le droit d'auteur et les droits voisins, *MB*, 27 July 1994.

4 Article 21 AL.

5 A Berenboom, *Le droit d'auteur et les droits voisins*, Brussels, (Larcier, 1997) pp 129 ff. A et B Strowel, 'La nouvelle législation belge sur le droit d'auteur', *JT*, 1995, p124 and with certain nuances B Van Asbroek, 'l'œuvre BD Multimédia, Essai comparatif en droit belge et droit français', in *Droit d'auteur et Bande dessinée*, Brussels, Paris, Bruylant, LGDJ, 1997, pp 177 ff.

6 Cass, fr, 05/11/93, JCP, 1994, II, 22201, comments Françon. This case law is severely criticised by the major french commentators. Read in PY Gautier, *Propriété littéraire et artistique*, Paris, PUF, 1996, nr 143 and quoted references.

general principle of freedom of expression, balanced with the necessary so-called disinterest status of the author of the secondary work⁷ should lead to an extensive interpretation of the concept of 'short quotations' which would consider the concept of shortness not only with respect to the work quoted but also with respect to the entire works of the relevant artist. In this case a limited amount of full reproduction of artistic works in a secondary artistic work would be possible without prior authorisation of the primary author. Such interpretation would tend to reconcile the concepts of short quotations and fair use.

Article 10 of the Berne Convention for the protection of literary and artistic works⁸ which allows quotations of artworks of any kind without making any more reference to the necessary shortness of the quotations should promote this suggested broad interpretation.

5.43 An analysis of the guidelines with respect to the amount and the length of acceptable quotations would exceed the scope of the present article. These questions have been thoroughly examined by Lionel Bochurberg.⁹ The reproduction of an artistic work is also permitted without the author's consent when the artwork is located in public spaces, in so far as the artistic work does not constitute the image's main subject (AL, Article 22, sections (1), (2°)).¹⁰

5.44 Finally, the reproduction of an entire artistic work is permitted for information purposes and in the limits of news events review (AL, Article 22, sections (1), (1°)).¹¹

5.45 The owner of an artistic work can forbid the taking of, or the use of photographs of 'his' artistic work if it is not located in a public space. This power is based on property¹² and/or on contractual rights issues. For example, art museums can contractually regulate the photography of artistic works which are in the public domain.

4 Biographical narratives

5.46 Can the facts belonging to the privacy of an individual be freely stated? The answer to that question lies in the balance to be struck between the right to freedom of expression and the right to privacy.¹³ The courts weigh the interests at stake and, according to the circumstances, decide which of those fundamental rights will prevail.¹⁴

5.47 The statement of information relating to a person's privacy requires, in principle, the consent of the person involved. But account must be taken of the behaviour of that person.¹⁵ The privacy accorded to public figures should reflect the fact that certain facts of their private lives which are normally reported become newsworthy and then 'available' even without their consent.¹⁶ The general public has a legitimate interest in information about all the facts reporting to a public figure's privacy which are related to his or her public activities and/or with what he or she publicly expresses.¹⁷ Some events of the privacy of public figures become 'news events' and can then be freely stated.¹⁸ These limitations to the privacy scope only affect public figures. Persons coming into the public sphere because of their implication in news events are to be put in the same category as public figures.

5 Right to oblivion

5.48 In this context, a problem which occurs frequently is that of the statement of facts related to a judicial condemnation. The freedom of expression allows the facts at stake to be stated solely during the trial. Indeed, case law has held that the right to privacy includes a 'right to oblivion' which could be defined as a right permitting the individual whose life is not dedicated to public activities to demand the peace and quiet necessary for the free development of his personality.¹⁹ A person involved in a trial enters the news through that trial and leaves the public sphere as soon as the trial is over.²⁰

5.49 The French Supreme Court,¹ whose case law has inspired Belgian decisions, admits exceptions to the right to oblivion in so far as the related facts were lawfully stated at the trial's time and as long as a subsequent statement can have a real interest, which is obvious, for instance, if the facts have an 'historical' importance.²

6 Personality distortion and right to honour

5.50 Another relevant question is that of the accuracy of biographical information. The tort rules permit any fault committed in the exercise of the freedom of expression which causes damage to the mentioned person to be actionable. Damage could either consist in a personality distortion or in an offence against the subject's right to honour. Personality distortion exists every

7 PY Gautier, *Propriété littéraire et artistique*, Paris, PUF, 1996, nr 143.

8 Revised in Paris, 24 July 1971 (due to be incorporated into Belgian law – see GATT Agreement on TRIPs).

9 L Bochurberg, *Le droit de citation*, Paris, Masson, 1994, p 153.

10 B Edelman, 'La rue et le droit d'auteur', *Dalloz*, 1992, chron, XVIII, p 95, nr 20. *Adde* Paris, 23 octobre 1990, *Dalloz*, 1990, IR, 298 (the 'Géode' case).

