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Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

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I. Current law and practice

1)	Does your law provide for exceptions or limitations to copyright protection for libraries and archives?
	yes
	If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a)	reproduction and/or distribution for the purpose of preservation or replacement;
	yes
	Please comment:

	Preliminary remark:
	The Belgian copyright law ^[1] provides for a number of exceptions to the exclusive right of reproduction and the exclusive right of communication to the public, in particular for libraries and archives, and also for the purpose of education and research, as detailed here below.
	By contrast, these exceptions are not explicitly extended to the right of distribution (as permitted under the Information Society Directive 2001/29), even when said materials have been previously reproduced in compliance with statutory exceptions. When taken literally, this would mean that, while the law contains a provision allowing a teacher to make a copy (reproduce) a copyright

protected material for teaching purposes, subject to certain conditions, it does not contain any provision allowing the teacher to distribute the copy to his students without the consent of the right holder. However, in practice, it seems to be accepted that in such a situation, the statutory exception allowing the making of the copy also covers the subsequent act of distribution of that copy^[2]. This pragmatic solution can be supported by the argument that generally speaking, according to the wording of the Belgian copyright act, the right of distribution is part of the right of reproduction^[3], and that in this specific case, the act of distribution is a mere continuation of the act of reproduction.

a) reproduction and/or distribution for the purpose of preservation or replacement

Article XI.190 of the (Belgian) Code of Economic Law ("CEL") provides that (free translation):

"When a work has lawfully been published, the author cannot prohibit:

.....

12°. the reproduction limited to a number of copies, to be determined and justified by the goal of safeguarding the cultural and scientific heritage, by publicly accessible libraries, museums or by archives that do not pursue a direct or indirect commercial or economic advantage, and to the extent that it does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Material thus created remains the property of these institutions that renounce any commercial or profitable use thereof.

The author may obtain access thereto on condition of strictly respecting the preservation of the work and subject to fair compensation for the work done by these institutions."

Footnotes

1. [^](#) *The Code on Economic Law, hereinafter "CEL", Book XI.*
2. [^](#) *P. LAURENT, "Les nouvelles exceptions au droit d'auteur en faveur de l'enseignement: l'ère de l'e-learning", A&M 2008, 3, (180) 192.*
3. [^](#) *Article 165 §1, CEL.*

b) reproduction and/or distribution for the purpose of interlibrary lending;

no

Please comment:

The CEL does not provide for a specific exception in respect of interlibrary lending.

However, article XI.192 §1 of the CEL provides an exception which may be relevant in this respect. It permits the lending for educational or cultural purposes, as follows (free translation):

"The author cannot forbid the lending of literary works, databases, photographic works, sheet music, audio recordings and audio-visual works, for educational or cultural purposes by institutions recognized or established by government."

According to article XI.243 CEL, this exception is subject to a remuneration which is determined by the Government.

c) reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or

yes

Please comment:

- From a library or archive perspective

The CEL provides that (free translation):

“When the work has lawfully been published, the author cannot prohibit:

.....

8°. the communication of works by institutions officially recognized or established by the government when the communication is made for the purpose of illustration for teaching or scientific research, it is justified by the non-commercial purpose to be achieved, it takes place in the course of the normal activities of the institution, it is made only through its closed transmission network of the institution, and it does not conflict with the normal exploitation of the work, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible.

.....

13°. the communication, including the making available to individuals, for the purpose of research or private study, of works which are not subject to purchase or licensing terms and which are part of the collections of publicly accessible libraries, scientific- or teaching institutions, museums or archives that do not pursue a direct or indirect economic or commercial goal, through dedicated terminals on the premises of these institutions.”

The scope of article XI.190, 8° BCEL is limited to teaching staff, students and researchers having an access to the closed transmission network^[1] whilst article XI.190.13° CEL can be invoked by all members of the public visiting the institutions described in this article.

Article XI.190.13° refers to *communication*, not to reproduction (e.g. digitisation). Admittedly, the Court of Justice^[2] allows the national legislator to grant the right to digitise. But that right is not (yet) recognized in CEL.

