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Questionnaire – Boundaries and Interfaces

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1. The subject Matter of Protection – Works

1.1 How do your legislators or caselaw define a literary work?

The Belgian copyright and related rights Act of 30 June 1994 (hereafter "BCA") grants copyright to the author of a "*literary or artistic work*" (art. 1). The expression "*literary or artistic work*" covers all kinds of works in the most diverse genres. It covers the non-exhaustive list of the Berne Convention (art. 2),² since the Convention is directly applicable in Belgium.³

The law does not define the concept of "*work*" as such. For commentators, the work is a human creation that can not be the result of pure chance, but rather the result of an activity of the mind.⁴

The law describes "*literary work*" by a very large list: "*Literary works shall mean the writings of any kind, as well as lessons, lectures, speeches, sermons or any other oral manifestation of thought*" (art. 8 § 1, para. 1).⁵ The literary work does not only cover works of "*literature*" in the cultural and aesthetic sense of the word.⁶ For example, computer programs are protected as literary works.⁷

¹ www.crids.be.

² Berne Convention of September 9, 1886 for the protection of literary and artistic works.

³ Act of March 25, 1999 on the application of certain provisions to the Belgians of the Berne Convention for the protection of literary and artistic works of 9 September 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967 and at Paris on July 24, 1971, and amended on September 28, 1979. Convention on international protection of performers, producers of phonograms and broadcasting organizations, done at Rome on October 26, 1961.

⁴ F. DE VISSCHER & B. MICHAUX, *Précis du droit d'auteur et des droits voisins*, Bruylant, Brussels, 2000, p.7, n°4 to 6.

⁵ Free translation of French : « *Par œuvres littéraires, on entend les écrits de tout genre, ainsi que les leçons, conférences, discours, sermons ou toute autre manifestation orale de la pensée* » (art. 8 § 1, para. 1).

⁶ D. VOORHOOF, in F. BRISON & H. VANHEES (dir.), *Hommage à Jan Corbet*, Larcier, Ghent, 2nd ed., 2008, p. 51.

⁷ Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs, article 1.

The courts have notably assimilated to literary works a technical book, a manual of video games, an instruction manual or a course book of scientific genetics.⁸

The law establishes specific provisions for certain categories of works, such as literary works, but also for example, plastic works, audiovisual works, sound works and databases. These categories of works are subject to special rules in addition to the common rules applicable to all works. These categories are not an exhaustive list of the types of works protected by copyright. A work which does not fit into any of these categories will nonetheless be protected if it meets the conditions of protection of copyright.

Section 2 of chapter 1 of the BCA is devoted to literary works. It contains special rules only for speeches ("*Speeches made in deliberative assemblies, in public hearings of the courts or in political meetings, may be freely reproduced and communicated to the public, but the author alone shall have the right to make offprints*",⁹ art. 8 § 1, para. 2) and the official acts of the authority which are not subject to copyright ("*The official acts of the authority shall not give rise to copyright*", art. 8 § 2).

Qualification as literary work also has implications on the exception for public lending (art. 23 and 62 of the BCA). The author may not prohibit the lending of literary works when the lending is organized for educational and cultural purposes by public institutions. In return, a compensation right is granted to the author.

The quality of literary work will also impact the future allocation of the remuneration for private copying (art. 58 § 1 of the BCA). The provision of the Act on this subject, introduced by the amending Act of May 22, 2005,¹⁰ is however currently not yet in force. It shall come into force at a date to be fixed by a royal decree not yet adopted.

In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

Speech and *ex tempore* speech in particular may be protected by copyright if they meet the conditions of protection. By law, the oral manifestation of

⁸ Jurisprudence cited by A. STROWEL, « Droits d'auteur et droits voisins », in D. KAESMACHER (dir.) « Les droits intellectuels », *Rép. Not.*, II, Book 5, 2007, n°346, p. 315, note 5 : Brussels, 27 February 1954, *J.T.*, 1954, p. 278; Brussels, 9 November 1972, *J.T.*, 1973, p. 463; Civ. Liège, 2 October 1992, *J.T.*, 1993, p. 342; Brussels (9e ch.), 11 April 1997, *A&M*, 1997, p. 265, note V. VANOVERMEIRE, p. 273 à 278; Civ. Brussels, 12 déc. 1995 (cess.), confirmed by Brussels, 28 January 1997, *Pas.*, 1996, II, p. 7; *Ann. prat. comm.*, 1997, p. 655, note S. DE SCHRIJVER; *A&M*, 1997, p. 262, note; *IRDI*, 1997, p. 99, confirmed by Cass., 12 June 1998, *Ing.-Cons.*, 1999, p. 100; *A&M*, 1999, p. 59; Arr. Cass., 1998, p. 681 (Kenwood c/ Biggs). Civ. Nivelles (cess.), 28 May 1996, *A&M*, 1996, p. 409; *J.T.*, 1996, p. 583, confirmed by Brussels, 10 October 1997 (Nokia c/ Bigg's), *DAOR*, 1998, n° 46, p. 64; *Ann. prat. comm.*, 1997, p. 737, note A. STROWEL; *R.D.C.*, 1997, p. 809, commented by A. STROWEL, « L'abus du droit d'auteur et les manuels d'utilisation », in *Handelspraktijken & Mededinging/Pratiques du Commerce et Concurrence*, H. De Bauw ed., Diegem, Kluwer, 1997, p. 737.

⁹ Free translation of French : « *Les discours prononcés dans les assemblées délibérantes, dans les audiences publiques des juridictions ou dans les réunions politiques, peuvent être librement reproduits et communiqués au public, mais à l'auteur seul appartient le droit de les tirer à part* », art. 8 §1, para. 2.

¹⁰ Act of 22 May 2005 transposing into Belgian law the European Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

thought is regarded as a literary work (art. 8 § 1 of the BCA). To be protected, it is not required that the oral work be fixed in some material medium.

Besides the fact that the oral work must fall within the domain of "*literary or artistic work*", the two conditions for protection are:

1. The work must have been concretized in a form. The form or the expression of the work is the realization of an idea in a form perceptible to human mind. The ideas underlying the works are not copyrightable, such as the idea of creating a work in a certain manner, the principles underlying the creation, theories, styles, *etc.*
2. The form of the work must be original (see below, question 2.1).

- 1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by de minimis rules? [In the EU discuss Infopaq and how the case is accommodated in national law].

Belgian law does not speak about short works. Therefore, short works will be protected if they meet the traditional rules of protection established by law and jurisprudence, that is to say if they constitute original works (on the definition of this criterion, see below), concretized in a form. Brevity does not exclude protection. Another rule in copyright is that works should not consist of mere "*news of the day*" or "*miscellaneous facts having the character of mere items of press information*", because this rough information is excluded from the protection of the Berne Convention.¹¹

Short works, amongst which titles and slogans, have been the subject of some litigation in Belgium, without being judged by the Supreme Court (the *Cour de cassation*).