11 B Vincotte, 'Droit d'auteur et comptes-rendus d'actualité', note sous Brussels, 21 septembre 1994, *RGDC*, 1996, pp 38–47.

12 See s 4.1 on the viewable character of the involved artwork.

13 Civ Brussels (réf), 06-04-1995, *Journ Proc*, nr 286, p 23.

14 J Milquet, 'La responsabilité aquilienne de la presse', *Ann Dr Louvain*, 1989, p 43.

15 F Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Brussels, Bruylant, 1990, nr 684.

16 Ibid, nr 201.

17 H De Page, *Traité élémentaire de droit civil belge*, Tome II, *Les Personnes*, volume I, par J-P Masson, Brussels, Bruylant, 1990, p 57. *Adde*: A Strowel, 'Démêlés judiciaires autour d'Une Paix royale de Pierre Mertens', *JT*, 1996, p 199; J Ravanias, *La protection des personnes contre la réalisation et la publication de leur image*, Paris, Bibliothèque de droit privé, 1978, p 141; P Kayser, *La protection de la vie privée par le droit*, Presses Universitaires d'Aix-Marseille, 1995, nr 153 ff.

18 C Bigot, 'Protection des droits de la personnalité et liberté de l'information', *Dalloz*, 1998, Chronique, p 238.

19 Civ Namur, 17-11-1997, *JT*, 1998, p 187.

20 Civ Brussels, 30-06-1997, *JT*, 1997, p 715. *Adde*: F Rigaux, 'Justice et presse: réflexions comparatives', *JT*, 1996, p 44.

1 Cass fr, 20-11-1990, *JCP*, 1990, nr 21908.

2 Cf A Strowel, 'Liberté de rappeler des faits contre droit au silence: les contretemps de la presse', *JLMB*, 1998, pp 785 ff.

time a personality which is different from the subject's real personality is suggested to the public.³

5.51 So far as concerns the right to honour, there is no need to specifically identify the person concerned.⁴ The right to honour⁵ protects against defamatory accusations⁶ and/or insults, without making any distinction between the private and the public life of the individual.⁷

5.52 The tort is relatively easy to prove when a false or incorrect fact is attributed to the relevant person. Evidence is more difficult to bring in the case of critical observations about the subject's personality.⁸ Even the author of a biographical narrative is bound by a duty of fairness and is not allowed to distort the subject's personality, although the right to freedom of expression requires freedom to criticise to be maintained.⁹ Prohibition against censorship prevents legal proceedings being commenced before publication of a narrative which is possibly prejudicial to honour.¹⁰

5.53 In the case of personality distortion by a periodical, the injured party can refer to their right of reply¹¹ and force the publisher to publish a reply written by them. Publication of the judgment is another form of compensation frequently sought.¹²

7 Use of name

5.54 A person's name is considered to be one of their attributes. Every person holds a right to their name.¹³ That right enables the holder to forbid each use of their name, even without demonstrating any particular patrimonial

damage.¹⁴ Indeed, each person has a moral right to control the use of their name.¹⁵ However, a person is not able to forbid the use of their name in a fictional work if there is no risk of confusion existing between the fictional figure and that person.¹⁶

5.55 The Benelux Uniform Trade marks Law (BUTL) expressly permits the registration of a person's name as a trade mark (Article 2).¹⁷ Three main conditions are required for the trade mark validity: (1) the distinctive character of the registered sign; (2) its lawfulness; and (3) its availability.

5.56 A sign is considered as 'distinctive' when it permits the identification of the product referred to in such manner as to distinguish its origin from that of other products.¹⁸ A sign is considered unlawful if it is likely to mislead the public about the product properties or its origin. Availability of any sign depends on the third parties' rights (marks, personal name, trade name).

5.57 The name holder's consent is obviously required for registration of a person's name. This consent must be obtained in good faith. If this is not done, the registration of a name which is homonymous with the name of a person will be invalid. A person whose name is homonymous with a registered trade mark may continue to use his or her name but not in the same territory as a trade mark.¹⁹

8 Right to image

5.58 Each individual has an exclusive right to the use of their 'image'. The 'right to image' enables any individual to prevent any unauthorised use of a reproduction of his visual features.²⁰ An 'image' could be defined as any lasting reproduction of the visual features of a specific and recognisable person.¹ The 'right to image' is based on the privacy general arrangements (ECHR, Article 8; ICCPR, Article 10; Belgian Constitution, Article 22)² and on the provisions of Article 10 of the new author's right law.³ The 'right to image' exceeds the limits of privacy and applies to every use of an individual's likeness.