- From a user perspective:

The CEL provides that an author of a work that has lawfully been made public cannot object to the following (free translation):

“When the work has lawfully been published, the author cannot prohibit:

...

5°. the reproduction in whole or in part, on paper or any similar medium, of articles, works of visual and graphic art or the reproduction of short extracts from other works, when this reproduction is made by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, solely for private use and does not conflict with the normal exploitation of the work.

6°. the reproduction in whole or in part, on paper or any similar medium, of articles, works of visual and graphic art or the reproduction of short extracts from other works, when this reproduction is made by the use of any kind of photographic technique or by some other process having similar effects, for the purpose of illustration for teaching or scientific research, it is justified by the non-commercial purpose to be achieved, and it does not conflict with the normal exploitation of the

work, as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

7°. the reproduction in whole or in part, of articles, works of visual or graphic art or short extracts from other works, when this reproduction is made on any medium other than paper or a similar medium, for the purpose of illustration for teaching or scientific research, it is justified by the non-commercial purpose, and it does not conflict with the normal exploitation of the work, as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

...

9°. the reproduction on any medium other than paper or a similar medium of works, made within the family circle and only intended therefor."

The foregoing provisions, read together, enable the users of libraries or archives to make copies of the works concerned, subject to certain conditions that are determined by the medium on which the reproduction is made (paper or other), and the purpose to be achieved (private use, illustration for teaching scientific research, use within the family circle). These exceptions are subject to compensation of the relevant right holders (articles XI. 229, XI.235, XI.240 CEL).

It is reminded here that, in its September 11th 2014 judgement in Case C-117/13 (TU Darmstadt / Eugen Ulmer KG^[3]), the Court of Justice has confirmed that article 5(3)(n) of Directive 2001/29, read together with article 5(2)(c) of that same Directive, must be understood not to preclude Member States from granting to publicly accessible libraries covered by those provisions the right to digitise the works in their collections, if such act is necessary for the purpose of making those works available to users by means of dedicated terminals within those establishments. In the same judgement, the Court decided that the reproduction of works on paper or on a USB stick carried out by users from dedicated terminals, may be permitted under national legislation transposing the exceptions or limitations provided for in article 5(2)(a) or (b). The cited provisions of the CEL indeed allow such use.

Footnotes

1. [M.-C. JANSSENS in F. BRISON en H. VANHEES \(eds.\), Hommage à Jan Corbet, 3rd edition, Brussels, Larcier, 2012, 164.](#)
2. [See the judgment in TU Darmstadt \(C-117/13\), commented here below.](#)
3. [Judgment in Technische Universität Darmstadt v Eugen Ulmer KG, C-117/13, ECLI:EU:C:2014:2196.](#)

d) any other activities, and if so, what activities?

no

Please comment:

There are no other exceptions for libraries and archives than those mentioned above.

2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

Article XI.190.8° CEL (the exception for the communication of works through closed transmission networks) refers to institutions "recognized or established by government", leaving it open to

government to add or remove institutions falling under the scope of this exception without having to change the law.

Article XI.190,12° CEL (the exception for the reproduction for the purpose of preservation) refers to “publicly accessible libraries, museums or archives that do not pursue a direct or indirect economic or commercial advantage” and does not provide that such institutions must be recognized or established by government.

Article XI.190,13° CEL (the exception for the communication and making available or works through dedicated terminals) refers to “publicly accessible libraries, scientific- or teaching institutions, museums or archives that do not pursue a direct or indirect economic or commercial goal” and does not provide that such institutions must be recognized or established by government.

3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.

Response (from a library or archive perspective):

- With regard to the number of copies.

Only article XI.190.12° CEL refers to a number of copies determined and justified “by the goal of safeguarding the cultural and scientific heritage” without putting forward an exact number. In case of dispute, it will be left to the discretion of the courts what is reasonable in light of the purpose and taking into consideration that no prejudice may be caused to the normal exploitation of the work and the legitimate interests of the author.

