

The Implementation of the 2001/29/EC Copyright Directive in Belgium and the Netherlands

All E.U. countries are presently in the course of implementing the Directive on the Protection of Copyright and Neighboring Rights in the Information Society of May 22, 2001 (hereafter »the Copyright Directive«) within the stringent timetable imposed by Article 11 of the Copyright Directive. Indeed, in order to respect the deadline of December 22, 2002, the various national authorities competent for copyright legislation have to initiate the law making process. In several countries, a consultation process has already started. Sometimes, the authority in charge of the implementation has convened all interested parties to a broad public meeting, such as in Finland. In other countries, the issues relating to the implementation have been discussed by working groups, such as the Copyright Council in the UK.

In the Netherlands, the »Auteurswet Commissie« composed of experts, mainly academics and practitioners, pre-

pared a report (delivered to the Ministry of Justice on July 17, 2001) that served as a basis for the implementation of the Copyright Directive. In France and Germany, the administration responsible for copyright matters (the Ministry of Culture in France, the Ministry of Justice in Germany) are collecting the position papers of all interested parties. In other countries, the persons in charge (most of the time, a civil servant at the Ministry of Justice, sometimes an academic as in Greece) have started the drafting of implementing texts. It seems however that as of mid-October 2001, only two countries, Belgium and the Netherlands, have made public a draft implementing text. This article intends to make a few comments on these two drafts and to highlight at the same time some difficulties in implementing the Copyright Directive. A thorough analysis of the provisions of the Copyright Directive is beyond the scope of this article.

I. Overview of the Copyright Directive

The Copyright Directive holds several provisions that are essential to effectively protect copyright in the digital age. Among others, the »making available right« (Art. 3) and the rules prohibiting the circumvention of technological measures (Art. 6) and the removal of rights management information (Art. 7), provide copyright holders with the incentives necessary to create new works and make them available on-line. These provisions are also mandated by the WIPO Copyright and Performances Treaties of 1996. Other provisions (such as Articles 4 and 5 on the distribution right and on the exceptions) do not directly relate to the digital agenda and they have not been introduced in order to fulfill the obligations arising from these international Treaties, but for harmonization purposes. It is noteworthy that the Copyright Directive includes four main categories of provisions.

1. The Provisions Relating to the Different Rights that are Protected

The Copyright Directive grants, among others, rights covering reproduction (Article 2) and communication to the public/making available (Article 3). The provision on the distribution right (Article 4) does not directly affect the movement of works in the on-line world.

Following the Copyright Directive, the *reproduction*

right must cover reproductions in any form, including temporary and permanent copies. In today's digital world, users often only make temporary copies while using a work. Protection for temporary copies in these cases provides the only means for authors to preserve the economic value of their works. The Copyright Directive further requires Member States to grant a *right of communication/making available to the public* by wire or wireless means. This right incorporates a right to make a work available in such a way that the public may access it from a place and at a time individually chosen by them. This right thus envisages works »made available« on a web-site for downloading and for on-demand transmissions. These new rights are critical if authors are to make their works available on-line.

2. The Exceptions Listed in Article 5

Article 5 of the Copyright Directive holds a list of 22 exceptions of which the implementation in national legislation is left to the Member States' discretionary power, except for temporary acts of reproduction that are transient or incidental in nature (Art. 5.1). Thus, the aforementioned exception is the only one that is mandatory, while the rest remain optional. Several exceptions summed up in the Copyright Directive were introduced at the request of particular Member States and already existed in national law. The level of harmonization achieved is thus quite low.

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3. The Third Layer of Protection: the Protection of Technical Measures of Protection

Technical measures (mainly access controls and anti-copy devices) are being used to deter copyright infringement. Since the adoption of the WIPO Treaties, the need for legal protection of these measures has become apparent. Article 6 of the Copyright Directive thus adds a third layer of protection on top of the legal protection granted by copyright and the technical measures of protection. More specifically, Article 6 of the Copyright Directive imposes on Member States the obligation to provide adequate legal protection against the circumvention of any effective technological measures and against any preparatory acts of circumvention, such as the manufacturing, importing, distributing, selling, promoting or renting for commercial purposes of devices, products or components whose primary purpose is to circumvent technical measures of protection.