In a case *Google against Copiepresse*,¹² the Court of First Instance of Brussels has acknowledged that newspaper headlines could be copyrighted works, "*the length of a work does not matter much, a title is likely to be protected if it meets of course the requirement of originality*"¹³ (the judge cites F. DE VISSCHER, B. MICHAUX and A. BERENBOOM)¹⁴. According to the court, some titles of articles cannot be considered as original as they appear purely descriptive and do not reveal the imprint of their author (e.g. "*Philippe Eloy murdered his wife's friend*", "*The deserts threatened by global warming*", "*Air: the Sowaer was dissolved*")¹⁵. Others were considered original, for example, "*Illegals will remain*" "*Tax removal rage*

¹¹ Article 2 § 8 of the Act of Paris.

¹² Civ. Brussels (cess.), 13 February 2007, *R.D.T.I.*, n°28, 2/2007, p. 221 ; *R.D.C.*, 4/2007, p. 377. This decision has been appealed.

¹³ Free translation of French : « *la longueur d'une œuvre importe peu, un titre étant susceptible de protection s'il répond bien entendu à l'exigence d'originalité* ».

¹⁴ F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 30 ; A. BERENBOOM *Le nouveau droit d'auteur et les droits voisins*, Larcier, Brussels, 1997, n°38 et 48.

¹⁵ Free translation of French : « *Philippe Eloy a assassiné l'ami de sa femme* », « *Les déserts menacés par le réchauffement* » ; « *Aérien : la Sowaer a été dissoute* »).

of Didier Reynders", "The music it makes school cool", "Monaco between Casino and Stratego".¹⁶

Some courts have accepted the protection of slogans.¹⁷ For example, the court of appeal in Antwerp has ruled that a 3-words slogan ("Maten, Makers, Maes") satisfied the requirement of originality because it created a unique combination by notably using the particular technique of alliteration creatively and that this was testifying of the inventiveness of the author.¹⁸

Other decisions have rejected the protection of slogans, for lack of originality. The Court of Appeal of Brussels decided that a slogan based on a reworked proverb could not be regarded as an original work.¹⁹ The advertising agency's work had consisted in substitution of words of a proverb by others.²⁰ Similarly, the slogan "Yes you can. Canon." or "You can. Canon.", playing with the sounds of the words, has been considered trivial by the Court of First Instance in Brussels.²¹

The name of a character was considered protectable (*Tintin*).²²

In music, it was considered that the first six measures of a stave could be copyrighted, as well as a theme consisting of 9 notes.²³

The case *Infopaq* of July 2009 of the Court of Justice of the European Union has found that an extract of eleven consecutive words could be protected by copyright.²⁴ Currently, this decision has not been mentioned explicitly in the published Belgian jurisprudence. We believe that the Belgian decisions cited above, recognizing the protection of short works under the originality requirement, follow the same logic as the decision of the Court of Justice.

1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

¹⁶ F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 30, n°33, cite the protection of « *Dimanche Presse. Le journal de Bruxelles* » and « *Dimanche* » (Brussels, 9 November 1969, *Ing.-Cons.*, 1961, p. 69) and the refusal of protection of « *Dagmisaal met Vespers* » (Ghent, 26 June 1959, *Ing.-Cons.*, 1959, p. 270, note Th. S.).

¹⁷ Brussels, 20 June 1985, *J.T.*, p. 715 on Civ. Brussels, 13 November 1981, *J.T.*, 1982, p. 529 ; Brussels, 3 June 1999, *IRDI*, 1999, p. 172.

¹⁸ Antwerp, 29 June 2009, *A&M*, 2010/2, p. 187, reforming Comm. Antwerp, 17 June 2008, *A&M*, 2009/5, p. 543.

¹⁹ Brussels, 21 September 2001, *A&M*, 2002/5, p. 414, note F. BRISON & A. COPPIETERS.

²⁰ The proverb "Zoveel hoofden, zoveel zinnen" (*i.e.* : "So many men, so many minds"), translated from the Latin proverb "Quot capita, tot sensus", had been transformed into "Zoveel mensen, zoveel schoenen" (*i.e.* : "So many people, so many shoes").

²¹ Civ. Brussels, 27 January 2004, *A&M*, 2005/2, p. 132. See also, Brussels, 3 February 1986, *Ing.-Cons.*, 1986, p. 234 (« *Le salon du salon* » for a motor show).

²² Brussels, 8 June 1978, *J.T.*, 1978, p. 619, cited by A. BERENBOOM *Le nouveau droit d'auteur et les droits voisins*, Larcier, Brussels, 5th ed., CIC, 2008, p. 53, n°39.

²³ Brussels, 15 July 2004, *A&M*, 2005/3, p. 237 and Brussels, 18 December 2008, *A&M*, 2010/1, p. 22.

²⁴ C.J.E.U., 16 July 2009, *Infopaq International*, C-5/08, point 48 ; confirmed by C.J.E.U., 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, point 46.

The law does not define the artistic work; it only says that this type work is protected (art. 1 of the BCA). As explained in the answer to question 1.1 about the literary character of the work, the notion of "*literary or artistic work*" should be understood broadly, the work should not necessarily be artistic (or literary) to be protected. Copyright protects more than just works of fine arts. The only requirements to be eligible for protection are originality and achievement in a form.

1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- surveillance art, installations, collage.
- performance art.
- Conceptual art

To our knowledge, no Belgian decision has addressed the access to the protection by copyright of this type of artistic expression. Any creation of original form is entitled to protection by copyright.

1.5 Are there any judicial decisions/ academic opinions on other forms of expression, whether protected or not (e.g. Perfumes)?

Perfumes were not subject to judicial decisions in Belgium.

Some authors are hesitant about this question;²⁵ others expressed themselves in disfavor of protection by copyright of fragrance creation²⁶.

Following the decisions of two neighboring countries of Belgium, from the Dutch Hoge Raad (providing protection)²⁷ and the French Court of Cassation (refusing it), an author has expressed a clear-cut opinion separating the two supreme Courts. According to L. VAN BUNNEN, only the theory of non-protection of perfumes could be allowed under Belgian law.²⁸ For this author, a perfume does not have a form that can be communicated and could not constitute a work. Moreover, it would be almost impossible to detect the original character of perfumery products. Finally, the author argues that the system of copyright would not be appropriate to the exploitation of perfumery creations.

A decision of the Commercial Court of Liège has been issued concerning recipes.²⁹ The judge refused to grant them protection under copyright.³⁰

²⁵ F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 5, n°3 ; M. FOSCHI, « Droit d'auteur et parfums: vers une protection des fragrances? », *A&M*, 2006/4, p. 309.

²⁶ A. BERENBOOM, *op. cit.*, p. 53, n°30.

²⁷ H. COHEN JEHORAM, « De Nederlandse Hoge Raad erkent auteursrecht op een parfumeur – De « Vliegende Hollander » : volle zeilen, geen anker », note under Hoge Raad, 16 June 2006, *A&M*, 2006/4, p. 331.

²⁸ L. VAN BUNNEN, « Le droit d'auteur peut-il protéger des parfums? », note under Hoge Raad, 16 June 2006, *R.C.J.B.*, 2007, p. 18 ; L. VAN BUNNEN, « L'élaboration d'un parfum: savoir-faire ou œuvre artistique? », note under Paris, 14 February 2007, *Ing.-Cons.*, n°4, 2007, p. 632.

