The Revision of Copyright Law in Belgium

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Introduction

My topic is supposed to focus on the “revision” of copyright law in Belgium, but as you probably know, my country doesn’t have a “real” government right now, and that situation renders any revision of the copyright law very unlikely in the near future. The last major revision of the copyright law was made in 2005.

Anyway, I'll explain what is the current situation of copyright in relation to the interests of education, scientific research and libraries. I will show that the present state of the law in Belgium is absolutely surreal. In particular, the current regime of exceptions to copyright is extraordinarily complex, is largely incoherent and is not particularly favourable to the libraries or the uses for purposes of scientific research or teaching, especially in the digital context. This is partly the responsibility of the European directive of 2001 (copyright in the information society) but also in great part the responsibility of the Belgian lawmaker errors.

First, I will give a brief history of the Belgian copyright law, by focussing on the question of the evolution of the regime of exceptions for use in research and teaching. Then I will discuss the regime established since its reform in 2005, highlighting the paradigm shift that has occurred and some issues raised by the current system of exceptions to copyright.

I. Historical of the Belgian Copyright Law

The Law of 1994

The current copyright law has been adopted in 1994 and has replaced an old law of 1886. The new law has created several new legal exceptions, in particular exception for private use and exceptions for educational purposes. The scope of these exceptions was nevertheless limited
to works fixed on traditional format. The law also provides an exception for lending and rental by some categories of establishments. Finally, a remuneration system was established, to give compensation to the copyright holders, in exchange of the application of some of the exceptions.

Revision of 1998

The law of 1994 has been modified in 1998 to implement the database directive of 1996. This modification has brought a major change in the conception of the exceptions to copyright in Belgium. First, the exception of reproduction for education has been extended to include explicitly the scientific research and to be also applicable to the works fixed on digital format. Then, and that is the main point, the law has given all the exceptions to copyright a peremptory character (“caractère impératif”). That means that the exceptions will prevail on any contrary provision of a license, and that the benefit of the exceptions is thus guaranteed by the law, for all users. This was very important in the digital context, in which the works are most of the time made available with a license. It was then not possible for the right owners to prohibit, by a provision in the contract, certain uses of the work that are permitted by an exception. Any contractual provisions contrary to the exceptions provided for in the law shall be null and void.

At this time, the Belgian system appeared to be rather favourable for the users in general, for the libraries, research activities and education in particular. It remained one loophole in the law: the exception of reproduction for private use was still not applicable to the literary works fixed on digital media.

II. Revision 2005 (current state of the law)

In 2005, a major revision of the law was made to implement the directive copyright in the information society. And that is the beginning of the trouble, with an incoherent, incomprehensible, unbalanced new system of exceptions to copyright.

Some new exceptions

On the positive side, we have the introduction of new exceptions in favour of research or libraries, which were proposed by the text of the directive, in particular:
communication for purposes of illustration for teaching or scientific research using closed networks;
- communication for the purpose of research or private study, to individual members of the public by dedicated terminals located on the premises of establishments like libraries of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections

But these are very specific exceptions, with very strict conditions of application.

*Modification of some existing exceptions*

The criteria of the definition of the scope of the exceptions of reproduction for private use and the exceptions of reproduction for educational and scientific purposes has changed: it is now the medium of reproduction that is relevant and not the medium of the work. For both categories of exception, the reproduction is permitted on paper (for instance the impression of an electronic document) or on digital medium (for instance downloading of an article or scanning of a paper document). But as we will see in a moment, this regime is not yet fully in force.

*The protection regime of the DRM*

According to the directive, the Belgian law has provided a legal protection regime of the technological measures and has established a system to ensure that rightholders make available to the beneficiary of some exceptions the means of benefiting from those exceptions. If the right holder prevents by a DRM the user to implement an exception, the user is entitled to bring an action before the judge. But some exceptions are excluded from this guarantee system, including copy for private use and some very specific exceptions concerning libraries. And pursuant to the directive, the Belgian law provides that the guarantee system is not applicable to « works 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 ».

*The Status of the exceptions*
The law of 2005 has maintained the peremptory character of the exceptions, BUT with a limitation which substantially reduces the scope: it is no longer applicable to works made available « on line, on demand ». It means that for works available on line, the rightholders have the possibility to exclude by a contractual provision the benefit of all the exceptions, even in the absence of any DRM. Exceptions like quotations, illustration for teaching or scientific research, parody, could be prohibited by the contract.

I’m not sure that the Belgian legislator has understood clearly the legal implications of such a modification.

*The absurdities and inconsistencies of the law*

The current regime of exceptions is now very complex and very hard to understand, for lawyers and a fortiori for users. At the present time, this regime is mostly inconsistent and absurd. As I told, some parts of the new exceptions regime is not in force, because its entry into force supposes the adoption by the government of a new system of compensation, and nothing has been done since 2005. This implies that some old exceptions continues to apply together with some new exceptions, but without any coherence. For instance, currently, there are no exception in force that allows a user to make an impression on paper of a document published in digital format, for teaching or scientific purposes. And there are no exception in force that permits the reproduction, in any medium, of literary works published in digital format, for private use.

There is another absurdity: the Belgian legislator has implemented the directive by creating a new “distribution right”, but he forgot to extend to this right the application of certain exceptions when necessary. For example, a teacher is allowed to make copies of an article for educational purposes but is not allowed to distribute the copies to his students.

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*Conclusions and perspectives*

The Belgian law in its current state appears to be contrary to the purpose of fair balance between the rights of authors and the larger public interest, particularly education, research and access to information, purpose recognized in the preamble of the WIPO treaty on
Copyright of 1996. The regime established in 2005 is based on a free market model, in which the balance between the rights of the authors and the interest of the users is fixed by the contract, and not by the law, especially in the digital context, for works available on line.

Some very small changes has been brought to the copyright law in 2009, but a more fundamental modification of the law is necessary, to restore a better balance. Maybe the opportunity to change the law will be offered by the implementation of a future directive on orphan works.