EUROPEAN CURRENT LAW

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The Belgian Copyright Act finally revamped with the implementation of the Copyright Directive (2001/29): the good, the bad and the ugly

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Introduction

On 22 May 2005, exactly two and a half years too late according to the maximum implementation deadline, Belgium finally implemented Directive 2001/29 on copyright and related rights in the information society ("the Directive").[1] The act was published in the Belgian Official Gazette (Moniteur Belge/Belgisch Staatsblad) of 27 May 2005 and entered into force the same day. This short commentary provides an overview of the implementation, focusing on the changes made to the Copyright Act 1994 and pinpointing areas where implementation has been correct and incorrect. For reasons of space, the commentary will focus only copyright and not related rights, although most of the provisions applying to the former also apply to latter.

Exclusive rights

The Directive broadened the rights of reproduction and communication to the public (art. 2 and 3). The implementation act reflects the Directive faithfully and accordingly, the author has now the exclusive right to reproduce or authorise the reproduction of his/her work, in any manner and form s/he wishes, be it direct or

[1] In July 2003, the Commission had sent reasoned opinions to the remaining eleven Member States which had not yet implemented the Directive. This included Belgium. Since Belgium still had not implemented the Directive, the Commission initiated an infringement procedure requiring Belgium to implement the Directive (http://www.hri.org/news/europe/midex/2005/05-03-21.midex.html).

indirect, temporary or permanent, in part or in whole (art. 1(1) of the Copyright Act[2]). This does not really change the old law as article 1(1) may have been said to be as broad as to include those forms already[3] but it makes the right more precise without restricting it. The right of communication is also modified to include the "making available right" so that the author of a work has the exclusive right to communicate the work to the public by any means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them (art. 1(4)). The Belgian lawmaker has also introduced a right of distribution together with the principle of exhaustion (art. 1 (5)), which were lacking in the act, although they had been firmly recognised by the courts.[4] In this respect, the new act rewrites quasi word for word article 4 of the Directive. So, as far as rights are concerned, Belgian law is compliant.

Exceptions

As a reminder, exceptions are all provided in article 5 of the Directive and only article 5(1) is mandatory. As far as the exceptions in article 5(2) and (3) are concerned, Member States could not maintain existing exceptions which conflicted with them.[5] In other words, they had to remove exceptions which did not appear in article 5(2) and (3) and amend those existing ones which conflicted with them.[6] In addition, Member States were not allowed to enact exceptions outside the list provided in article 5(2) and (3) (recital 32). However they could keep "traditional" exceptions of less importance as long as they only concerned analogue uses (art. 5(3)(o)). Finally, Member States were not obliged to introduce new exceptions (i.e. exceptions in the list but not appearing in national law) if they did not wish to (recitals 34 & ff.). In Belgium, many changes had to be made to the existing exceptions to comply with article 5(1)-(3). Belgium also kept some traditional exceptions. In addition, new exceptions were introduced.

Modification of the existing exceptions

The good

Here follows a description of the exceptions which were changed and comply with the Directive. The citation exception has been amended in two ways. First, citations do not have to be short anymore. Second, the lawmaker has added that the source and name of the author must be mentioned unless this turns out to be impossible. In the past, even if it was impossible, those mentions had to be made to comply with the law. So the citation exception is now much broader.

[2] Articles cited are always to the amended Copyright Act unless otherwise provided.
[3] A. Strowel & E. Derclaye, *Droit d'auteur et numérique: logiciels, bases de données, multimédia, Droit belge, européen et comparé*, Bruylant, Brussels, 2001, p. 52.
[4] Strowel & Derclaye, supra n. 3, p. 57 ff.
[5] J. Reinbothe, "Provisions on exceptions in the European Community proposed Directive on copyright and related rights in the information society", in *ALAI Study days, 1998 - The Boundaries of copyright*, Australian Copyright Council, 1999, p. 64.
[6] M. Hart, "The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame About the Exceptions" [1998] EIPR 169.

Anthologies for teaching purposes are now only exempted if they do not seek any direct or indirect commercial or economic to comply with article 5(2)(c) of the Directive.