For the other exceptions, there is no reference to an exact number of copies. As will be explained below (question 10), it is however accepted under Belgian law that the Three-Step Test applies to each exception mentioned above.

- With regard to the size (portion / integral reproduction) of the work that is used.

Articles XI.190.8°, 12° and 13° CEL, which can all apply to communications, reproductions or the making available of works by libraries and archives do not refer to an explicit size limit. The Three-Step Test, as partially repeated in the text of articles XI.190.8° and 12° CEL however applies.

- With regard to the form of reproduction.

Articles XI.190.8° and XI.190.13° CEL stipulate that works may only be communicated or made available under these exceptions via either a closed transmission network (article XI.190,8° CEL) or a dedicated terminal (article XI.190, 13° CEL).

As indicated above, the response is different from a user perspective. As elaborated on sub question 1 (c) above, restrictions as to the applied medium (carrier), reproduction size and purpose are to be respected by library or archive users.

4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created

copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.

The first sentence of article XI.190 CEL states that the copyright exceptions provided in this article only apply for works that have been "lawfully published". In recent years, there has been discussion about the correct interpretation of the reference to works that have been "lawfully published". A part of Belgian scholars have argued that this condition only refers to the author's right of divulgation^[1] whilst others have analysed this as excluding illegal copies as a source of reproduction^[2]. Given the recent jurisprudence of the Court of Justice (see case C-435/12 of April 10th 2014, ACI Adam BV / Stichting de ThuisKopie) - and although this judgement only concerns the interpretation of article 5.2(b) of Directive 2001/29 (private use copy) - there is reason to believe that the reference to "lawfully published" works excludes illegal copies of works as a source for (authorized) reproductions or communications as provided in article XI.190 CEL.

Footnotes

1. [S. DUSSOLIER](#), *Droit d'auteur et protection des œuvres dans l'univers numérique - Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres.*, Brussels, Larcier, 2007, nr. 587.
2. [A. BERENBOOM](#), *Le nouveau droit d'auteur et les droits voisins*, Brussels, Larcier, 2005, 313.

5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) performance and/or display for educational purposes;

yes

Please comment:

Article XI.190.4° CEL provides that (free translation):

"When the work has lawfully been published, the author cannot prohibit:

...

4°. the free of charge performance within the framework of school activities, whether or not within the premises of the teaching institution;"

It is clearly accepted that the term "performance" covers the communication of copyright protected materials such as power point presentations. By contrast, it is disputed whether that term also covers the use of works in the context of communication at distance (video conferences, etc.), e.g. for the purpose of teaching at distance^[1]. The exception of article XI.190.4° is limited to "school activities", which is generally viewed as requiring an element of teaching and excludes for example playing music at school festivities^[2].

Article XI.190.11° CEL provides a specific exception for the performance of a work during public examinations and states that an author cannot prohibit (free translation):

"the free of charge performance of a work during a public examination, when the purpose of the performance is not the work itself but rather the assessment of the performer or performers in consideration of granting a certificate of qualification, degree or title related to a recognized

education program.”

Unlike in article XI.190.4° CEL, the term “performance” is generally interpreted in a clearly restrictive way for this exception.

Footnotes

1. [^](#) See in favour of this position, M.-C. JANSSENS o.c., 157.
2. [^](#) See M.-C. JANSSENS, o.c., 158.

b) reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);

yes

Please comment:

Article XI.189 CEL states:

“§1. Citing of a work that has lawfully been published, for the purpose of criticism, polemic, review, teaching, or in the framework of scientific work, does not infringe on copyright, to the extent it takes places in accordance with fair professional practices and is justified by the intended effect. Citing as described above must include a source and name of the author, unless this turns out to be impossible.

§2. Composing an anthology for education that does not pursue a direct or indirect economic or commercial advantage, requires the consent of the author out of whose work extracts are being compiled. If the author has died, the consent of the right holders is not required to the extent that the extract, including its place and presentation, respects the author’s moral rights and that a fair compensation is paid as agreed upon between parties or, by lack of agreement, by a judge in accordance with fair practices.”

