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Introduction
On May 22, 2005, exactly two and a half years too late according to the maximum implementation deadline, Belgium finally implemented European Parliament and Council Directive 2001/29 (the Directive). The implementing Act was published in the Belgian Official Gazette (Moniteur Belge/Belgisch Staatsblad) of May 27, 2005 and entered into force on the same day. This article provides an overview of the implementation, focusing on the changes made to the Copyright Act 1994 and pinpointing areas where implementation has been correct and incorrect. It will focus on copyright and not related rights, although most of the provisions applying to the former also apply to the latter.

Exclusive rights
The Directive broadened the rights of reproduction and communication to the public (Art.12 and Art.13). The implementation Act reflects the Directive faithfully and accordingly, an author now has the exclusive right to reproduce or authorise the reproduction of his/her work, in any manner and form he/she wishes, be it direct or indirect, temporary or permanent, in part or in whole (Art.1(1) of the Copyright Act). This does not really change the old law as Art.1(1) may have been said to be broad enough to include those forms already8 but it makes the rights more precise without restricting it. The right of communication has also been modified to include the "making available right" so that the author of a work now has the exclusive right to communicate the work to the public by any means, including making their work available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them (Art.1(4)). The Belgian lawmaker has also introduced a right of distribution together with the principle of exhaustion (Art.1(5)), which were lacking in the Act, although they had been firmly recognized by the courts9 in this

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2 Article 13 on exclusive rights in the amended Copyright Act refers to articles 28, 29, 30, 31, 32 and 35.
3 See supra, note 1.
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respect, the new Act rewrites quasi word for word Art.4 of the Directive. So, as far as rights are concerned, Belgian law is now compliant.

Exceptions

Exceptions are provided for in Art.5 of the Directive, with only Art.5(1) being mandatory. As far as the exceptions in Art.5(2) and (3) are concerned, Member States could not maintain existing exceptions which conflicted with them. In other words, they had to remove exceptions which did not appear in Art.5(2) and (3) and amend those existing ones which conflicted with them. In addition, Member States were not allowed to enact exceptions outside the list provided in Art.5(2) and (3) (Recital 32). However they could retain "traditional" exceptions of less importance as long as they only concerned analogue uses (Art.5(3)(o)). Finally, Member States were not obliged to introduce new exceptions (i.e. exceptions in the list but not appearing in national law) if they did not wish to do so (Recitals 34 & 36). In Belgium, many changes had to be made to the existing exceptions to comply with Art.5(1) to (3). Belgium also kept some traditional exceptions. In addition, new exceptions were introduced.

Modification of the existing exceptions

The good

Here follows a description of the exceptions which have been changed in order to comply with the Directive.

The citation exception has been amended in two ways. First, citations do not have to be short anymore. Secondly, the lawmaker has added that the source and name of the author must be detailed, unless this turns out to be impossible. In the past, even if it was impossible, those details had to be present to comply with the law. As a result, the citation exception is now much broader.

To comply with Art.5(2)(c) of the Directive, anthologies for teaching purposes are now only exempt if they do not seek to pursue any direct or indirect commercial or economic purpose.

The implementation Act provides the "private" copying exception of Art.5(2)(a) of the Directive, which requires that reproductions must not only be made on paper or similar medium but does not need to be private anymore (Art.22(1)(4) of the Act). This exception can be called the "paper copying" exception and as required by the Directive, excludes sheet music and provides fair compensation for authors (Art.59).

To comply with Art.5(2)(c) of the Directive, Belgium changed Art.22(1)(6) of the Act to broaden it to publicly accessible libraries, museums and archives (before it only applied to the Royal Cinémathèque). The Directive mentions "specific acts" of reproductions, which is vague. As a result, Belgium has chosen to restrict this exception to a limited number of copies made by those institutions determined and justified by the aim of preserving cultural and scientific heritage.

Belgium has also retained three traditional exceptions. According to Art.5(3)(o) of the Directive, Belgium could certainly retain its exception for the free and private communication of works within the family circle, which has now been broadened to include communication in the framework of school activities. However, although the implementation Act does not specify it, to comply with Art.5(3)(o) of the Directive, this does not include digital uses. In contrast, in accordance with Art.5(3)(o), the exception provided for in Art.22(1)(5) of the Act concerning the reproduction of audiovisual and musical works in the family circle, was restricted to analogue reproductions. In addition, although it was not obliged to change the latter exception further, the lawmaker decided to broaden it to cover all works. In the same vein, Belgium was also able to retain its exception to communicate works to the public during exams.


The bad

A number of "ugly", i.e. reproductive exceptions have been changed in the extent of the exception. The report itself states that the extent of the exception for the limited circulation for library purposes has been reduced. Secondly, the public of which the work has been made is not the work as a whole. Therefore although the Directive clearly states that the public has not been defined as the work as a whole, the report states that this is not the way it is applied.

The report states that although there is a legal provision for the limited circulation for private purposes, it is only granted to "the public" as opposed to "the Directive. Hence, less provisions are not covered by such exceptions.

New exceptions

In addition to the above, Belgium introduced new exceptions in the form of "optional" exceptions. Hence, these exceptions are not mandatory and therefore the Member States have the option to include them or not. This is contrary to the Directive which required the introduction of all exceptions. However, the Directive does not specifically state that these exceptions are only optional.

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as the exception fell within Art.5.3(a) of the Directive, and given that such executions would obviously not be made digitally, it was not necessary to change it.

