

**QUESTIONNAIRE – ALAI CONGRESS 2018 – MONTREAL**

Since the congress theme should attract many copyright practitioners, the Canadian group has chosen to develop a questionnaire which you are asked to complete with succinct answers, in either **French, English or Spanish**. The answers will be compiled in an analytical table that will be given to congress participants so that they can leave with a document allowing them to quickly compare the situation prevailing in several countries.

It is therefore essential to complete the table below by briefly answering each question. We invite you to refer to the legal provisions that apply in your country, if any.

For national groups who would also like to provide additional information related to certain questions, we ask you:

- 1) to indicate "\*\* see also answer No. X below" after the short answer that you have provided in the table.
- 2) to put your more detailed answer after the table.

Please note, however, that only the answers to the table will be compiled in the practical tool that will be given to the participants.

<b>Belgium</b> Name of the person(s) answering the questionnaire <b>Benoît Michaux</b> <b>Zorana Rosic</b> <b>Noémie Gillard</b> <b>Michael Lognoul</b>											
<b>QUESTIONS FOR THE SUMMARY TABLE</b>	1) Are statutory damages available? If so, please indicate the criteria for awarding them and the amount of such damages.	2) If punitive damages are available, indicate the criteria for awarding them.	3) Are class actions or class remedies available in copyright matters? If so, indicate in what circumstances they are used.	4) If seizures before judgment are available, indicate what gives rise to such procedures and the criteria for granting them.	5) Are there in your country 1) criminal remedies; 2) customs measures, in connection with copyright? If so, which ones?	6) Describe how circumvention of technological protection measures is dealt with, if such is done.	7) Is there a mandatory notice and notice regime or notice and take down regime for intermediaries in the case of alleged copyright infringement? If so, describe it briefly, and indicate if how it is dealt with differs based on which rights holder requests it.	8) Does the notion of secondary copyright infringement in the digital world exist in your country? If so, describe it briefly.	9) Indicate for which rights collective management is available.	10) With respect to collective management, indicate who sets the tariffs and how they are set.	11) Indicate whether copyright remedies are within the power of specialized courts or common law courts, and in the case of a mixed system, please specify in which cases an action should be brought before one rather than the other.

ANSWERS TO QUESTIONS FOR THE SUMMARY TABLE	<p>There is no general provision providing for statutory damages under Belgian copyright law.</p> <p>Noteworthy, however: the law provides that the debtor who fails to pay the fair compensation due for private copy shall be liable to pay an additional amount equal to twice the amount of the fair compensation (article XI.293 of the Belgian Code of Economic Law- hereinafter “CEL”).</p> <p>Moreover, even though non-</p>	<p>No punitive damages apply in Belgium .</p>	<p>Yes.</p> <p>First, collective management organizations (CMO’s) and professional groups have standing to file applications for injunctions aiming at the protection of a global repertoire (article XVII.19, CEL).</p> <p>Second, CMO’s are entitled to claim damages not only for the infringement of individual rights but also for the infringement of collective rights mentioned in their by-laws (case law, see</p>	<p>Yes.</p> <p>Belgian law provides for a specific fast-track procedure on a ex-parte basis to obtain seizures before judgment (article 1369bis of the Belgian judicial code).</p> <p>Conditions are: First, the copyright must be at first sight valid. Second, the infringement is not subject to a potential serious challenge. Third, a fair balance must be struck between all the interests involved.</p> <p>See detailed answer below.</p>	<p><u>Criminal remedies:</u></p> <p>1) Offence of counterfeiting (art. XI. 293, art. XV. 104 et art. XV. 70 CEL): «any malicious or fraudulent infringement of a copyright or a neighbouring right».</p> <p>Are also to be considered as criminal offences: sale, rental or import of infringing copies.</p> <p>The notion of criminal offence also covers aiding, or abetting and inciting such offence of counterfeiting.</p>	<p>The circumvention of technological protection measures (TPM’s) is expressly prohibited.</p> <p>The CEL treats as a criminal offence the circumvention of any effective TPM which the person concerned carries out in the knowledge, or with having reasonable grounds to know, that he or she is facilitating a malicious or fraudulent infringement of a copyright (art.XI.291 CEL). In that case, articles XV.104 and XV.70 of the CEL apply, which results in a fine from 500 to 100.000 EUR, possibly along with an imprisonment</p>	<p>There is no provision under Belgian law, which provides for a mandatory notice and notice regime, or notice and take down regime in the case of alleged copyright infringement .</p>	<p>Yes.</p> <p>First, there is a general provision in the CEL, which provides that aiding or abetting and inciting intentional copyright infringements amounts to a criminal offence (art.XV.69, CEL).</p> <p>This provision is perfectly suited for the digital world, even though initially not designed for that particular purpose.</p> <p>Likewise, in the civil area, Belgian judges take the view that aiding or abetting and inciting copyright infringements amount to wrongful acts. Some decisions</p>	<p>Collective rights management is available for all economic rights, i.e. rights of reproduction, distribution, rental, lending, communication to the public, making available, and so forth.</p> <p>The situation of moral rights is different.</p> <p>Admittedly, collective rights management organizations may also manage moral rights in some circumstances, when right owners grant them specific and <i>ad hoc</i> representation powers. However, in such cases, the management of</p>	<p>The answer depends on the situation.</p> <p>A distinction has to be made between the following situations: (a) The collective management is voluntary; (b) The collective management is compulsory, there is no fee set by the public authority; (c) The collective management is compulsory, and there is a fee set by the public authority.</p> <p>The first situation (a) happens, e.g., when a CMO of copyright owners authorizes an entity to</p>	<p>The Belgian rules in judicial matters do not provide for courts specializing in copyright on a specific and exclusive basis. However, some rules have the effect of concentrating certain procedures in copyright matters in the hands of a limited number of jurisdictions.</p> <p>First, there is a general rule ensuring some concentration in terms of territory. According to said rule, IP-infringement cases, including copyright matters, may</p>