Article XI.189 CEL regulates two distinct hypotheses: §1 permits limited citations for the purpose of *inter alia* teaching (corresponding to Article 5(3)(d) Directive 2001/29). The composing of anthologies is dealt with in §2 of the same article and does not amount to an actual exception while the author is alive (his/her consent is required^[4]), but after his/her death, the anthology can be published on condition that his/her moral rights are respected, the parties find an agreement on the fair compensation to be paid (absent which the court will decide upon the compensation).

This consent will not be necessary when applying the copyright exceptions included in articles XI.190.6°, XI.190.7°, 190,8° and XI.190.13° BCEL as cited above.

Footnotes

1. [^](#) This consent will not be necessary when applying the copyright exceptions included in articles XI.190.6°, XI.190.7°, 190,8° and XI.190.13° BCEL as cited above.

c) making translations;

yes

Please comment:

Whether or not making translations is included in the copyright exception for educational purposes, is subject to discussion^[1]. There are no (published) Belgian court decisions on the matter and scholars have signalled that clarification by the legislator would be appropriate.

Footnotes

1. [^] [M.-C. JANSSENS o.c., 162.](#)

d) making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);

yes

Please comment:

Article XI.190.8° CEL states that an author cannot prohibit (free translation):

“the communication of works by institutions officially recognized or established by the government for the purpose of illustration for teaching or scientific research, when it is justified by the non-commercial purpose, made in the course of the normal activities of the institution and through its closed transmission network, and it does not conflict with the normal exploitation of the work, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible.”

The exception here above only concerns the *communication* of a work. As far as the prior reproduction of this work is concerned (i.e. the reproduction of the work before its communication through a closed transmission network), other conditions need to be fulfilled in order for the user to benefit from a statutory exception to the exclusive reproduction right. Such prior reproduction on a medium than paper will need to fulfil the conditions of article XI.190.7° CEL as cited sub question 1c above.

e) reproduction and/or distribution for research purposes; or

yes

Please comment:

Reproduction of works for the purpose of research is included in articles XI.190.6°, XI.190.7° CEL as cited above. As already mentioned^[1], the distribution of copies is included in the constraints of the exceptions.

Footnotes

1. [^] [See preliminary remark above.](#)

f) any other activities, and if so, what activities?

yes

if so, what activities?:

Article XI.190.13 CEL – cited with regard to libraries and archives – is also relevant for scientific and teaching institutions and provides that an author cannot prohibit (free translation):

“the communication, including the making available of works not subject to purchase or licensing terms which are part of the collections of publicly accessible libraries, scientific- or teaching institutions, museums or archives that do not pursue a direct or indirect economic or commercial

advantage, consisting of communicating or making the work available to individual members of the public through dedicated terminals on the premises of these institutions and this for the purpose of research or private study."

6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

Article XI.190.8° CEL (the exception for the communication of works through closed transmission networks) refers to institutions "recognized or established by government", leaving it open to government to add or remove institutions falling under the scope of this exception without having to change the law.

The other exceptions (articles XI.190.6°, XI.190.7°, XI.190.11°) refer to a purpose of education or scientific research and add the requirement of a non-profit seeking goal. This latter term should be interpreted in line with recital 42 of Directive 2001/29 which reads: "*When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.*"

7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

• With regard to the scope of activities.

Article XI.189, §1-2 CEL provides that only citations or anthology for educational purposes fall in the scope of the exception.

Article XI.190.4° CEL (performance during school activities) limits the performance to a school activity.

Articles XI.190.6° and 7° CEL (reproduction on paper (6°) and other medium (7°)) require that the reproduction is made for the purpose of illustration for teaching or for scientific research.

Article XI.190.8° CEL (communication through a closed transmission network) requires the same and adds that only institutions recognized or established by government can rely on this exception.

Article XI.190.11 CEL (performance during public examination) limits the exception to a performance for the purpose of assessing a performance in light of granting a degree or title.

Article XI.190.13 CEL (communication through dedicated terminals) is limited to communication for private study and research.

• With regard to the number of copies.