²⁹ Comm. Liège, 26 November 2009, *J.L.M.B.*, 2010/33, p. 1581.

³⁰ In the same sens: A. BERENBOOM, *op. cit.*, p. 53, n°30.

According to the Court, the creation of a recipe does not fall into the literary or artistic field, "*the recipe is only a method of preparation and not a work*"³¹. The court cited on that occasion F. DE VISSCHER and B. MICHAUX³²: "*It seems just as difficult to protect as such the realized product since it is not the product as such that would be reproduced or communicated to the public*".³³ This decision has been appealed.

- 1.6 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc)? What is the basis of the protection? (dramatic or choreographic work, other?)

To our knowledge, there is currently no case law on the protection of sports events by copyright.

According to some authors, sports events should not be protected by copyright, because they could not be regarded as artistic or literary works.³⁴ During the preparatory works of the Belgian copyright Act, one of the experts has excluded that a football match could be protected by copyright: "*A football match, as artistic as it can be, could never be qualified as a "literary or artistic" work*".³⁵

However, some artistic performances (and not merely technical), such as the choreography of a ballet, are protectable by copyright.³⁶ The Court of Appeal of Brussels has protected in this way a scene from a dance performance.³⁷

2. **Creativity – the Originality Standard**

- 2.1 How does your legislation set out the requisite originality standard?

The Belgian Copyright Act does not define the level or degree of originality for a work to be protected. It does not mention the originality requirement as a condition of protection, except for photographs (BCA, article 2, § 5), databases (BCA, art. 20bis) and computer programs³⁸. In those three particular cases, the Act specifies that those works are original if they are the author's "*own intellectual creation*". This definition comes from European directives.³⁹

³¹ Free translation of French : « *la recette de cuisine n'est qu'un mode de préparation et non pas une œuvre* ».

³² F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 5, n°3.

³³ Free translation of French : « *Il paraît tout aussi difficile de protéger comme tel le produit réalisé puisque ce n'est pas lui qui serait reproduit ou communiqué au public* ».

³⁴ A. STROWEL & E. DERCLAYE, *Droit d'auteur et numérique : logiciels, bases de données et multimédia*, Bruylant, Brussels, 2001, p. 22, n°20 and A. BERENBOOM, *op. cit.*, p. 53, n°30.

³⁵ Report De Clerck, 473/33 – S.E. 1991-1992, p. 70.

³⁶ The Berne Convention also recognizes that a choreographic work is a literary and artistic production (art. 2 of the Convention).

³⁷ Civ. Brussels (cess.), 27 February 1998, *J.L.M.B.*, 1998/19, p. 821, note V.-V. DEHIN; *Journ. procès*, 1998, n°345, p. 28, note B. MICHAUX, confirmed by Brussels, 18 September 1998, *I.R.D.I.*, 1998, p. 346 ; *A&M*, 1999, p. 60, note V. CASTILLE.

³⁸ Act of 30 June 1994 transposing into Belgian law the European directive of 14 May 1991 on the legal protection of computer programs, art. 2.

³⁹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, art. 1; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, art. 3, paragraph 1;

Although the BCA does not require it, it is accepted by doctrine and case-law that the condition of originality is required in copyright for all types of works to access to copyright protection (see response to the next question).

2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

It is the case-law which has defined the criterion of originality. According to the Court of cassation, originality is "*the expression of the intellectual effort of its author, a indispensable condition for giving the work the character of necessary individuality to have a creation*"⁴⁰ or "*the imprint of the personality of the author*"^{41, 42}. Generally, doctrine and jurisprudence agree to see in the originality "*the imprint of the author's personality*" that gives the work its "*own character*" opposing originality to banality.

The criterion of originality, as identified by case-law, is a single criterion for all kinds of works. However, the question of whether the assessment of this criterion varies or not according to the kind of the work has sometimes been diversely applied in the doctrine.

In the past, some authors have looked for a variable definition of originality.⁴³ They said it was an objective criterion for some works (computer programs, which did not require for them the personal imprint of the author)⁴⁴ and subjective for the others (the classical works had to reveal the mark of a personality).⁴⁵

For over ten years now, doctrine has been harmonized and retains only a single subjective definition, a personalist approach, whatever the subject pretending to the protection.⁴⁶

For certain categories of works, it will be easier to find originality than for others. The doctrine uses in this context the expression "*criterion with variable geometry*"⁴⁷ to refer to the originality.⁴⁸ The expression does not

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, art. 6.

⁴⁰ In French: « *l'expression de l'effort intellectuel de son auteur, condition indispensable pour donner à l'œuvre le caractère d'individualité nécessaire pour qu'il y ait création* ».

⁴¹ In French: « *l'empreinte de la personnalité de l'auteur* ».

⁴² Cass., 27 April 1989, *Pas.*, 1989, I, p. 908, *J.L.M.B.*, 1989, p. 1222 et obs. ; Cass., 25 October 1989, *Pas.*, 1990, I, p. 239 ; Cass., 2 March 1993, *Pas.* I, 1993, p. 234; Cass., 10 December 1998, *A&M*, 1999, p. 335, note N. IDE & A. STROWEL ; Cass., 24 February 1995, *R.W.*, 1995-1996, p. 433; Cass., 25 September 2003, *A&M*, 2004, p. 29; Cass., 11 March 2005, *A&M*, 2005, p. 396, note F. DE VISSCHER, *I.R.D.I.*, 2005, p. 238, *Ing.-Cons.*, 2005, p. 154.

⁴³ M. FLAMEE, « Droit de l'informatique. La protection juridique du logiciel », *Droit de l'informatique : enjeux. Nouvelles responsabilités*, ed. Jeune barreau de Bruxelles, 1993, p. 91 ; H. VANHEES, « Neieuwigheden in de Auteurswet van 30 juni 1994 en de Wet houdende de bescherming van computerprogramma's », *Intellectuele eigendomsrechten*, ed. Vlaams Pleitgenootschap bij de Balie te Brussel, Biblio, 1995, p. 73 et 74.

⁴⁴ The objective test only requires that the work is not a copy.

⁴⁵ B. MICHAUX, « L'originalité en droit d'auteur, une notion davantage communautaire après l'arrêt *Infopaq* », *A&M*, 2009/5, p. 476.

⁴⁶ B. MICHAUX, « L'originalité ... », *op. cit.*, p. 476 to 478; A. BERENBOOM, *op. cit.*, p. 58 to 61, n°33 ; F. GOTZEN, « Auteurs- en modellenrecht 1990-2004 », *TPR*, 2004, p. 1446 and 1447 ; A. STROWEL & E. DERCLAYE, *op. cit.*, n°213, p. 188; F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 17 to 19, n°19 and 20.

⁴⁷ Free translation of French: « *critère à géométrie variable* ».

question the uniqueness of the definition of the originality, but it means that "the extent of the originality and how it manifests itself (composition or expression) may vary depending upon the nature of the work".⁴⁹ This explains why the functional or factual works may be original, even if the originality is very thin or hardly detectable.