The bad

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

Secondly, Art.22(1)(2), which allows the reproduction and communication to the public of works exposed in places accessible to the public, has not been modified. However, in light of Art.5.3(b) of the Directive it should have been amended as the Directive does not require the condition that Belgian law still does, i.e. that the use's aim is not the work itself.

The teaching and research exception seems to have been correctly implemented, although the Act does not specify that the reproduction must be exclusively for these purposes. However, the Act envisages separately the communication to the public for teaching and research purposes and adds several conditions which are not required by the Directive. One such condition is that fair compensation should be granted to authors (Art.5.9 and Art.61bis), which is not required by the text of the Directive, but is provided for by Recital 36. Another condition is that the communication must be made by officially recognised establishments. Therefore, in this respect, the exception can be said to be non compliant.

New exceptions

In addition to amending its existing exceptions, Belgium decided to add five new exceptions to the Act, thus making the law more "user-friendly". They have all been written almost word for word which consequently makes them all compliant with the Directive. First, Art.22(1)(9) of the Act implements Art.5.3(d) of the Directive concerning use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in para.2(c) of works and other subject-material not subject to purchase or licensing terms which are contained in their collections. Secondly, Art.22(1)(10) implements Art.5.2(d) concerning ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts. Thirdly, Art.22(1)(11) corresponds to Art.5.3(e) concerning use for the benefit of people with a disability. Fourthly, Art.22(1)(12) implements Art.5.3(f) concerning use for the purpose of advertising the public exhibition or sale of artistic works and finally Art.5.2(e) concerning reproductions of broadcasts made by social institutions pursuing non commercial purposes, such as hospitals or prisons is implemented by Art.22(1)(13). Broadly, an exception comparable to Art.5.1 of the Directive, which exempts temporary reproductions acts which enable, among others, internet transmissions, did not exist in Belgian law. Article 21(3) of the Act implements word for word Art.5.1.

While Belgium was the first and only Member State to have made all its exceptions applicable to 1998 (Art.23bis), the implementation Act, by adding a second paragraph to Art.23bis, now allows contractual derogations in cases where works are made available to the public on demand so that anyone may access them from a place and at a time individually chosen by them. This may arise from Art.6.4 of
the Directive which prohibits all circumvention of technological measures in such cases.

Protection of technological measures and rights management information
A Ch.VIII has been added to the Copyright Act to implement Art.6 and Art.7 of the Directive which protect technological measures and rights management information ("RM"). Article 79bis implements Art.6(1) to (3) faithfully by punishing those who circumvent an effective technological measure, knowingly or with reasonable grounds to know and the same persons who manufacture, import, distribute, sell, rent, advertise for sale or rental, or possess for commercial purposes devices, products or components or the provision of services which are promoted, advertised or marketed for the purpose of circumvention of, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures. These acts are classed as misdemeanours and Art.80 to Art.85 of the Act apply. The Act also rewrites word for word the definition of a technological measure, which is any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law or the database sui generis right. Technological measures shall be deemed "effective" where the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective.

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

As required by Art.6(4), Art.79bis(2) does not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them (Art.79bis(3)). Article 87bis(2) ensures that if right holders do not take the measures required by Art.79bis(2), this can be sanctioned before the court of first instance. Thus the State indirectly monitors whether right holders effectively grant access to users. This represents a positive implementation of Art.6(4) of the Directive, which is somewhat obscure. It transforms Cinderella's pumpkin into at least a "rideable" coach for users. If right holders do not take measures within a reasonable timeframe (which will in the end be decided by courts), users can sue them. Of course, this is not the best solution as they have to engage in legal proceedings to get access but possibly, this will give an incentive to right holders to take the measures timely to avoid costly litigation e.g. by consumers associations and avoid the payment of damages for their non-compliance. In addition, this solution goes beyond mere measures mandating Article 79bis(2) electronic RM shall be reproduced almost at the same time as the book or the product.

Finally, as briefly mentioned, implementing Art.79bis(2) is still an open issue. Belgium is not the only country to have not implemented the Directive in this field. The remaining exceptions, teaching and research, are accessible to the user. They have been implemented in the past by a technological means. However, implementing the Directive in the same way would mean that the Act is very similar. As for the remaining exceptions, copyright law regards them as ever accessible to the user. Their exception has been better balanced and almost completely covered by the Directive is surely with regard to the implementation is a step forward.

Conclusion
No doubt, Belgium is not the only country to have not implemented the Directive in this field. The remaining exceptions, teaching and research, are accessible to the user. They have been implemented in the past by a technological means. However, implementing the Directive in the same way would mean that the Act is very similar. As for the remaining exceptions, copyright law regards them as ever accessible to the user. Their exception has been better balanced and almost completely covered by the Directive is surely with regard to the implementation is a step forward.

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solution goes beyond the only voluntary measures of Art.6(4): it makes these measures mandatory as the inaction of rights owners can be sanctioned judicially.  

Article 78ter also makes it a misdemeanour to knowingly delete or modify electronic RMI. The Directive’s definition of RMI contained in Art.7 is also reproduced almost word for word.

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

Conclusion

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

As far as pan-European copyright harmonisation is concerned, Professor Hugenholtz’s prediction that most countries would want to change very little as regards their exceptions has not been true for Belgium at least. A great number of exceptions have been added to the existing ones, broadening users’ rights and thus better balancing the broad rights. Although with regard to the exceptions, the Directive is surely “hit and miss” as far as pan-European harmonisation is concerned, with regard to the rights, the protection of technological measures and RMI, harmonisation is surely achieved, expect perhaps for Art.6(4) whose implementation, it is fair to say, is likely to differ in every country due to its original opacity.

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