	<p>binding, CMO's tariffs may serve to calculate damages.</p> <p>See extensive answer below</p>		<p>detailed answer below).</p> <p>Third, in certain cases (e.g. private copy), one single CMO can act on behalf of all right owners (potentially) concerned (article XI.229, CEL).</p> <p>For class actions on behalf of consumers/users of works, see detailed answer below.</p>		<p>Criminal sanctions: fine ranging from 500 to 100.000 EUR, and an imprisonment penalty ranging from 1 year to 5 years, or one of these two penalties only<sup>1</sup>.</p> <p>2) Offences related to the technical measures of protection and identification: see next question (art. XI. 291 and XI. 292 CEL). These offences are sanctioned in the same way as the offence of counterfeiting.</p> <p><u>Customs measures</u> According to EU-Regulation 608/2013, customs authorities can take a number of actions, including the suspension of the release of, and the detention of, the goods suspected of infringing (article 17 and following of the Regulation).</p>	<p>sentence (from 1 to 5 years). Furthermore, the CEL also treats as a criminal offence the manufacture, import, distribution, sale, rental, advertisement for sale or rental or possession for commercial purposes of goods or services which 1) are promoted, advertised or marketed for the purpose of circumvention ,or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures (art.XI.291 CEL). This criminal offence is subject to the same criminal sanctions as the offence of circumvention of TPM's.</p>		<p>are noteworthy in this respect. In the pre Svensson era, Belgian courts have used the concept of secondary infringement (or indirect liability). They have considered that providing hyperlinks to works that have been made available to the public without the authorization of the right holder constitutes an act of tort (i.e. secondary infringement) when the link provider knows or ought to know that the making available of the linked works is not authorized<sup>2</sup>. In another case and on another issue, they found that an Internet hosting provider is liable for secondary infringement in a situation where it failed to remove diligently hyperlinks to illegal files after being explicitly notified by the right holders that those links referred to illegal content<sup>3</sup>.</p>	<p>granted rights may not be considered as «collective».</p> <p>With respect to economic rights, a distinction is to be made between rights that <i>may</i> be subject to collective management, and rights that <i>must</i> be subject to such management. In the first case, right owners confer the management of their rights on a voluntary basis to CMO's in order to benefit of wider means (enforcement, contracts, and so on). In the second case, right owners are legally compelled to have their rights managed by CMO's<sup>5</sup>. The second case includes i.a. the following situations: granting an authorization for</p>	<p>communicate works to the public during a live concert. The collective management takes place on a voluntary basis. In such a situation, the CMO's may in principle decide on their own the setting of their tariffs (article XI.279 CEL). That setting of tariffs is, however, monitored by an administrative authority in charge with the supervision of the CMO's (article XI.270 CEL). Furthermore, the recent case law precised that judicial authorities do have a marginal appreciation on the increases of tariffs by CMO's under the legislation concerning unfair</p>	<p>only be filed with five courts, namely those established in the five main cities. Second, special rules provide that injunction proceedings (as opposed to ordinary proceedings on the merits) in copyright matters must be filed with a specific section of the courts. Third, other rules provide for a similar system concerning the so-called descriptive-seizure procedure, namely the procedure seeking to obtain measures of description and seizure on an ex-parte basis. Apart from the limitations resulting from the above, the liberty for the parties to bring a case before the</p>
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<sup>1</sup> Article XV.70 CEL read together with article XV.104 CEL.