None of the educational / scientific research exception makes reference to an exact maximum number of copies. As will be explained below (question 10), it is however accepted under Belgian law that the

Three-Step Test applies to each exception mentioned above.

- With regard to the size (portion / integral reproduction) of the work that is used.

Article XI.189, §1CEL (citations) is limited to an extract justified for the purpose of criticism, review, etc. (citation right).

Article XI.189, §2CEL (anthologies) refers to fragments out of works without stating an exact size limit. As an anthology requires the author's consent (unless he/she is no longer alive), the size of the anthology will be subject to negotiation.

Article XI.190.4° CEL (performance during school activities) does not provide a size limit.

Article XI.190.6° CEL (reproduction to paper for illustration for teaching and scientific research) and article XI.190.7° CEL (reproduction to a medium other than paper for illustration for teaching and scientific research) provide no size limit for reproductions of articles and works of visual or graphic art. For other works, the reproduction should be limited to "short extracts".

Article XI.190.8° CEL (communication through a closed transmission network) does not mention any size limit. As flagged sub question 5.d. above, one should however take into consideration that a size limit may apply for the reproduction of the source of digitization.

Article XI.190.11° and 13° CEL do not refer to an explicit size limit. The three-step test however applies.

- With regard to performing persons.

Article XI.189, §1CEL (citations) is not limited to beneficiaries acting in a specific capacity (teacher, student or other).

Article XI.189, §2CEL (anthologies) does not explicitly refer to people acting in a specific capacity (teacher or student) and merely states that the anthology should be created "for education". This does not seem to rule out students making an anthology as an assignment.

Article XI.190.4° CEL does not explicitly refer to people acting in a specific capacity (teacher or student) and applies to both.

Articles XI.190.6° and 7° CEL (reproduction on paper and medium other than paper for illustration for teaching and scientific research) applies to students, teachers or staff making copies for students^[1].

Article XI.190.8° CEL (communication through a closed transmission network) is limited to institutions recognized or established by government.

Article XI.190.11° CEL (performance during public examination) logically only applies to the person performing for the purpose of the examination.

Article XI.190.13° CEL (communication through dedicated terminals) is limited to dedicated terminals owned or controlled by publicly accessible libraries, scientific or educational institutions, museums and archives.

- With regard to the form of reproduction.

Article XI.189, §1 and §2 CEL (citations - anthologies) is not limited to a specific form (medium) of reproduction.

Article XI.190.4° CEL is limited to a “performance” of a work. As explained above, it is disputed whether the term “performance” includes both the use of a work through a live presentation such as power point presentations *and* a communication at distance (e.g., video conferences, etc.), for example for the purpose of distance learning.

Articles XI.190.6° and 7° CEL explicitly refer to the allowed medium: either on paper or equivalent medium (article XI.190.6° CEL) or on other medium than paper (article XI.190.7° CEL).

Article XI.190.8° CEL (communication through a closed transmission network) is limited to institutions recognized or established by government. Teaching staff, students and researchers are allowed access to the works.

Article XI.190.11° CEL (performance during public examination) logically only applies to the performance by the person that is being assessed.

Article XI.190.13° CEL (communication through dedicated terminals) is limited to digital versions that are to be consulted on terminals within publicly accessible libraries, scientific or educational institutions, museums and archives. Individuals of the general public consulting such terminals are allowed to access the works. (Also see reference to the Darmstadt judgement sub question 1c above).

Footnotes

1. [^](#) F. DE VISSCHER and B. MICHAUX, *Précis du droit d’auteur, Brussels, Bruylant, 2000, 114.*

8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

See question 4 above.

For the questions below, please provide an answer for each exception or limitation mentioned above.

9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation?

Relevant statutory provisions were cited above.

10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?

Belgian law does not provide a specific overarching clause stipulating the Three-Step Test¹¹. Nevertheless, Belgian copyright law partially repeats the Three-Step Test in particular exceptions and limitations, i.e.