4. Remedies for Copyright Infringement

Article 8 of the Copyright Directive requires that sanctions must be «effective, proportionate and dissuasive». It also requires Member States to adopt civil remedies permitting injunctive relief, damages and seizure of infringing material and devices.

II. The Implementation of the Copyright Directive in Belgium and the Netherlands

1. Belgium

In Belgium, a proposal for an Act («proposition de loi», «wetsvoorstel») amending the Belgian Copyright Act of June 30, 1994 (hereinafter «the BCA») has been made by a member of the Senate, Mr. Monfils, who as former member of the European Parliament, has been involved with the lengthy discussions which led to the adoption of the Copyright Directive (hereafter: «the Proposal»)¹. It seems that the Monfils Proposal will be replaced by a draft law («projet de loi») that is currently being drafted by the competent services of the Ministry of Justice² but so far the Proposal remains the only official text that should be taken into account.

The Monfils Proposal aims to implement the Copyright Directive by amending the current Belgian Copyright Act of June 30, 1994 (hereinafter «the BCA»). Unfortunately, some of its provisions are rather poorly drafted (at least the provision relating to the protection of technical measures of protection).

a) The Rights

The Proposal does not mention the changes reflected in the Copyright Directive regarding the *right of reproduction*. Furthermore, the recitals of the Proposal do not even refer to this right and the specific problems

related therewith. More specifically, it is not expressly mentioned that this right covers direct and indirect reproductions, permanent and temporary reproductions, and total and partial reproductions. One could however interpret the phrase «reproduction by any means or by any form» which already appears in Article 1, § 1, al. 1 of the Belgian Copyright Act, as including all forms of reproduction.

The Proposal however addresses the *right of communication/making available to the public* by wire or wireless means. Indeed, the Proposal incorporates a right to make a work available in such a way that the members of the public may access it from a place and at a time individually chosen by them. The Recitals of the Proposal lay down that this right is granted to copyright holders (such as authors) as well as to holders of neighboring rights (such as producers and performing artists).

b) The Exceptions

Articles 3 to 5 of the Proposal are intended to implement the exceptions listed in Article 5 of the Copyright Directive. Article 5.1 of the Copyright Directive, which is the only exception of imperative nature, holds the exception for certain temporary copies that are transient or incidental in nature. The compromise reflected in Article 5.1, which established the so-called «network» and «lawful user» exceptions, is the result of a large debate among several parties. This exception should be read in close connection with Article 8.3 of the Copyright Directive, which provides right holders with an injunction against intermediaries whose services are used by a third party to infringe copyright. The so-called «network» and «lawful user» exceptions of Article 5.1 of the Copyright Directive will be implemented in the new Article 23ter of the BCA. However, the text of the Proposal does not follow from the provision of the Directive.

The Proposal partly proposes to implement -- in its own specific way and in accordance with Belgian legal tradition -- some of the remaining «optional» twenty one exceptions of the Copyright Directive, which were lobbied by various countries. With respect to the private copy exception, the relevant provision of the Proposal explicitly prohibits commercial use of the private copy of a work. Such an exception is however not necessary, as current Belgian copyright law presently only allows private copies made in the family circle and for family use, and thus implicitly prohibits commercial use (including reproduction and communication to the public) of the private copy of a work. The Proposal also

1) Proposal of Act n.2-704, Sen. 2 – 704/1 – 2000/2001 (available on the website of the Senate: <http://www.senat.be>). Strangely enough, this Monfils Proposal is dated March 23, 2001, while the Copyright Directive was only finally adopted on May 22, 2001!

2) In Belgium, the situation is complicated by the fact that the competent authority for implementation is still the Ministry of Justice, but that in the course of 2002, this matter, and the civil servants of the administration, will be transferred to the Ministry of Economic Affairs which will then have competence in all areas of intellectual property law.

provides for exceptions in respect of specific acts of reproduction in publicly accessible libraries, educational establishments or museums, which are not for direct or indirect economic commercial advantage.