<sup>2</sup> Court of appeal of Antwerp, 26 June 2001.

<sup>3</sup> Court of appeal of Brussels 13 February 2001.

<sup>5</sup> For a view of all collective rights management companies that are active in Belgium, please consult : Public Federal Service of Economic Affairs, « Service de contrôle des sociétés de gestion de droits d'auteur et de droits voisins », March 2018, available at the address <https://economie.fgov.be/fr/themes/propriete-intellectuelle/droit-dauteur/service-de-contrôle-des>, consulted on 19 June 2018.

				<p>The CEL provides for further details in relation to the competences of the customs authorities under Belgian law (art. XV. 21 and following of the CEL).</p> <p>See detailed answer below.</p>	<p>It is generally admitted that, apart from criminal sanctions, the abovementioned acts in relation to TPM's are also subject to civil proceedings, including injunctions, even though not expressly foreseen in the text of the Code on Economic Law.</p> <p>See detailed answer below.</p>		<p>Second, there are specific provisions in the CEL, which seek to sanction particular forms of indirect copyright infringements. For instance, with respect to TPM's, the Code treats as a criminal offence 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 which are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of TPM's (art.XI.291 CEL).</p> <p>Third, the provisions concerning the civil injunction procedure<sup>4</sup> allow for obtaining an order imposed on individuals or entities who merely enable or facilitate copyright infringements. It must be stressed in this respect that the availability of injunctions is very broadly construed.</p>	<p>retransmission, collecting a fair compensation for private copy or reprography, etc.</p> <p>See detailed answer below.</p>	<p>commercial practices<sup>6</sup>. The second situation (b) occurs, e.g., when a CMO authorizes cable operators to retransmit television broadcasts. The collective management is compulsory, but there is no fee fixed by the authority, and there is no binding fee setting process prescribed by law. The parties concerned, i.e. the CMO and the cable operators, have to negotiate in order to reach an agreement. The third situation (c) occurs when it comes to fix the fair compensation which is due, e.g., for private copy and reprography. The fee is set by the authority (the government) after consultation</p>	<p>court of their choice is quite significant.</p> <p>See detailed answer below.</p>
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<sup>4</sup> Article XVII.14 through 20, CEL.

<sup>6</sup> Comm. Bruxelles (Cess.), 12 April 2018, not published yet.

								<p>An injunction is available against any defendant who is in a position to contribute in any manner to the discontinuation of the copyright infringements, even if he is only an indirect or secondary infringer – and even when he has no liability at all about the infringement (even not indirect).</p> <p>See detailed answer below.</p>	<p>of the stakeholders<sup>7</sup>.</p> <p>See detailed answer below</p>	
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**FURTHER QUESTIONS (OPTIONAL)**

QUESTION: Are there recent legislative or jurisprudential developments in your country that would be interesting to share with the ALAI public?

ANSWER :

QUESTION: Are there any special remedies in your jurisdiction that, to your knowledge, are less or not available in other jurisdictions?