In July 2009, the Court of Justice of the European Union in the case *Infopaq*, defined the criterion of originality as the "expression of the intellectual creation of the author".⁵⁰ By this decision, the Court of Justice has made the originality a Community concept identical in all Member States of the European Union and applicable to all works.

The words chosen by the Court of Justice are close to a personalist definition of originality.⁵¹ The concept would thus be subjective. Accordingly, the definition generally given by the Belgian courts would satisfy the criterion articulated by the Court of Justice.

Currently we do not know of any published Belgian case law that has already taken up the criterion established by the decision *Infopaq*.

- 2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. *IceTV* (Aust) *CCH* (Canada). How has "sweat of the brow" been treated in recent case-law?]

The criterion of originality is the same for compilations/collections than for other works. For example, a selection of 49 colors as a whole (which might be called a color collection) was found to be original, because the choice of the colors may be considered as "an original creation that is the mark of the personality of its author".⁵²

Compilations or collections might be qualified as databases. According to the law, a database is "a collection of works, of data or of other materials arranged in a systematic or methodical manner and individually accessible by electronic means or otherwise"⁵³ (article 20bis, al. 3 of the BCA).⁵⁴ The

⁴⁸ A. STROWEL, « L'originalité en droit d'auteur: un critère à géométrie variable », *J.T.*, 1991, p. 513, and notably, following him: F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 19, n°21 ; F. BRISON, « Tien jaar auteurswet: en nu? Haar toepassingsgebied onder de loep genomen », *A&M*, 2004/5-6, p. 422 ; B. MICHAUX, « L'originalité ... », *op. cit.*, p. 477.

⁴⁹ Free translation of French: « l'étendue de l'originalité et la manière dont elle se manifeste (la composition ou l'expression) peut varier selon la nature de l'œuvre », F. DE VISSCHER & B. MICHAUX, *op. cit.*, p. 19, n° 20 ; B. MICHAUX, « L'originalité ... », *op. cit.*, p. 477.

⁵⁰ C.J.C.E., 16 July 2009, *Infopaq International*, C-5/08, point 39; confirmed by C.J.U.E., 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, point 46.

⁵¹ "For expressing "his creativity in an original manner" (recital 45 of the Judgment *Infopaq*), the author is led to express his personality" B. MICHAUX, « L'originalité ... », *op. cit.*, p. 482.

⁵² Free translation of French: « une création originale qui revêt la marque de la personnalité de son auteur ». Brussels, 7 December 2001, *J.L.M.B.*, 2002/20, p. 873.

⁵³ In French: « un recueil d'œuvres, de données ou d'autres éléments indépendants, disposés de manière systématique ou méthodique et individuellement accessibles par des moyens électroniques ou d'une autre manière ». The French version of the Copyright Act, does not use the French term "collection" but the term "recueil" which is synonymous with the word "collection".

⁵⁴ This definition comes from the directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

legislator, following the 1998 directive, gave a definition of originality applied to databases; they are original when they "*constitute the own intellectual creation of their author*".⁵⁵ Thus, if the compilations/collections are regarded as databases, they can be protected as such by copyright if they are the "*own intellectual creation to their author*".⁵⁶ The Act determines what in the database must be original: the selection or arrangement of their contents (art. 20*bis* of the BCA). According to doctrine, one can conclude that the protection concerns "the container", *i.e.* the structure or the architecture of the database.⁵⁷

Compilations or collections which meet the definition of a database could benefit from the *sui generis* database protection, conferred by the Act on Databases (ADB).⁵⁸ This Act gives to the producer, that is to say "*the natural or legal person who takes the initiative and assumes the risk of investments that are the source of the database*"⁵⁹, the right on the produced database. The idea is to reward the financial and technical efforts of the promoter.⁶⁰ Under article 3 of the ADB, "*the right of producers of databases shall apply to databases irrespective of their form of which the obtaining, verification or presentation of content demonstrates an investment qualitatively or quantitatively substantial*".⁶¹

The producer must have invested, qualitatively and quantitatively substantially;⁶² expenses for the realization of the database must have been significant. The concept of "*investment qualitatively or quantitatively substantial*" determines the access to the protection by the *sui generis* right. Investment is measured by several parameters: the material costs involved, employment of staff, promotional efforts... The Belgian judges decided that the hiring of two people full time and their work represented a substantial investment.⁶³ Similarly, substantial investment may consist in the development of a weekly collection procedure, in the acquisition of software for this task, as well as in a proactive management designed to ensure full coverage of all programs of cinemas in Belgium.⁶⁴ Judges said that the fact that the initial investment has already been amortized does not matter much.

⁵⁵ In French: « *une création intellectuelle propre à leur auteur* ». Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; Belgian Act of 31 August 1998 implementing into Belgian law the European directive of 11 March 1996 on the legal protection of databases.

⁵⁶ Art. 20*bis* para. 1 of the BCA.

⁵⁷ J.-P. TRIAILLE, in F. BRISON & H. VANHEES (dir.), *Hommage à Jan Corbet*, Larcier, Ghent, 2nd ed., 2008, p. 114.

⁵⁸ Act of 31 August 1998 transposing into Belgian law the European directive of 11 March 1996 on the legal protection of databases. On databases, refer to B. MICHAUX, *Droit des bases de données*, Kluwer, Brussels, 2005.

⁵⁹ Art. 2, 5° of the ADB.

⁶⁰ B. Michaux, *Droit des bases de données*, *op. cit.*, n° 160, p. 133.

⁶¹ Free translation of French : « *le droit des producteurs de bases de données s'applique aux bases de données quelle que soit leur forme dont l'obtention, la vérification ou la présentation du contenu atteste un investissement qualitativement ou quantitativement substantiel* ».

⁶² Art. 3, para. 1 of the ADB.

⁶³ Aff. « Mutualités socialistes / Belpharma », Civ. Brussels (cess.), 16 March 1999, A&M 1999, note J. Corbet. See B. MICHAUX, *Droit des bases de données*, *op. cit.*

⁶⁴ Civ. Brussels (cess.), 18 January 2002, I.R.D.I., 2002, p. 15. See B. MICHAUX, *Droit des bases de données*, *op. cit.*

2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).

Collections may be protected by copyright if they are original works. They can also be protected by copyright as a "database" if they meet the definition of article 20bis, para. 3 of the BCA.

All collections are not necessarily databases. For example, the Court of Appeal of Brussels held that a touristic tour was perhaps a collection of data, but because these data are not individually accessible by electronic means or otherwise (by a table of contents for example), the tour could not be considered as a database.⁶⁵ The same Court decided that a color palette does not meet the legal definition of the database, because the different elements were not available individually.⁶⁶ This same palette was however protected by copyright, because the selection made by its creator was original.

Television listings and telephone directories could be qualified as databases under Belgian law. Indeed, they are collections of independent data (references to programs or telephone numbers) arranged in a systematic or methodical manner (a grid, a directory) and individually accessible by electronic or other means (software, paper, *etc.*).