The implementation act is compliant as regards the "private" copying exception (article 5(2)(a) of the Directive), which must only be made on paper or similar medium but does not need to be private anymore (art. 22(1)(4) of the act). We will call it the "paper copying" exception. As required, the exception excludes sheet music and provides a fair compensation for authors (article 59).

To comply with article 5(2)(c) of the Directive, Belgium changed its article 22(1)(8) to broaden it to publicly accessible libraries, museums and archives (before it only applied to the Royal Ciménathèque). The Directive's article mentions "specific acts" of reproductions, which is vague. Belgium has chosen to restrict this exception to a limited number of copies made by those institutions determined and justified by the aim of preserving the cultural and scientific heritage.

Belgium kept three traditional exceptions. According to article 5(3)(o) of the Directive, Belgium could surely retain its exception for the free and private communication of works within the family circle which now has been broadened to include communication in the framework of school activities. However, although the implementation act does not specify it, to comply with article 5(3)(o) of the Directive, this may not include digital uses. In contrast, in clear accordance with article 5(3)(o), the exception provided in article 22(1)(5) of the act concerning the reproduction of audiovisual and musical works in the family circle, was restricted to analog reproductions. Additionally, although it was not obliged to change the latter exception further, the lawmaker decided to broaden it to all works. In the same vein, Belgium could keep its exception to communicate works to the public during exams as it will fall within article 5(3)(o) of the Directive (such executions will obviously not be made digitally) and therefore did not change it.

The bad

A few exceptions were badly implemented, although not that badly that it makes them "ugly", i.e. strongly non compliant. First, article 22(1)(1), which exempts the reproduction and communication to the public when reporting current events, has not been changed except to provide in article 22(2) that the source and name of the author must be mentioned unless this turns out to be impossible and that the exception is only available to the extent justified by the informatory purpose. This seems to leave the exception broader than is required by the Directive and thus non compliant. Indeed, the reproduction or communication must be done by the press and the works must have an economic, political or religious character.

Second, article 22(1)(2), which allows the reproduction and communication to the public of works exposed in places accessible to the public, has not been modified although it ought to be as article 5(3)(h) does not require the condition that Belgian law still does, i.e. that the use's aim is not the work itself.

The teaching and research exception seems to be correctly implemented although the act does not specify that the reproduction must be *exclusively* for these purposes. However, the act envisages separately the *communication* to the public for teaching

and research purposes and adds several conditions, not required in the Directive. One is that a fair compensation is granted to authors (art. 59 and 61 bis) but while the Directive does not require it, it is allowed by recital 36.[7] Another is that it must be made by officially recognised establishments. Therefore, in this respect, the exception can be said to be non-compliant.

New exceptions

In addition to amending its existing exceptions, Belgium decided to add five new exceptions to its act, thus making the law more "user-friendly". They also have all been written almost word for word which makes them all compliant. First, article 22(1)(9) of the act implements article 5(3)(n) of the Directive (use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections). Second, article 22(1)(10) implements article 5(2)(d) (ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts). Third, article 22(1)(11) corresponds to article 5(3)(b) (uses for the benefit of people with a disability). Fourth, Belgium adds the use for the purpose of advertising the public exhibition or sale of artistic works (art. 5(3)(j) of the Directive and art. 22(1)(12) of the act). Finally, article 5(2)(e) is implemented in article 22(1)(13) (reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons[8]). Finally, an exception comparable to article 5(1) of the Directive which exempts temporary reproductions acts which enable, among others, Internet transmissions, did not exist in Belgian law. Article 21(3) of the act implements word for word article 5(1).

While Belgium was the first and only Member State to have made all its exceptions imperative in 1998 (art. 23 bis), the implementation act, by adding a second paragraph to article 23 bis, now allows contractual derogations in cases works are made available to the public on demand so that anyone may access them from a place and at a time individually chosen by them. This may spring from article 6(4) of the Directive which prohibits all circumvention of technological measures in this case.