ANSWER :

**DEVELOPMENT OF ANSWERS**

<sup>7</sup> Royal Decree of 18 October 2013 on the right to remuneration for private copy, *M.B.*, 24 October 2013; Royal Decree of 5 March 2017 on the remuneration of authors for reprography, *M.B.*, 10 March 2017.

## QUESTION 1

### PRELIMINARY REMARK

The Belgian group assumes that in the context of this question, statutory damages are to be understood as

- (i) damages intended to compensate the prejudiced parties for the prejudice suffered as a consequence of the infringement
- (ii) whereby the amount of the compensation is established by law (directly or indirectly, between maximum and minimum values), independently of the actual prejudice.

In light of this assumption,

### ANSWER

There is no general provision providing for such statutory damages under Belgian copyright law.

Admittedly, the calculation of damages suffered by copyright owners may include references to collective rights management organizations' (CMO) tariffs. But these tariffs are non-binding for judges. They serve as mere benchmarks. Moreover, they may not include penalties, such as those penalties that are provided in the CMO's' tariffs where no contract has been concluded between the CMO and the user of the work. In this respect, in 2009 the Belgian Supreme Court - « Cour de cassation » - ruled<sup>8</sup> that amounts claimed under penalty clauses by CMO's (200 % extra fee) are not part of the damage actually suffered, and thereby do not fit civil liability principles. Since, Belgian jurisdictions complied with this interpretation<sup>9</sup>.

That being said, in a very particular area, the language of the Belgian copyright law could suggest that there is a form of statutory damages. The situation at stake is extremely specific. It relates to the field of private copy and reprography. The law provides that the debtor who fails to pay the fair compensation shall be liable to pay an additional amount equal to twice the amount of the fair compensation<sup>10</sup>. The law, however, does not clarify who is going to benefit from that additional amount. It appears that some courts are inclined to consider that the right owners will be the beneficiaries<sup>11</sup>. This last position means in practice that the additional amount is treated as statutory damages. But it should be emphasized, once more, that the situation is very specific and that the solution is far from being unanimously accepted.

## QUESTION 2

## QUESTION 3

The Belgian group assumes that the notion of class action in this context may be understood broadly as referring to an action that enables a group of individuals or entities who have had their rights violated to be represented by a third party (for example, by an organization) which seeks compensation or other judicial measures for them. When compared with individual – regular – actions, class actions (or group actions) offer significant advantages in terms of time, money and efficiency.

To some extent, various class actions (in a broadly meaning) do exist under Belgian law when it comes to protect the interests of the parties who are prejudiced by copyright infringements.

<sup>8</sup> Cass. (2<sup>nd</sup> ch.), 13 May 2009, *Pas.*, 2009, I, p. 1167.

<sup>9</sup> For an example, see Bruxelles (9<sup>th</sup> ch.), 11 October 2013, *J.L.M.B.*, 2014, p. 462.

<sup>10</sup> Article XI.293 of the Code of Economic Law (introduced by Law of 19 April 2014, *Moniteur belge*, 12 June 2014, p.44352) . Actually, this provision refers to a rule contained in the Code on Value Added Tax, which provides for that rule.

<sup>11</sup> Court of appeal of Brussels (9<sup>th</sup> ch.), 22 January 2010, 2008/AR/2296, available at the address: <http://www.auvibel.be/userfiles/files/RP22012010.pdf> and Court of appeal of Antwerp (1<sup>st</sup> ch.), 27 February 2012, 2010/AR/2783, available at the address: <http://www.auvibel.be/userfiles/files/RP27022012.pdf>.

First, when it comes to terminate or to prevent infringements, the copyright law expressly provides that an application for an injunction may be filed – not only by each individual interested injured party concerned, but also – by (i) a collective management organization, and (ii) a professional or an inter-professional organization<sup>12</sup>. Consequently, the latter organizations are in a position to defend collective interests and to obtain the protection of global repertoires, not only in terms of discontinuation but also in terms of prevention of the infringements.