Article 5.5 of the Copyright Directive is fully consistent with the Berne Convention (Art. 9.2) and the WTO TRIPs Agreement (Art. 13). Indeed, Article 5.5 permits exceptions only in »certain special cases« that do not »conflict with a normal exploitation of the work« and do not »unreasonably prejudice the legitimate interests of the right holder«. Member States are required to ensure that every exception implemented into national legislation, meets the aforementioned requirements. More specifically, Member States will have to take particular care with digital private copy exceptions, as it is quite likely that national provisions that broadly permit digital private copying, will violate Article 5.5 of the Copyright Directive.

It is important to point out that the Monfils Proposal does not withhold the »three-step-test« laid down in the Berne Convention and the WTO TRIPs Agreement. The explicit implementation of the »minor exception« rule would have served as a clear sign that there are limitations to the existing exceptions. Hence, Belgian failure to do so should be regretted.

Finally, the list of exceptions summed up in the Copyright Directive is exhaustive. Consequently, any exception that is provided for by the respective legislations of the Member States holding other exceptions than those of the Copyright Directive, should be abolished. In Belgium, at least the following three exceptions do not seem to be listed in Article 5 the Copyright Directive:

- the exception in favor of the »Cinémathèque« (film library) provided for in Article 22, § 1, 8, of the current BCA;
- the exception for public exams provided for in Article 22, § 1, 7, of the current BCA; and
- the exception provided for in Article 21, paragraph 3 of the BCA regarding the making of anthologies.

c) The Protection of Technical Measures of Protection

The Proposal aims to implement the protection of technical measures laid down in Article 6 of the Copyright Directive in a new Article 79bis of the BCA, which means in the chapter of the law delineating the scope of application of the Copyright Act. It is firstly questionable because the protection of technical measures of protection does not relate at all to the general provisions concerning the scope of protection of the Copyright Act (for instance whether, and under which conditions, it applies to foreigners). Such a transposition might secondly be interpreted as indicating that this protection will not apply when the technical measures are protecting the sui generis right vested in databases.

Otherwise, the proposed Article 79bis more or less copies the structure of Article 6 of the Copyright Directive regarding technological means of protection, except that it does not provide for a definition of technological measures as Article 6.3 of the Copyright Directive. Article 79bis of the BCA contains:

– a general statement that effective technological measures are protected against any neutralization (which seems more restrictive than protection against any act of circumvention, as is laid down in the Copyright Directive), but without any reference to the remedies allowed in case of neutralization (§ 1). The absence of any express sanction in the text of the law might indicate that the protection is not »adequate« in the sense of the Copyright Directive. Besides, it is not sufficiently clear from the proposed text that acts of circumvention as such are prohibited (and if they are, the requirement of knowledge incorporated in Article 6.1 of the Copyright Directive is not mentioned). Indeed, the actual wording might imply that the sole prohibition of the preparatory acts could satisfy the requirements of the Copyright Directive. It is also not clear whether the access controls are also covered by the protection of technical measures ;

– a reference to the remedies of Article 80 and following of the BCA in case of any preparatory acts of circumvention of any effective technological measures, such as manufacturing, importing, distributing, selling, promoting or renting for commercial purposes of such devices, products or components (§ 2). The wording of this second paragraph seems more or less in line with Article 6.2 of the Copyright Directive, except that the primary function test (for the devices, etc.) is not used;

– rules in relation to the exceptions (§ 3). Firstly, the wording of the newly proposed Article 79bis, § 3, al. 1 is not adequate as it seems to oblige the rightholders to give access to the works in favor of the beneficiaries of the exceptions. Besides, in order to implement Article 6.4 of the Directive, the Proposal only authorizes the King (meaning the executive branch) to take measures in the absence of any voluntary measure adopted by the rightholders. The European Commission has expressly condemned such a general enabling provision. According to Mrs. Julie Samnadda of the European Commission, the implementing text must indicate more clearly what action the empowered authority might take, under which circumstances, within which reasonable delay, etc.