Protection of technological measures and rights management information

A chapter VIII is added to the Copyright Act to implement article 6 and 7 of the Directive which protect technological measures and rights management information ("RMI"). Article 79 bis implements article 6(1)-(3) faithfully by punishing those who circumvent an effective technological measure, knowingly or with reasonable grounds to know and the same persons who manufacture, import, distribute, sell, rental, advertise for sale or rental, or possess for commercial purposes devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or have only a limited commercially significant

[7] Recital 36 provides that "the Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation."
[8] Article 55 provides for a fair compensation in this case as required by the Directive.

purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures. These acts are misdemeanours (articles 80-86 of the act apply). The act also re-writes word for word the definition of a technological measure, i.e. any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law or the database *sui generis* right. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

Article 6(4) is implemented at article 79bis (2) which provides that right holders have to take voluntary measures within a reasonable timeframe to provide users of a work or other protected subject-matter the necessary means to benefit from certain exceptions (namely citation, teaching and research, paper copying, specific acts of reproduction made by libraries, museums and archives, ephemeral recordings by broadcast organisations and use for handicapped persons) when they have lawful access to the work or subject-matter protected by technological measures. Thus interestingly, the Belgian lawmaker does not include all exceptions which are listed as possible ones in article 6(4) of the Directive (e.g. reproductions of broadcasts made by social institutions pursuing non-commercial purposes) and additionally, it includes a very important exception (the citation exception) which had been left out from article 6(4) by the European lawmaker. Although this is incorrect implementation, it can only be applauded because of the importance of the citation exception.

As required by article 6(4) as well, article 79 bis (2) does not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them (art. 79 bis (3)). Article 87 bis (2) ensures that if right holders do not take the measures required by article 79 bis (2), this can be sanctioned before the court of first instance. Thus the State indirectly monitors whether right holders effectively grant access to users. This makes the implementation of article 6(4), which is by any means obscure, rather positive. It transforms Cinderella's pumpkin in at least a "ridable" coach for users. If right holders do not take measures within a reasonable timeframe (which will in the end be decided by courts), users can sue them. Of course, this is not the best solution as they have to engage into legal proceedings to get access but possibly, this will give an incentive to right holders to take the measures timely to avoid costly litigation e.g. by consumers associations and avoid the payment of damages for their non-compliance. In addition, this solution goes beyond article 6(4)'s only voluntary measures: it makes these measures mandatory as the inaction of rights owners can be sanctioned judicially.[9]

Article 79 ter also makes it a misdemeanour to knowingly delete or modify electronic RMI. The Directive's definition of RMI is also reproduced. This article will not be

[9] S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique, Droits et exceptions à la lumière des dispositifs de verrouillage des oeuvres*, Larcier, Brussels, 2005, p. 180.

further discussed as it rewrites almost word for word article 7 of the Directive on RMI.

Finally, as briefly mentioned above, article 87 bis of the act provides that the court of first instance is also competent to sanction violations to article 79 bis, thus implementing article 8 of the Directive.

Conclusion

No doubt, Belgium's implementation of the Copyright Directive has been late. But Belgium was not the last one to be so. At the time of writing, France has yet to implement the Directive. Generally, the Belgian implementation is compliant. The rights have been finally clarified and a few traditional exceptions have remained unchanged. The remaining exceptions have been modified. Except for the exceptions relating to teaching and research, reporting current events and works exposed in places accessible to the public, the act respects the letter and spirit of the Directive. Since they have been implemented almost word for word, the provisions relating to technological measures and RMI are compliant. The only incorrect, but in our view laudable, implementation as regards technological measures is the addition of the citation exception in article 79 bis (2). The Belgian legislature will have to remedy the few "misimplementations" regarding the three important above-mentioned exceptions. In the meantime, courts will have to construe them in accordance with the Directive so that the legislative damage should be minimised. So the act is very good, albeit with a few bad but no ugly misimplementations.

As far as pan-European copyright harmonisation is concerned, Prof. Hugenholtz's prediction that most countries would want to change very little as regards their exceptions[10] is not true for Belgium at least. A great number of exceptions have been added to the existing ones, broadening users' rights and thus better balancing the broad rights. Even though as regards exceptions, the Directive is surely a "hit and miss" as far as pan-European harmonisation is concerned, as to the rights, the protection of technological measures and RMI, harmonisation is surely achieved, expect perhaps for article 6(4) whose implementation may differ in every country due to its original opacity.

[10] P. B. Hugenholtz, "Why the Copyright Directive is unimportant, and possibly invalid" [2000] EIPR 499 at 501.