Second, when it comes to obtain a compensation for infringements upon the rights and interests of the right owners, even though the copyright law does not contain any explicit provision in this respect, case law has granted extended standing to collective management organizations for the protection of the collective interests as provided in their by-laws. Hence, CMO's are entitled to claim damages not only for the infringement upon the rights and interests of certain individuals who are (already) members, but also for the infringement upon collective rights and interests as mentioned in the by-laws<sup>13</sup>.

Third, in a number of cases, the Belgian copyright law provides that one or several CMO's may be appointed to collect a fair remuneration for the benefit of all the right owners (e.g., private copy, reprography, orphan works). In such said CMO ('s) will be considered as representative of all the CMO's and acting for the benefit of all the right owners concerned.

On another note, class actions must also be considered from the prospective of the users of the works in copyright matters.

At first sight, under the copyright law, in many cases, users seem merely to benefit from exceptions – i.e. they do not seem to have “enforceable rights” that might be claimed against right owners in order to obtain a free use of the work. However, in a number of specific situations, the Belgian copyright law allows entities to act on behalf of categories of users – and in some cases on behalf of all the consumers in general, namely when technological protection measures have the effect of impairing specific exceptions or even simply the normal use intended by the legitimate purchaser of the work<sup>14</sup>. In those situations, a class action can be filed to obtain an injunction forcing the right owners to enable the benefit of the exception or the normal use of the work<sup>15</sup>.

Moreover, under Belgian law, the copyright law provisions have to be read together with other legal provisions which provide for a collective redress in favor of the consumers<sup>16</sup>. The latter provisions allow consumers organizations to obtain redress for the violation of the provisions of the copyright law – which might include the benefit of specific exceptions.

#### QUESTION 4

Seizures before judgment on the merits are available under Belgian law.

The Belgian Judicial Code<sup>17</sup> provides for a specific fast-track procedure in this respect, which is applicable in cases of prima facie copyright infringements.

This procedure allows to obtain two kinds of measures:

- (i) In the first place, it allows to collect evidences and information concerning the alleged infringement (i.a. extent of dissemination of the infringing copies, parties involved, benefits, etc). To this end, an expert is appointed, who is entitled to collect any kind of evidence, at any time, at any place in Belgium. The application is filed and processed on an ex parte basis, in a short timeframe (usually 48 hours). The criteria for granting the measure are as follows: a) the copyright must be at first sight valid; potential objections against the eligibility as copyright protected work do not suffice to dismiss the request<sup>18</sup>; b) there must be indications that there is an actual infringement or a threatening infringement of the copyright; mere indications – if reasonable – do suffice, which means that evidences are not required<sup>19</sup>. Urgency is not a condition for obtaining this kind of measures.
- (ii) In the second place, it allows to obtain the seizure of the alleged infringing copies and the instruments used for producing or disseminating the copies. Theoretically, seizures may also apply to revenues generated by the infringing activities. In practice, however, they are not applied for revenues, because the notion “revenues” is generally interpreted in a very restrictive manner: it refers to cash that has proven to be directly generated by the infringement. The application for this kind of measures (i.e. seizures) is processed on an ex parte basis, in a short timeframe. However, the judge can decide that he will hear the counterpart (in the absence of the plaintiff) in his office. In the latter case, he will inform the plaintiff in advance, so that the plaintiff has the possibility to cancel his request for seizures. The criteria for granting the seizure are as follows: a) the copyright

<sup>12</sup> Article XVII.19, par.2, CEL.

<sup>13</sup> See, i.a., Belgian Supreme Court (“Cour de cassation”) 26 April 2012, *A&M*, 2012, 435-437.

<sup>14</sup> Article XI.291, par.4, CEL.

<sup>15</sup> Article XI.336, CEL.

<sup>16</sup> Articles XVII.36 through 70, CEL.

<sup>17</sup> Article 1369bis of the Judicial Code.

<sup>18</sup> Cass., 3 September 1999, Arr. Cass., 1999, p. 1027, I.R./D.I., 2000, p. 71 ; Ing-cons., 1999, p. 603 ; R.W., 1999-2000, p. 876 ; R.D.C., 2000, p. 128, note M. PERTERGASSENDER; Anvers, 6 February 2008, I.R./D.I., 2008, p. 173 ; Anvers, 10 December 2003, I.R./D.I., 2004, p. 166 ; Bruxelles, 29 June 2004, I.R./D.I., 2005, p. 402 ; Civ. Bruxelles (j.s.), 1er April 2003, I.R./D.I., 2003, p. 260 ; Civ. Bruxelles (j.s.), 13 June 2003, I.R./D.I., 2003, p. 275.