The protection of *rights-management information* will be governed by the new article 79ter of the BCA, which provides legal protection against removal or alteration of any electronic rights-management information.

d) Remedies for Copyright Infringement

The Belgian government reasoned that, since injunctive relief, damages and seizure of infringing material and devices are already provided for by the current BCA and relevant case law, the Proposal does not have to implement additional legislative tools to comply with the requirements of the Copyright Directive. However, current practice shows that, in order to comply with the vast remedy-requirements laid down in the Copyright Directive, the Proposal should have included:

- specific provisions granting courts jurisdiction over acts of circumvention of technological measures;
- specific provisions allowing copyright holders to calculate damages more easily, which seems almost

impossible in Belgian practice, as damages too often need to be calculated on the basis of *ex aequo et bono* damages;

- the possibility of a conservatory seizure of the assets of the dealer.

Nevertheless, it should be noted that the Green Paper on Combating Counterfeiting and Piracy in the Single Market as proposed by the European Commission, might meet such expectations. However, it should be regretted that the Belgian legislator has not yet provided adequate responses for these needs, and awaits the EU law making process and the eventual implementation of a future Directive on counterfeiting and piracy.

2. The Netherlands

In the Netherlands, the text used as reference is a draft consultation document of October 15, 2001 (called »Wet houdende aanpassing van de Auteurswet 1912, de Wet op de naburige rechten en de Databankenwet ter uitvoering van richtlijn 2001/29/EG van het Europees Parlement en de Raad van de Europese Unie van 22 mei 2001 betreffende de harmonisatie van bepaalde aspecten van het auteursrecht en de naburige rechten in de informatiemaatschappij«, hereafter the »(Dutch) Draft Law«).³

In order to implement the Copyright Directive, the Dutch Draft Law proposes modifications to three Acts: the Copyright Act of 1912, the Act on Neighboring Rights and the Database Act. This threefold structure of legislation relating to copyright (in the broad sense of the word, covering both the neighboring and sui generis rights) will thus remain, but the explanatory memorandum (containing the recitals of the forthcoming law) suggests that there are reasons to merge the Copyright and the Neighboring Acts at the occasion of a more fundamental revision of existing law still to come.

a) The Rights

Fitting the broad rights granted by the Copyright Directive into the current system of law seems a bit more complicated in the Netherlands, where concepts such as »verveelvoudiging« and »openbaar maken« have developed that do not fully comply with the system of rights now determined at the level of Community law.

As in Belgium, the Draft Act does not incorporate into the Copyright Act, the exact wording of Article 2 (on reproduction) of the Copyright Directive. It is thus unclear whether for instance temporary reproductions are covered by the existing right (called the right of »verveelvoudiging«), because the Ministry of Justice considers the notion of »reproduction« used in the Copyright Directive (»reproductiebegrif«) as already included in the current definition of reproduction (»verveelvoudigingsbegrif«).

The particular exception of Article 5.1 is nevertheless incorporated in a new Article 13a of the Copyright Act, and the wording of this new exception indicates

that the »verveelvoudigingsrecht« comprises temporary reproductions.

According to the explanatory memorandum, the notion of »making public« (»openbaar maken«) of the 1912 Copyright Act is broad enough to cover the three notions of »communication to the public«, »making available« and »distribution« used in Article 3 and 4 of the Copyright Directive. For this reason, the wording of Article 3 of the Copyright Directive is not integrated in a new provision of the Draft Law. Such a decision raises questions because the »making available right« recognized in the Directive, as well as in the WIPO Copyright Treaty, is thus not expressly mentioned in the Copyright Act. At least for the sake of clarity, it would have been better to introduce a »making available« right as such. The mere statement that the right of »making public« already encompasses the »making available right« is probably not enough in order to respect the obligations arising out of the Copyright Directive.