As explained above, copyright could protect these television listings and telephone directories only if they are original, *i.e.* if they constitute the own intellectual creation of the author by the choice or the arrangement of materials (article 20bis, para. 1 of the BCA). Consequently, only the container (structure) of these databases, if it is original, will be protected and not the data themselves (the references to the programs and the telephone numbers), that are *a priori* not original works (article 20bis, para. 2 of the BCA). If these works/data are original in themselves, they will benefit from a parallel protection by copyright.

The originality requirement of a database is difficult to reach, but is not impossible.⁶⁷ For example, the Court of Appeal of Brussels has granted protection by copyright to the structure of an inventory and index cards.⁶⁸ An appeal had been lodged against the decision but the Court of Cassation rejected it.⁶⁹

Prior to the amendments of Belgian law regarding the protection of databases, different types of collections have been recognized as protectable by copyright, for example, a notary rate list, a collection of financial information, a collection of laws and case-law, a booklet of

⁶⁵ Brussels, 5 June 2007, *A&M*, 2008/1, p. 37, note B. MICHAUX, « La protection *sui generis* des bases de données après *William Hill* ».

⁶⁶ Brussels, 7 December 2001, *J.L.M.B.*, 2002/20, p. 873.

⁶⁷ J.-P. TRIAILLE, *op. cit.*, p. 116.

⁶⁸ Brussels, 3 May 2000, *I.R.D.I.*, 2001, p. 35 ; see also Antwerp, 14 October 2002, *A&M*, 2003/4, p. 276.

⁶⁹ Cass., 11 May 2001, *A&M*, 2001/3, p. 353.

insurance rates, a book guide on the Royal Palace of Brussels.⁷⁰ On the contrary, the protection has been denied to a catalog of spare parts, because the catalog did not show enough effort in the selection and arrangement of the information, and also to a file of applicants created from a software, because it was not the result of a "*personal and original work of literary creation*".⁷¹

The *sui generis* right of the database producers can be an alternative to the non protection by copyright to databases in the event that the criterion of originality is lacking, which is likely in the case of television listings or directories.⁷² For example, a database containing information on programs and telephone numbers may be entitled to protection by the *sui generis* right⁷³ provided that the investment made for its obtaining, verification or presentation has been qualitatively or quantitatively substantial (see above question 2.3 *in fine*).

3. **Achieving Access for the visually impaired**

3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?

Articles 22 § 1, 11° (copyright) and 46, 10° (related rights) of the Belgian Copyright Act contain an exception to copyright and related rights, to the benefit of people with a disability, without distinguish the categories of disability.

The use - reproduction or communication - of the work or performance must:

- be directly connected to the disability,
- be of non-commercial nature,
- be done to the extent required by the concerned disability, and
- not affect the normal exploitation of the work, nor cause unreasonably damage to the legitimate interests of the rightholder of the concerned rights.

Articles 22 § 1, 13° (copyright) and 46, 12° (related rights) also provide an exception to copyright and related rights notably to the benefit of recognized institutions assisting persons with disabilities. Reproduction of broadcasts by these institutions is authorized "*provided that these institutions do not pursue profit and that this reproduction is reserved for the exclusive use of individuals who reside there*".⁷⁴

⁷⁰ Respectively: Ghent, 13 November 1902, cited by Poirier, *Les Nouvelles*, Droit d'auteur, n°117 ; Civ. Brussels, 4 May 1904, *Pas*, 1904, III, p.235 ; Brussels, 22 November 1930, *J.T.*, 1931, p. 28 ; Civ. Brussels, 21 June 1966, *I.C.*, 1969, p. 211 ; Civ. Brussels, 18 June 1992, *J.T.*, 1993, p. 166 (case-law cited by M. BUYDENS, *Droits d'auteur et Internet. Problèmes et solutions pour la création d'une base de données en ligne contenant des images et/ou du texte*, SSTC, 1999, p. 48).

⁷¹ Respectively: Cass., 25 October 1989, *Pas.*, 1990, I, p. 239 ; Civ. Liège (cess.), 11 July 1995, *I.R.D.I.*, 1996, p. 84.

⁷² Comm. Brussels (cess.), 19 July 1995, *R.D.C.*, 1995, p. 745 (*Belgacom vs. Kapitool Trading*).

⁷³ Antwerp, 19 December 2005, *A&M*, 2007/1-2, p. 85 ; Civ. Brussels (cess.), 18 January 2002, *I.R.D.I.*, 2002, p. 115.

⁷⁴ Free translation of French : « *pour autant que ces établissements ne poursuivent pas de but lucratif et que cette reproduction soit réservée à l'usage exclusif des personnes physiques qui y résident* ».

The Belgian Copyright Act does not provide a remuneration or a compensation right for authors and performers. It provides a reimbursement of the compensation paid for the private copy exception by "*the blind, visually impaired, deaf and hearing impaired, as well as recognized institutions established for such persons*"⁷⁵ (art. 57 para. 1, 4° of the BCA). This means that these individuals or institutions may request reimbursement of fees collected on their CDs, DVDs, MP3 players, USB keys, *etc.* to the collecting societies of the authors. In practice, the application is lodged to the company Auvibel, the collecting society for the private copying of sound and audiovisual works. It is the same company that makes the refund.

3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording?

Exceptions to articles 22 § 1, 11° (copyright) and 46, 10° (related rights) to the benefit of disabled persons concern all categories of works and performances.

However, exceptions to the articles 22 § 1, 13° (copyright) and 46, 12° (related rights) devoted notably to the recognized institutions assisting disabled persons only apply to a certain type of works and performances, namely the broadcasts.

Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?

Visually impaired and, in general, disabled persons will directly benefit from copies of the works concerned. However, regarding the reproduction of broadcasts, only recognized institutions assisting these people will be allowed to proceed to it.

3.3 Are the exceptions and limitations confined to the reproduction of the work?

Exceptions to articles 22 § 1, 11° (copyright) and 46, 10° (related rights), to the benefit of disabled persons concern reproduction and also communication to the public of works and performances.

However, exceptions to articles 22 § 1, 13° (copyright) and 46, 12° (related rights) devoted notably to recognized institutions assisting disabled persons only apply to a certain type of works and performances, namely the broadcasts.

If making available or adaptation is possible, on what conditions?

See the conditions in question 3.1 above.

3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

⁷⁵ Free translation of French : « *aux aveugles, aux malvoyants, aux sourds et aux malentendants, ainsi qu'aux institutions reconnues, créées à l'intention de ces personnes* ».

Yes, regarding the visually impaired, Belgium agreed internationally to the proposal made by the EU at Wipo, namely the "*Draft Joint Recommendation Concerning the Improved Access to Works Protected by Copyright for Persons with a Print Disability*".

- 3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?

Yes, a Memorandum of Understanding, for example, was signed by, among others, the Federation of European Publishers and the European Blind Union.

The aim of the Memorandum of Understanding (MoU) on access to works by people with print disabilities is to increase the number of works published in special formats and facilitate their distribution across the European Union.⁷⁶

4. **Access to the Internet as a Human Right**

- 4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

Internet access is not defined as a human right or a particular right in Belgium, either by law or constitution. To our knowledge, the courts have not had to rule on the issue.