3 J Mestre, 'La protection, indépendante du droit de réponse, des personnes physiques et des personnes morales contre l'altération de leur personnalité aux yeux du public', *JCP*, 1974, nr 2623, para 7-18.

4 Cf Civ Brussels, 23-03-1993, *JT*, 1993, p 579 (about the case of a publication questioning the honesty of a municipality management without specifically identifying the persons responsible).

5 Cf ICCPR, art 17 (above).

6 About the libel incrimination, cf Penal Code, arts 443-452.

7 A Strowel, 'Démêlés judiciaires autour d'Une Paix royale de Pierre Mertens', *JT*, 1996, p 197.

8 Personality distortion can also result from the publishing of a photograph (P Kaiser, *La protection de la vie privée par le droit*, Presses Universitaires d'Aix-Marseille, 199, p 189).

9 Civ Brussels, 26.04.1991, *JT*, 1992, p 315. About the application of the civil responsibility rules in case of satirical or fictional works, cf E Montero, 'La responsabilité civile des médias', in *Prévention et réparation des préjudices causés par les médias*, Brussels, (Larcier, 1998) pp 121-124.

10 Civ Brussels (réf), 22-08-1991, *Pas*, 1992, III, 1. *Addé* JP Masson and N Massage, 'Chronique de jurisprudence: les personnes (1991-1993)', *JT*, 1994, p 729. See also: Civ Brussels (réf), 05-02-1997, *A & M*, 1997, p 200; Brussels (réf), 08-05-1998, *JLMB*, 1998, p 1046.

11 Cf Loi du 23 juin 1961 relative au droit de réponse, *Moniteur Belge*, 8 July 1961. About the possible extension of the right to reply to the Internet sphere, cf F Jongen, 'Droit de réponse dans la presse et l'audiovisuel', in *Prévention et réparation des préjudices causés par les médias*, Brussels (Larcier, 1998) pp 55-56.

12 For example: Civ Namur, 17-11-1997, *op cit*.

13 About the right to the name, cf AC Van Gysel, 'Examen de jurisprudence (1991-1996) les personnes', *RCJB*, 1998, pp 452-453. *Addé* Civ Liège, 12-12-1997, *JLMB*, 1998, p 819.

14 Civ Brussels (réf), 11-02-1991, *JT*, 1991, p 567.

15 H De Page, *op cit*, nr 138 ff.

16 Brussels (réf), 12-01-1994, *RW*, 1994-1995, p 229.

17 Loi du 30 juin 1969 portant approbation de la Convention Benelux en matière de marques de produits et annexe signée à Bruxelles le 19 mars 1962, *Moniteur Belge*, 14 October 1969.

18 Cf A Braun, *Précis des marques*, Brussels, (Larcier, 1995) pp 97 ff.

19 A Braun, *Précis des marques*, Brussels, (Larcier, 1995) pp 50 ff.

20 R Lindon, note sous Paris, 25-10-1982, *Dalloz*, 1983, p 343. *Addé*: Paris, 10-09-1996, *RDPI*, 1996, nr 68, p 63; Civ Brussels (réf), 04-10-1995, unpublished, RG nr 95/1469/C, p 4. M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998) p 68.

1 Cf above.

2 This article states that neither the author, neither the owner of a portrait, nor any other possessor of a portrait has the right to reproduce or to publicize it without the consent of the represented person or of his or her entitled beneficiary during the 20-year period commencing on his or her death ('Ni l'auteur, ni le propriétaire d'un portrait, ni tout autre possesseur ou détenteur d'un portrait n'a le droit de le reproduire ou de le communiquer au public sans l'assentiment de la personne représentée ou celui de ses ayants droit pendant 20 ans à partir de son décès').

3 B Michaux, 'La bande dessinée et les droits des tiers', in *Droit d'auteur et bande dessinée*, Brussels-Paris, Bruylant-LGDJ (1997) p 200.

5.59 The 'right to image' implies therefore a visual representation of a specific and recognisable person. Only the textual description of an individual does not come under the 'right to image'.

5.60 However, a visual representation in whatever form could lead to a breach of someone's 'right to image': strip,⁴ painting,⁵ and so on. The represented person must be recognisable.⁶

5.61 There is no need for an absolutely identical representation, so long as the person is recognisable (by his attitudes, features or by a caption⁷) by any third person. Therefore, the Paris Court (Tribunal de Grande Instance) ruled that the actress Catherine Deneuve could refer to her 'right to image' with regard to a representation of her bust because her nearest and dearest could recognise her.⁸ Account has to be taken of the person's attitude. The rights of a person with regard to their image end with their death.