The introduction of this »making available« right in the framework of the Act on Neighboring Rights raises other questions, because the notion of »making public« (»openbaar maken«) in the case of neighboring rights is limited to immaterial forms of dissemination. Article 6, 7 and 8 of the Act on Neighboring Rights are amended to take that into account (in addition, Article 7 of the Act on Neighboring Rights is modified to make it clear that the usual compulsory license for a broadcast of a phonogram and for other means of »making public« a phonogram does not apply when the phonogram is »made available« to the public, such as in the case of »on-demand« services).

Moreover, a new Article 12b is added in the Dutch Copyright Act, which now makes it clear that the exhaustion of the distribution right only occurs when the work is put on the market of one of the Member States of the EU or of the EEA. In the field of copyright, this Community-wide exhaustion rule was already applied in the case of distribution of databases and of computer software; it now has acquired an horizontal dimension as it has been extended to all categories of works (it already applied to the distribution right in the case of the neighboring rights).

b) The Exceptions

The effect of the Copyright Directive on the provisions relating to the exceptions is of course a complex and delicate issue which cannot be investigated thoroughly here. As in other countries, some exceptions will be kept or only slightly modified (i. e. the exceptions in favor of the press, for quotation, for ephemeral reproductions of broadcasts, for reproductions in exhibition catalogs, etc.). Other exceptions will be amended in order to benefit from the possibilities offered by the list of exceptions of Article 5 of the Copyright Directive.

3) This text is available on the website of the Dutch Ministry of Justice (<http://www.minjust.nl/a-beleid/auteurswet/wetsvoorstel/index.htm>) and is supplemented with a detailed explanation (the so-called »Memorie van Toelichting«).

An exception for parody is also introduced in the Dutch Draft Law.

c) The Protection of Technical Measures of Protection

The provision relating to the protection of technical measures of protection (Art. 6) is almost literally copied by the Draft Law. The obligations related there with are introduced in chapter II of the Copyright Act dealing with the exercise and enforcement of copyright, which indeed seems to be an adequate part of the law for the implementation of Article 6 of the Copyright Directive. Civil remedies will be available in case of circumvention of the technical measures of protection, but the Dutch legislator seems to agree that criminal sanctions should be added, and that further issues might be debated in relation to the adherence to the Cybercrime Treaty of the Council of Europe. According to the explanatory memorandum, the new provisions implementing Article 6 of the Copyright Directive do not affect the existing provision on the protection of technical measures protecting software.

The new Article 29a of the Copyright Act closely follows the structure of Article 6 of the Copyright Directive as they are both divided into four paragraphs dealing respectively with the prohibition of the acts of circumvention, the prohibition of preparatory acts, the definition of effective technical measures and the enabling process to guarantee the benefit of the exceptions where technical measures of protection are used. On this last issue, the Dutch Draft Law does not distinguish between the exceptions for which the Member States have the obligation to intervene in case the right-holders do not find a solution to guarantee that the users benefit from the seven exceptions listed in Arti-

cle 6.4 first paragraph of the Directive on the one hand, and the exception for private copy laid down in Article 6.4 second paragraph (option left to Member States to intervene when the beneficiaries of the private copying exception cannot benefit from this last exception) on the other hand. The system otherwise only enables the competent authorities to adopt the necessary measures, but does not list the measures that should/might be taken. The explanatory memorandum, which stresses that these measures are the »ultimum remedium«, gives a few examples of such measures: a mandatory deposit of an unprotected version of the work at the Royal Library, a mandatory key escrow with a trusted third party or a mandatory delivery of unprotected versions to several qualified users.

III. Conclusion

Many other comments will probably be directed towards these first implementing drafts in the future months. Despite some shortcomings, these drafts nevertheless exist. While in the case of the Netherlands, one can now anticipate that the legislator will respect the deadline of December 22, 2002, in Belgium, some uncertainties remain, in part because the matter of copyright will soon be transferred to the Ministry of Economic Affairs. One can only hope that the Minister of Justice will nevertheless direct enough attention and resources to this implementing process even if the final text might be adopted under the guidance of his successor.