- 4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

To our knowledge, the judges did not have to rule on any restrictions or limitations of any right of access to the Internet based on the ECHR.

5. **Orphan Works**

- 5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

To our knowledge, there is not, in Belgium, legislation authorizing the access / usage of orphan works.

However, self-regulatory initiatives have been taken concerning the management of these works. As an illustration, SOFAM (Society of Authors in the field of Visual Arts) has established a surety agreement ("*convention de porte-fort*"). The system works as follows: a user who signed this agreement has to pay compensation to the SOFAM for the use of a work whose author or right holders are unknown or non-identifiable. If the copyright owner appears, he may contact the SOFAM in order to get the remuneration thus collected⁷⁷. Otherwise, if rights holders are not found or

⁷⁶ For more information:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1120&format=HTML&aged=0&language=EN&guiLanguage=en>

⁷⁷ Please see the SOFAM website: <http://www.sofam.be/mainfr.php?ID=104&titel=Conventions+de+porte-fort>.

do not come forward within five years, money collected will be distributed among all authors who are members of SOFAM and for the same class of works covered by the surety agreement. In practice, it seems that SOFAM only signs such agreements in very specific cases and after a meeting with the Board. However, as a general rule, judges do not appreciate the fact that collecting societies manage the rights of authors that were not granted to them⁷⁸.

- 5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

The issue becomes moot due to the answer to question 5.1.

- 5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

To our knowledge, there are not, at present, proposals for the introduction of orphan works provisions in Belgium. The issue of orphan works, however, is the subject of discussions within the Council of Intellectual Property, a consultative body of the ministry responsible for copyright. The objective of these discussions was to compare the existing solutions in other countries and see which legislative action might be considered. For its part, the European Commission announced a draft directive on this category of works; member states are pending.

6. **Graduated Response Laws or Agreements**

- 6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?

In Belgium, Senator Montfils had filed, April 21, 2010, a bill "to promote the protection of cultural creation on the Internet."⁷⁹ On January 26, 2011, Senators Clarinval, Ducarme, Jadin, and De Donnea Perman have reintroduced the same bill in identical terms⁸⁰. Chapter VI is entitled "From the graduated response in case of non-compliance with the conditions under which the holder can exchange works protected by copyright or related rights and in case of unauthorized downloads of works." The terms of the graduated response are described in Articles 17 and 18. The staff designated by the Minister may, on the first offense, sending a warning to the subscriber within 15 days from the finding of infringement through the Internet service provider (ISP). The warning must state the date and time of the offense but does not reveal the content of the works concerned; he reminds the subscriber Article 14 of the proposal and urges him to comply. This provision indicates both that the subscriber can not use his Internet access to share and to exchange works and performances beyond what is allowed under the agreement negotiated between the Internet service

⁷⁸ Cass., 16 January 2009, *Eurodef/SOFAM*, aff. n°C.06.0343.N/2.

⁷⁹ Available on the Senate website: http://www.senate.be/www/?Mival=/index_senate&LANG=fr.

⁸⁰ Available on : <http://www.jadin.be/medias/pdf/propositions-de-loi/Proploi260111-sitecult.pdf>.

providers and the collecting societies (Art. 12 of the proposal) and secondly that the sharing of works and performances is prohibited without permission of their respective rights holders. The warning also mentions penalties in case of new violations of Article 14. It informs the subscriber on the legal provision of online cultural content as well as the dangers of counterfeiting for the creation and the economy of the sector. Finally, the warning allows the subscriber to make comments or to obtain information about the content of the works concerned. If within six months of sending the first warning, the subscriber commits a second offense, the officers send to the subscriber, within 10 days after the finding of the infringement, a reminder of the first infringement and the recommendations mentioned. The payment of a sum, in order to stop the prosecution, is then offered to the subscriber. The amount of the fine may not exceed 100 euros⁸¹. Within 15 days, the subscriber may appeal to the Minister who shall issue its decision within two months. If within 2 years, a new violation is discovered, the agents inform the public prosecutor who then decides to prosecute. The sanctions include a fine between 100 and 1000 euros⁸² and a limitation of Internet access for a period fixed by the judge. So there is no suspension of the Internet connection but simply blocking broadband. Finally, in case of recurrence within 3 years, the fine can be doubled and the complete suspension of Internet pronounced.

It should be mentioned also a second draft bill submitted by Senators Moraël and Piryns the December 9, 2010 "to adapt the perception of copyright to technological developments while preserving the right to privacy of users of Internet"⁸³. This bill is the same that had been filed the March 2, 2010 by Senators Hellings and Piryns⁸⁴. This proposal can be considered as an alternative to the proposed law Clarinval in that it does not provide for a graduated response, but the establishment of a global license to allow the peer-to-peer filesharing. The proposal seeks to insert a chapter VII bis "sharing of works on the Internet" in the Belgian law on copyright and neighboring rights. The proposal foresees the possibility for collecting societies to allow Internet service providers to enable the exchange of works between their subscribers thanks to a blanket license. The remunerations, negotiated between the parties, are different depending on the kind of Internet subscription (medium speed or high-speed). They will be collected and distributed by the collecting societies, between the authors, the performers, the producers of phonograms and of videograms. The agreement thus obtained becomes mandatory by royal decree. If negotiations fail, the King is given the charge to fix the remuneration on the basis of those of the previous year. This item characterizes a statutory licensing. It should be noted that the proposed law intends to impose a maximum price for Internet access. Finally, the bill proposes the creation of

⁸¹ This is a basic amount which will then be surcharged as required by the Act of March 5, 1952. Since 1 March 2004, the basic amount has to be multiplied by 5.5.

⁸² *Ibid.*

⁸³ Available on the Senate website:
<http://www.senate.be/www/?Mival=/publications/viewPubDoc&TID=83886998&LANG=FR>.

⁸⁴ Available on the Senate website: http://www.senate.be/www/?Mival=/index_senate&LANG=fr.

an Internet Observatory (additional mission for the Belgian Institute of Postal Services and Telecommunications - BIPT) who would be responsible for elaborating a general, independent and anonymous mapping of the upload and download reality in Belgium on the basis of surveys conducted among a representative and voluntary sample of Internet users, respecting their privacy. The allocation of the remuneration of rights holders would then be decided on that basis.

- 6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

The bill Clarinval contains several provisions for educational purposes. Article 5, relating to Chapter III which is dedicated to "promoting sites containing works whose making available to the public has been authorized by the authors and owners of neighbouring rights", requires Internet service providers, in the contracts with their subscribers, mention that the authors and rights holders of neighbouring rights have exclusive rights of reproduction and public communication of their works or performances (1°); the regulations must also be specified (2°) as well as the penalties incurred for violation of the law proposal (5°) and the dangers of counterfeiting for the creation and the economy of the sector (3 *in fine*). Articles 17 and 18 on the graduated response have also pedagogical considerations. The warnings sent to the subscriber committing illicit exchange of works and performances include an educational component in that they remind the subscriber the article 14 of the proposal dealing with illegal acts reprehensible. The penalties for further violations of this article are also shown. The warnings inform the subscriber about the legal provision of online cultural content as well as the dangers of counterfeiting for the creation and the economy of the sector.