<sup>19</sup> Cass., 25 November 2011, R.G. n°C.10. 0559.F ; Bruxelles, 17 February 2009, *I.R.D.I.*, 2009, p. 181, p. 19.

is at first sight valid b) the infringement of the copyright may not be subject to a potential serious dispute c) a fair balance must be struck between all the interests involved, so that the seizure appears sufficiently reasonable to protect the copyright.

#### QUESTION 5

Under Belgian law, there are (1) criminal remedies, and (2) customs measures in connection with copyright.

##### (1) Concerning the criminal remedies

The Code of Economic Law treats as a criminal offence any infringement upon a copyright or a neighbouring right committed with malicious or fraudulent intent. The offence is called “counterfeiting offense”<sup>20</sup>. The malicious intent refers to the intent to harm, while the fraudulent intent refers to the intent to make a profit, whatever the nature of this profit might be, and regardless of whether in the end a profit is actually made.

The notion of counterfeiting offence, regarded as a criminal offence, also covers (i) commercializing infringing copies with knowledge, (ii) aiding, abetting and inciting such offense<sup>21</sup>.

The criminal sanctions are set at a fine ranging from 500 to 100.000 EUR, and an imprisonment sentence ranging from 1 year to 5 years, or one of these two penalties only<sup>22</sup>.

The same sanctions apply to the acts mentioned under article 6, par.1 and 2, of the Directive 2001/29 in relation to technological protections measures<sup>23</sup> respectively under article 7, par.1 of the same Directive in relation to rights-management information<sup>24</sup>, whereby said acts constitute criminal offences as well.

##### (2) Concerning the customs measures

According to EU Regulation 608/2013<sup>25</sup> – which is directly applicable in each of the EU-Member States, including Belgium – customs authorities can take a series of actions. In particular, they can:

- Suspend the release of, or detain the goods suspected of infringing an intellectual property right, including a copyright or a neighbouring right<sup>26</sup>;
- Give the holder of the decision by the customs, the opportunity to inspect the goods<sup>27</sup>;
- Send to the holder of the decision by the customs, samples of the goods<sup>28</sup>;
- Control the destruction of the goods<sup>29</sup>;

The Belgian Code of Economic Law provides for further details in relation to the competences of the customs authorities under Belgian law<sup>30</sup>.

<sup>20</sup> Article XI.293 CEL.

<sup>21</sup> Article XV.69 CEL.

<sup>22</sup> Article XV.70 CEL read together with article XV.104 CEL.

<sup>23</sup> Article XI.291, CEL read together with article XI.336, CEL.

<sup>24</sup> Article XI.292, CEL,

<sup>25</sup> Regulation of 12 June 2013 concerning customs enforcement of intellectual property rights.

<sup>26</sup> Article 17.

<sup>27</sup> Article 19.

<sup>28</sup> Article 19.

<sup>29</sup> Article 23.

<sup>30</sup> Articles XV.21 and following, CEL.

QUESTION 6

Since the transposition of directive 2001/29<sup>31</sup> into Belgian law<sup>32</sup>, the circumvention of technological protection measures is expressly prohibited .

The Code of Economic Law treats as a criminal offence the circumvention of any effective technological protection measures which the person concerned carries out in the knowledge, or with having reasonable grounds to know, that he or she is facilitating a malicious or fraudulent infringement of a copyright<sup>33</sup>. In that case, articles XV.104 and XV.70 of the CDE apply, which results in a fine from 500 to 100.000 euros to be paid to the state by the convicted person, possibly along with an imprisonment penalty (from 1 to 5 years).

Furthermore, the Code of Economic Law also treats as a criminal offence the manufacture, import, distribution, sale, rental, advertisement for sale or rental or possession for commercial purposes of goods or services which 1) are promoted, advertised or marketed for the purpose of circumvention, or 2) have only a limited commercially significant purpose or use other than to circumvent, or 3) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures<sup>34</sup>. This criminal offence is subject to the same criminal sanctions as the offence of circumvention of TPM's<sup>35</sup>.