5.62 The prerogatives transmitted to the rightholder relate only to images made during that person's life.⁹ It is therefore impossible to refer to the 'right to image' about the representation of mortal remains. The forbidding of such representation could only be based on the prejudice to the late person's memory and/or to the family's honour.¹⁰

9 Public figures and persons involved in news events

5.63 Unless formally refused, a person's consent will be presumed in certain circumstances: public figures, persons involved in a news event, and (sometimes) persons in a public place.

5.64 The consent of a public figure can be presumed with regard to any reproduction of their visual characteristics relating to their public activities or opinions.¹¹

5.65 Public persons are also able to refer to their right to privacy.¹² Their presumed consent can only be assumed for information purposes, to the exclusion of any commercial use.¹³ The consent of persons involved in a news event can also be presumed, but only for immediate information purposes.¹⁴

10 Consent to use of image

5.66 Can a person's consent in relation to the use of his or her image be deduced from the sole fact that he or she walks on the street? Great care is required: in fact, privacy can partially exist in public places.¹⁵ Some authors recommend a distinction depending on the main subject of the photograph.¹⁶ The consent of the represented person could be presumed if they are not the main subject of the photograph.¹⁷ Otherwise, the represented person's consent is necessary.

5.67 The authors are divided upon the necessity (or not) of consent for the mere taking of a photograph in a public place independently of the use of the photographs concerned. There are different opinions in this matter. Some authors consider that the right to control the use of photographs has necessarily to be completed by the right to control the photograph being taken.¹⁸ Others believe that nothing forbids the taking of a photograph of a person in a public space.¹⁹ F Rigaux considers that the person who enters the public sphere implicitly waives his right to forbid his image being taken and used for some purposes (see above).²⁰

5.68 This opinion cannot be shared: the sole fact of leaving a private area cannot a priori be interpreted as a will to publicise. Indeed, it is not always possible to avoid public places, even when a person wants some elements of their privacy to be kept secret.¹ So far as the act of taking a photograph results in an image which is of a durable character, which is perhaps legitimately objected to by the person represented, the person represented should retain their right to forbid its taking and/or use.

5.69 Consent for the use of a person's image is interpreted in a restrictive way: consent for a specific use does not imply the consent for another use.² In a recent case involving the reproduction of images of parents of missing children in a neo-fascist political leaflet, the Brussels Civil Court ('Tribunal de Première Instance' or 'Rechtbank van Eerste Aanleg') went further and affirmed that the express consent of the person represented is required for any use or reproduction of their physical appearance.³

5.70 In addition, the person represented has the right to withdraw and can always cancel any consent given for a specific use of their physical appearance.⁴

4 Cass fr, 14.03.1900, *Dalloz*, 1900, I, 497.

5 Trib Gr Inst Lyon, 18.02.1976, *JCP*, 1978, II, 18900.

6 J Corbet, note sous Civ Brussels, 19.06.1981, *RW*, 1981-1982, col 2616.

7 Trib Gr Inst Paris, 29.03.1978, quoted by P Fremont, *Le droit de la photographie. Le droit sur l'image*, Paris, Publicness, 1985, p 352.

8 For a 20-year time period.

9 M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998), p 85. About the commercial use of President Pompidou's image, cf Trib Gr Inst Paris (réf), 04.04.1970, *JCP*, 1970, II, 16328.

10 M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998), p 96.

11 This issue is treated in M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998), p 109 and following. *Adde* Trib Gr Inst Paris, 25.04.1994, *Juridata*, 043178.

12 About the limits of said right, cf above.

13 J Milquet, 'La responsabilité aquilienne de la presse', *Ann Dr Louvain*, 1989, p 64.

14 M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998), p 96.

15 Y Marecellin, *Photographie et loi*, Paris, CEDAT, 1997, p 124.

16 X Dijon, *Le sujet de droit en son corps: une mise à l'épreuve du droit subjectif*, Brussels (Larcier, 1982) p 159.

17 M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998), p 66. *Adde* D Acquarone, 'L'ambiguïté du droit à l'image', *Dalloz*, 1985, *Chron*, nr 2.

18 P Kaiser, *La protection de la vie privée par le droit*, Presses Universitaires d'Aix-Marseille, 199, p 184.

19 Cf the case relating to the use of Jacques Brel photographs representing him as a sick man going downstairs in an airport (quoted by M Isgour and B Vincotte, *Le droit à l'image*, Brussels (Larcier, 1998), p 108).

20 F Rigaux, *La protection de la vie privée et des autres biens de la personnalité*, Brussels, Bruylant, 1990, p 760.

1 Civ Bruxelles (réf), 23.10.1998, unpublished, RG nr 98/1553/C. It seems quite excessive and may be prejudicial to the right to the freedom of expression.

2 Civ Brussels (réf), 04.10.1995, op cit.

3 For a 20-year time period.

4 Com Brussels, 24.02.1995, *Ing-Cons*, 1995, p 333.