Moreover, under Article 5, 4° of the bill Clarinval, Internet service providers must, in the contracts with their subscribers, specify the need for them to secure their Internet access.

Finally, article 5, 3° requires Internet service providers, in the contracts with their subscribers, to inform them of the legal provision of online cultural content by referring to the website created by the "Council for the Welfare of copyright on the Internet" (created by section 25 of the proposal) identifying all websites offering a legal supply of works.

- 6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

There is no administrative authority that authorizes the suspension of access to the Internet or the termination of the subscription. The ordinary judicial authorities have jurisdiction over these issues.

- 6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services ?

The issue becomes moot in light of the answer to question 6.1.

- 6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

To our knowledge, there is no case law on the application of techniques of blocking or filtering by an ISP on its own initiative.

Furthermore, no legal action has taken place to suspend a subscriber's Internet access by an ISP. The Commission for the Protection of Privacy has estimated that Internet service provider can not deliver to third parties personal data about its subscribers with the aim of detecting violations of copyright, except in the context of judicial proceedings⁸⁵. For its part, Article 21 § 2 of the law of 11 March 2003 on certain legal aspects of the Information Society that implements the Directive 2000/31 on electronic commerce, as amended by section 59 of the Act of July 20, 2005, requires Internet service providers⁸⁶ to "communicate to the judicial or administrative authorities, upon request, any information they have available and useful to the research and the detection of infringement committed thanks to the network." An obligation to cooperate with judicial and administrative authorities is therefore the responsibility of Internet service providers⁸⁷.

However, litigation is pending in Belgium between SABAM (Belgian Society of Authors, Composers and Publishers) and the ISP Scarlet (formerly Tiscali) regarding the imposition of filtering to it by the judge. SABAM has filed a lawsuit against Scarlet, on the basis of Article 87 § 1 of the Belgian law of copyright, arguing that it benefits from illegal downloading of musical works repertoire of SABAM made by users through peer-to-peer software⁸⁸. On 29 June 2007, the presiding judge of first instance tribunal in Brussels condemns Scarlet to stop infringements of copyright by providing solutions content filtering, both at the time of sending and receiving works through peer-to-peer. Scarlet has appealed the ruling, holding that the general duty of supervision is not in compliance with Article 15 of Directive 2000/31. The Court of Appeal of Brussels, in a ruling dated 28 January 2010⁸⁹, decided to stay proceedings pending responses from the Court of Justice of the European Union to the following prejudicial questions: can a judge "order a Internet service provider (ISP for short) to put in place, in respect of all its customers, *in abstracto* and preventively, at the cost of the ISP and without limitation in time, a filtering

⁸⁵ « Avis de la Commission de la protection de la vie privée n° 44/2001 du 12 novembre 2001 », *Revue Ubiquité, Droit des technologies de l'information*, Larcier, n° 12, June 2002, p. 103.

⁸⁶ Article 59 of the Act applies to all intermediaries, internet service providers and hosting providers. See E. MONTERO, « Droit du commerce électronique », « Responsabilités des intermédiaires », point n° 4, pp. 27-28, in *Chronique de jurisprudence en droit des technologies de l'information (2002-2008)*, *RDTI*, June 2009, n° 35.

⁸⁷ See also art. 46 *bis* of the Code of Criminal Procedure.

⁸⁸ See E. MONTERO, « Droit du commerce électronique », « Responsabilités des intermédiaires », point n°2, pp. 23-25, in *Chronique de jurisprudence en droit des technologies de l'information (2002-2008)*, *RDTI*, June 2009, n°35.

⁸⁹ Bruxelles (9^{ème} ch.), 28 January 2010, *A&M*, 2010/2, p. 176.

system for all electronic communications, both incoming and outgoing, transiting through its services, notably by the use of software peer-to-peer, in order to identify traffic on its network of electronic files containing a musical work, film or audio-visual on which the plaintiff claims to have rights and then to block their transfer, either at the application or in connection with the shipment?". The second part of the question focuses on whether the judge is obliged to "apply the principle of proportionality when called upon to pronounce on the effectiveness and deterrent effect of the measure sought."

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to "3-strikes" laws?

To our knowledge, no private agreement between rights holders and Internet service providers foreseeing measures of three-strike approach has been introduced in Belgium.

However, we should mention the signing of a protocol of collaboration, dating from 2004, resulting from a settlement agreement between the IFPI (International Federation of the Phonographic Industry) and Internet service providers including Telenet⁹⁰. These providers have pledged to block or remove access to discussion forums when they contain illegal content or hyperlinks to such content, through the establishment of a notification procedure and withdrawal. The agreement goes further than the notification procedure required by law to ISPs (see below).

For its part, the ISPA (the Belgian association of ISPs) has developed a code of conduct⁹¹. Internet service providers access have "to focus on the fighting against the presence of illegal or questionable material on the Internet. They will bring their attention to the legal use of the Internet". On the one hand, Internet service providers have been committed to include in the contracts with their subscribers a clause of "good conduct" to prohibit the subscriber from engaging in illicit activities and allowing the provider of take all appropriate measures in case of non-compliance with the obligation. On the other hand, they are obliged to mention an email address so that subscribers can report illegal practices on the network.

It has to be mentioned that since 2005, Internet service providers – as well as providers who engage in any activity of storage or hosting – are obliged to establish a procedure for reporting illegal content. In accordance with Article 21 § 2 of the legislation of 11 March 2003 on certain legal aspects of the Information Society that implements the Directive 2000/31 on electronic commerce, as amended by the Article 59 of the Act of July 20, 2005, they are required to "immediately inform the judicial or administrative authorities of alleged illegal activities of recipients of their services, or alleged illegal information that they provide." Systems have

⁹⁰ See E. WERY, « Les FAI sont-ils responsables des contenus des forums Usenet ? Un juge sera amené à trancher », available on http://www.droit.be/1_2.asp?actu_id=895&motcle=telenet&mode=motamot.

⁹¹ Available on http://www.ispa.be/files/code_of_conduct_x20fr.pdf.

been set up to fight against illegal activities of subscribers⁹². As an illustration, the Internet service provider Belgacom has developed a notification procedure on its website. It is stated that "the notification is made: - ut singuli and by form letter, in the days following the receipt of information on the illegality by a specialist ; - in an agglomerated way, once a month, by electronic file attached to a form letter for complaints automated"⁹³. Once the complaints received, Belgacom notifies them to the public prosecutor. It seems that, for lack of funds, the prosecutor is unable to pursue all complaints. Moreover, to our knowledge, this notification procedure has not yet been used to highlight content infringing intellectual property rights.

7. **Private Agreements and UGC**

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of "best practices" regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

To our knowledge, there is not, in Belgium agreements related to content filtering between rights holders and hosting providers. No interprofessional charter on filtering has been drafted. Unless our error, we are not aware of initiatives by government to encourage the adoption of such agreements.