It is generally admitted that, apart from criminal sanctions, the abovementioned acts in relation to TPM's are also subject to civil proceedings, including injunctions, even though not expressly foreseen in the text of the Code on Economic Law<sup>36</sup>.

QUESTION 7

QUESTION 8

First, there is a general provision in the Code of Economic Law, which provides that aiding or abetting and inciting intentional copyright infringements amounts to a criminal offence<sup>37</sup>. This provision is perfectly suited for the digital world, even though initially not designed for that particular purpose.

Likewise, in the civil area, Belgian judges take the view that aiding or abetting and inciting copyright infringements amount to wrongful acts. Some decisions are noteworthy in this respect. In the pre Svensson<sup>38</sup> era, Belgian courts have used the concept of secondary infringement (or indirect liability). They have considered that providing hyperlinks to works that have been made available to the public without the authorization of the right holder constitutes an act of tort (i.e. secondary infringement) when the link provider knows or ought to know that the making available of the linked works is not authorized<sup>39</sup>. In another case and on another issue, they found that an Internet hosting provider is liable for secondary infringement in a situation where it failed to remove diligently hyperlinks to illegal files after being explicitly notified by the right holders that those links referred to illegal content<sup>40</sup>.

As a side note, a special attention should be paid for the position of certain Belgian scholars concerning the provision of hyperlinks. They are of the opinion that the liability for providing hyperlinks must be assessed in light either of the anti-circumvention legal provisions if the hyperlink enables to circumvent the technological protection measures or of the indirect liability for enabling an unauthorized access to the work<sup>41</sup>.

Second, there are specific provisions in the Code of Economic Law, which seek to sanction particular forms of indirect copyright infringements. For instance, with respect to TPM's, the Code treats as a criminal offence 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 which are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of TPM's<sup>42</sup>.

<sup>31</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *O.J.E.C.*, L167, 22 January 2001.

<sup>32</sup> Statute of the 30 June 1994, bearing the «loi relative au droit d'auteur et aux droits voisins», *M.B.*, 27 July 1994, modified by Statute of 22 May 2005, *M.B.*, 27 May 2005. This Statute was then codified in the CDE in 2014.

<sup>33</sup> Article XI.291 CEL.

<sup>34</sup> Article XI.291, CEL.

<sup>35</sup> See above. Articles XV.104 read together with article XV.70, CEL.

<sup>36</sup> S. DUSOLLIER, « Les nouvelles dispositions belges en matière de protection technique des œuvres », *A&M*, 2005, p. 546.

<sup>37</sup> Article XV.69 CEL, which refers to the general provisions of the criminal Code.

<sup>38</sup> CJEU, Svensson, 13 June 2014, C-466/12. In this decision, the Court of Justice took the view that providing links to copyright protected works amounts to an act of communication to the public, so that, subject to some conditions, it can result into a direct copyright infringement when made without the right owner's consent.

<sup>39</sup> Court of appeal of Antwerp, 26 June 2001.

<sup>40</sup> Court of appeal of Brussels 13 February 2001.

<sup>41</sup> A. Strowel, "Le Cour de justice confirme qu'établir un hyperlien ne constitue pas une « communication au public », mais ne clarifie rien quand aux conditions implicites de son raisonnement à propos de l'ordonnance *BestWater* et de l'arrêt *C-More Entertainment*", *A&M* 2015, 176.

<sup>42</sup> Article XV.291, CEL.

Third, the provisions concerning the civil injunction procedure<sup>43</sup> allow for obtaining an order imposed on individuals or entities who merely enable or facilitate copyright infringements. It must be stressed in this respect that the availability of injunctions is very broadly construed. An injunction is available against any defendant who is in a position to contribute in any manner to the discontinuation of the copyright infringements, even if he is only an indirect or secondary infringer – and even when he has no liability at all about the infringement (even not indirect).