- Art. XI.190.5° CEL (re reproduction on paper for private use)
- Art. XI.190.6° CEL (re reprography for education or scientific research)
- Art. XI.190.7° CEL (re reproduction on other carriers than paper for education or scientific research)
- Art. XI.190.8° CEL (re communication to the public to teaching staff, students and researchers with access to the closed transmission network)
- Art. XI.190.12° CEL (re reproduction for safeguarding the cultural and scientific heritage)
- Art. XI.190.13° CEL (re communication and making available of works through terminals)
- Art. XI.190.15° CEL (re reproduction and communication in favour of disabled persons)
- Art. XI.191 § 1 CEL (re reproduction and communication of databases)
- Art. XI.217 CEL (re neighbouring rights).

Even though this disparate textual approach might cause confusion at first sight, it has been generally accepted under Belgian copyright law that the Three-Step Test applies to each and every exception mentioned in Belgian copyright law²¹, even without a specific reference to the Three-Step test.

Footnotes

1. [^](#) M.-C. JANSSENS, *o.c.*, 161 and the references cited there.
2. [^](#) M.-C. JANSSENS *o.c.*, 151 and the references cited there.

- 11) Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter, please explain the criteria/procedure(s).

As a principle, the use under the exceptions or limitations is permitted automatically under Belgian copyright law.

An exception to this rule is stated in Art. XI.189 § 2 CEL (see above sub 5.B), which provides for a compulsory license for the use of works in an anthology – in case the author has died²¹. This compulsory license consists in a “*fair compensation*” that is to be “*agreed upon between parties*” (copyright owners and anthology compilers) “*or, by lack of agreement, by a judge in accordance with fair practices*”. Only when such a fair compensation has been determined, one can rely upon the anthology exception when the author of the particular copyrighted work has died.

Footnotes

1. [^](#) *When the author is still alive, his/her authorization is required.*

- 12) Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?

Not all but various exceptions and limitations under Belgian copyright law provide in a mandatory compensation/remuneration:

- i. **Compensation for the exception on the private use reproduction (art. XI.229-XI.234 BCEL)**

Art. XI. 229 CEL provides a mandatory compensation for the author, performing artist, publisher of literary works and graphic art and producer of audio works in the private use reproduction exception (on another carrier than paper) and the exceptions for disabled people.

These compensations consist of fixed fees that have to be paid by the manufacturer, importer or purchaser of:

- carriers that are clearly used for making private use reproductions on an any medium other than paper or similar carrier, or
- devices that are clearly used for such reproductions.

These fixed fees have to be paid on the date on which the carriers and devices are introduced to the Belgian market. These compensations are to be collected by collecting societies which will subsequently allocate the compensations to the authors, performing artists, publisher of literary works and graphic art and producers.

i. Compensation for the exception re reprography (art. XI. 235-239 BCEL)

Art. XI. 235 CEL provides a mandatory compensation/remuneration for the author or publisher of literary works and databases in the reprography exception, i.e. the reproduction on paper or a similar carrier for private use, education or scientific research and for disabled people.

These compensations consist of fixed fees that have to be paid by the manufacturer, importer or purchaser of devices that are clearly used for making private use reproductions on paper or a similar carrier.

These fixed fees are paid on the date on which the devices are introduced to the Belgian market. These compensations have to be proportionate to the amount of reproductions made and they are due by:

the persons or entities that exploit the acts under these exceptions; or

the persons or entities that put such a device to the disposal of the persons mentioned in the previous bullet (in such a case, those persons mentioned in the previous bullet are exempted from payment).

These compensations are to be collected by collecting societies which will subsequently allocate the compensations to the authors, performing artists, publisher of literary works and graphic art and producers.

i. Compensations for reproduction and/or communication for education and scientific research (art. XI.240-242 BCEL)

Art. XI.240 CEL provides a mandatory compensation/remuneration:

§ 1 for the author or publisher of literary works or databases for the reproduction on any carrier other than paper with the purpose of education or scientific research;

§ 2 for the author or publisher of literary works or databases for the communication through transmission networks with the purpose education or scientific research

§ 3 for the performing artists, producers of sound recordings and of first fixations of cinematographic works for (i) the reproduction of short fragments for education and research (art. XI. 217 § 5°) and (ii) the communication through transmission networks with the purpose education and research (art. XI. 217 § 6°).