However, the law imposes on hosting providers (as well as Internet service providers and providers that make storage) a procedure for reporting illegal contents. In accordance with Article 21 § 2 of the law of 11 March 2003 on certain legal aspects of the Information Society that implements the Directive 2000/31 on electronic commerce, as amended by section 59 of Act of July 20, 2005, hosting providers are required to "immediately inform the judicial or administrative authorities of illegal activities alleged made by of recipients of their services, or illegal information alleged that they provide." Systems have been set up to fight against illegal activities of subscribers, including activities which violate intellectual property rights. By way of illustration, Ebay Belgium has developed the VeRO program (Verified Rights Owners) that aims to protect intellectual property⁹⁴. Through this program consisting of a notification process online, rights holders can report violations of their rights in the advertisements posted on the Ebay website. Ebay offers rights holders to use a feature that allows them to automate the search for potentially infringing listings so that they

⁹² We should mention that, on May 28, 1999, before the Directive 2000/31 on electronic commerce, a cooperation protocol for the fight against illegal acts on the Internet has been concluded between the Belgian association of Internet Service Providers (ISPA) and Departments of Justice and Telecommunications (available on the ISPA website : http://www.ispa.be/files/collaboration_protocol_fr.pdf; see the *Consultation publique sur l'avenir du commerce électronique dans le marché intérieur et la mise en œuvre de la directive commerce électronique (2000/31/CE)* drafted by the CRID, University of Namur, nov. 2010, and particularly the point n° 56 by Z. Karambiri). Although the protocol mentions explicitly certain criminal offenses such as child pornography, racism, offenses relating to games of chance, it applies to all offenses committed via the Internet.

⁹³ See T. STAMOS, « Récapitulatif des devoirs et responsabilités des intermédiaires de l'Internet en droit belge », available on http://www.droit-technologie.org/1_2.asp?actu_id=1073, 6 May 2005.

⁹⁴ See the Belgian website of Ebay : <http://pages.befr.ebay.be/befr/hubs/security/vero/index.html>.

are regularly informed of any new listing that may infringe their intellectual property rights.

Furthermore, Article 20 § 3 of the Act of March 11, 2003 requires the hosting provider, when he has "actual knowledge of an activity or illegal information", to communicate them to the public prosecutor. Pending the decision of the Prosecutor, "the claimant may only take measures to prevent access to information." The notification procedure established by Belgacom falls into this category. As a hosting provider for some of its activities, Belgacom has developed a process of cooperation in the fight against illegal contents in general (see also above question No. 6.6). If a complaint is transmitted by the notification procedure on line, Belgacom blocks in the following days the access to the relevant content. It then asks the client to delete the content itself. If ever he does not comply, Belgacom makes the deletion of content⁹⁵.

7.2 How is the filtering to be accomplished?

Please refer to question 7.1.

7.3 Have there been any cases concerning such agreements or "best practices"?

To our knowledge, there has been no litigation on these issues.

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?

To our knowledge there are no court decisions in which judges have ordered the practice of "take down, stay down." However, the judge may "impose a temporary duty of supervision in a specific case where this is allowed by law" under Article 21 § 1 in fine of the legislation of 11 March 2003 on certain legal aspects services of the Information Society that implements the Directive 2000/31 on electronic commerce. So, the judge could decide on a temporary duty of supervision in situations clearly identified.

Furthermore, Article 21 § 1 of the Act of March 11, 2003, stipulates that providers, including hosting providers, "have no general obligation to monitor the information they transmit or store, nor any obligation General actively to seek facts or circumstances indicating illegal activity. "

On 31 July 2008, the Commercial Court of Brussels, in the case *Lancôme v. Ebay*, has refused to impose Ebay to take preventive measures to avoid infringing contents to be broadcast on its website. In this case, *Lancôme* criticized Ebay posting offers to sell illegal fragrances of the brand and the absence of effective measures against counterfeiting⁹⁶. The judge recognized Ebay as a host for this type of activity⁹⁷ and the system of exemption from liability thereon; in addition, a general duty of supervision

⁹⁵ See T. STAMOS, « Récapitulatif des devoirs et responsabilités des intermédiaires de l'Internet en droit belge », *op. cit.*

⁹⁶ E. MONTERO, « Droit du commerce électronique », « Responsabilités des intermédiaires », point n°3, p. 25-26, in *Chronique de jurisprudence en droit des technologies de l'information (2002-2008)*, *RDTI*, 2009, n° 35.

⁹⁷ The judge applies a different regime of responsibility depending on the type of activities of Ebay.

in this context has not been imposed to the host, in accordance with Article 21 of the Belgian law of 11 March 2003. The judge said that Ebay had "no obligation to monitor the information which it hosts, and no general obligation to actively seek facts or circumstances indicating illegal activity."

Although the decision is not about hosting providers but Internet service providers, it is worth mentioning again (see above question 6.5) Case SABAM / Scarlet. SABAM has filed a lawsuit against Scarlet, on the basis of Article 87 § 1 of the Belgian law of copyright, arguing that it benefits from illegal downloading of musical works repertoire of SABAM made by users through peer-to-peer software⁹⁸. On 29 June 2007, the presiding judge of first instance tribunal in Brussels condemns Scarlet to stop infringements of copyright by providing solutions content filtering, both at the time of sending and receiving works through peer-to-peer. Scarlet has appealed the ruling, holding that the general duty of supervision is not in compliance with Article 15 of Directive 2000/31. The Court of Appeal of Brussels, in a ruling dated 28 January 2010⁹⁹, decided to stay proceedings pending responses from the Court of Justice of the European Union to the following prejudicial questions: can a judge "order a Internet service provider (ISP for short) to put in place, in respect of all its customers, *in abstracto* and preventively, at the cost of the ISP and without limitation in time, a filtering system for all electronic communications, both incoming and outgoing, transiting through its services, notably by the use of software peer-to-peer, in order to identify traffic on its network of electronic files containing a musical work, film or audio-visual on which the plaintiff claims to have rights and then to block their transfer, either at the application or in connection with the shipment?". The second part of the question focuses on whether the judge is obliged to "apply the principle of proportionality when called upon to pronounce on the effectiveness and deterrent effect of the measure sought."

⁹⁸ See E. MONTERO, « Droit du commerce électronique », « Responsabilités des intermédiaires », point n° 2, *op. cit.*

⁹⁹ Bruxelles (9^{ème} ch.), 28 January 2010, in *A&M*, 2010/2, p. 176.

Bibliography

Legislation

From Belgium

- Copyright and related rights Act of 30 June 1994.
- Act of 30 June 1994 transposing into Belgian law the European directive of 14 May 1991 on the legal protection of computer programs.
- Act of 31 August 1998 implementing into Belgian law the European directive of 11 March 1996 on the legal protection of databases.
- Act of March 25, 1999 on the application of certain provisions to the Belgians of the Berne Convention for the protection of literary and artistic works of 9 September 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967 and at Paris on July 24, 1971, and amended on September 28, 1979.
- Act of 22 May 2005 transposing into Belgian law the European Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

European

- Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights,
- Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs.

International

- Berne Convention of September 9, 1886 for the protection of literary and artistic works.