#### QUESTION 9

Under Belgian copyright law, collective rights management is available for all economic rights of copyright and neighbouring rights owners, i.e. rights of reproduction, distribution, rental, lending, communication to the public, making available, and so forth.

The situation of moral rights is different. Admittedly, collective rights management organizations may also manage moral rights in some circumstances, when right owners grant them specific and *ad hoc* representation powers. However, in such cases, the management of granted rights may not be considered as «collective».

With respect to economic rights, a distinction is to be made between rights that *may* be subject to collective management, and rights that *must* be subject to such management.

In the first case, right owners confer the management of their rights on a voluntary basis to CMO's in order to benefit of wider means (enforcement, contracts, and so on). In the second case, right owners are legally compelled to have their rights managed by CMO's<sup>44</sup>. The second case includes i.a. the following situations: granting an authorization for cable retransmission, collecting a fair compensation for private copy or reprography, etc.

#### QUESTION 10

The answer on the questions as to (i) who sets the tariffs and (ii) how the tariffs as set, depends on the situation.

A distinction has to be made between the following situations:

- (a) The collective management is voluntary;
- (b) The collective management is compulsory, there is no fee set by the public authority;
- (c) The collective management is compulsory, and there is a fee set by the public authority.

The first situation (a) happens, e.g., when a CMO of copyright owners authorizes an entity to communicate works to the public during a live concert. The collective management takes place on a voluntary basis. In such a situation, the CMO's may in principle decide on their own the setting of their tariffs (article XI.279 CDE). That setting of tariffs is, however, monitored by an administrative authority in charge with the supervision of the CMO's [the « Service de contrôle des sociétés de gestion de droits d'auteur et de droits voisins » (article XI.270 CDE)]. Furthermore, recent case law precised that judicial authorities do have a marginal appreciation on the increases of tariffs by CMO's under the legislation concerning unfair commercial practices<sup>45</sup>.

The second situation (b) occurs, e.g., when a CMO authorizes cable operators to retransmit television broadcasts. The collective management is compulsory, but there is no fee fixed by the authority, and there is no binding fee setting process prescribed by law. The parties concerned, i.e. the CMO and the cable operators, have to negotiate in order to reach an agreement.

The third situation (c) occurs when it comes to fix the fair compensation which is due, e.g., for private copy and reprography. The fee is set by the authority (the government) after consultation of the stakeholders<sup>46</sup>.

#### QUESTION 11

The Belgian rules in judicial matters do not provide for courts specializing in copyright on a specific and exclusive basis. Having said this, some rules have the effect of concentrating certain procedures in copyright matters in the hands of a limited number of jurisdictions. Admittedly, these jurisdictions have also do deal with matters very different from copyright. However, at least, in the long run, they will be successful in building a significant experience in copyright matters.

First, there is a general rule ensuring some concentration in terms of territory. According to said rule, IP-infringement cases, including copyright matters, may only be filed with five courts, namely those courts established in the five main cities.

<sup>43</sup> Article XVII.14 through 20, CEL.

<sup>44</sup> For a view of all collective rights management companies that are active in Belgium, please consult : Public Federal Service of Economic Affairs, « Service de contrôle des sociétés de gestion de droits d'auteur et de droits voisins », March 2018, available at the address <https://economie.fgov.be/fr/themes/propriete-intellectuelle/droit-dauteur/service-de-contrrole-des>, consulted on 19 June 2018.

<sup>45</sup> Comm. Bruxelles (Cess.), 12 April 2018, not published yet.

<sup>46</sup> Royal Decree of 18 October 2013 on the right to remuneration for private copy, *M.B.*, 24 October 2013; Royal Decree of 5 March 2017 on the remuneration of authors for reprography, *M.B.*, 10 March 2017.

Second, special rules provide that injunction proceedings (as opposed to ordinary proceedings on the merits) in copyright matters must be filed with a specific section of the courts (namely the president of the court, seating as in summary proceedings).

Third, other rules provide for a similar system concerning the so-called descriptive-seizure procedure, namely the procedure seeking to obtain measures of description and seizure on an ex-parte basis.

Apart from the limitations resulting from the above, the liberty for the parties to bring a case before the court of their choice is quite significant.