These compensations have to be proportionate to the exploitation acts that are performed under these exceptions and they have to be paid by the persons exploiting these exceptions. This means that these compensations are in first instance due by the users themselves, being physical persons or entities. As a consequence, the researchers and teachers are often liable for making such payment. However, Belgian copyright law provides that these persons or entities can be exempted from payment, when the payment is made by the education and research institution that reproduces or communicates the works under these exceptions^[1].

i. Compensation for the exception on public lending (art. XI.243-245 BCEL)

Art. XI.243 CEL provides a mandatory compensation/remuneration:

§ 1 (see above 1.B) for the author and publisher of literary works, databases, photographic works and sheet music;

§ 2 (see above 1.B) for the author, performing artist(s) and producer of audio works and audio visual works.

These compensations are determined by Royal Decree taking into account, a.o. the volume of the collection of the lending institution and the amount of loans.

The compensations are collected by collecting societies and are subsequently allocated as follows:

- 70% to the authors and 30% to the publishers pursuant to Art. XI.243 § 1 CEL;
- Pro rata with each share of the author, performing artist(s) and producer pursuant to art. XI.243 § 2 CEL.

Footnotes

1. [^] M.-C. JANSSENS in F. BRISON en H. VANHEES (eds.), *Hommage à Jan Corbet, 3rd edition, Brussels, Larcier, 2012, 375.*

13) Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.

Currently under Belgian law, there is none. Nevertheless, by lack of any specific treatment for orphan works, Belgian scholars presume that the above-mentioned exceptions and limitations also apply to orphan works^[1].

Footnotes

1. [^] M.-C. JANSSENS, "Op zoek naar een adoptieregeling voor wezen in het auteursrecht (A « diligent search » into the issue of orphan works)" *I.R. D.I. 2009, 12 and 14.*

14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?

Pursuant to articles XI.193 and XI.219 CEL all exceptions under Belgian copyright law are mandatory, which means that they cannot be overridden by contracts.

15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?

yes

If so, please explain those efforts.:

There is no official information available in this respect.

According to unofficial sources, it appears that some public libraries started with a test project to lend e-books. The lending fees were determined in cooperation with the publishers. It seems that due to technical issues, this project has been recently aborted. Nevertheless, the libraries announced that they intended to re-launch a new version of a similar project in a near future.

II. Policy considerations and proposals for improvements of the current law

16) Should there be any exceptions or limitations to copyright protection for libraries and archives?

yes

If yes, in relation to what activities?:

Yes: in relation to the activities that pertain to the public interest mission that libraries and archives are supposed to pursue^[1]:

- Preservation,
- Restoration (including format shifting),
- Making accessible (dissemination) to the public of cultural, scientific or informational works^[2].

The public interest mission of libraries and archives can be related directly to fundamental rights (protected in the EU Charter of Fundamental Rights) such as the right to freedom of expression and information, right to privacy, the freedom of the arts and sciences, the right to education.

Consequently, there should be exceptions to copyright protection (reproduction, communication to the public including the making available right, and distribution including lending) for libraries and archives to the extent that such is required to achieve the public mission these institutions are entrusted with.

The exact formulation of such exception should however reconcile diverse interests, especially the interest of the libraries and archives (whose mission is to preserve and disseminate cultural and scientific works), of the general public and the individual user (who wishes to enjoy the opportunities created by digital and online technologies to access cultural, scientific and informational works) and of the authors, performers and other right holders (who have exclusive rights protecting the exploitation of their works and creations - including new emerging exploitation models). Particular attention should be paid to the digitisation of the collection (transforming an analogue format to digital format) and, independently from the digitisation, the availability to the public of the work in the digital format (onsite or online).

The taking into account of the interest of the right holders should include the payment of a fair compensation in appropriate cases.

Footnotes

1. [^](#) See on the role of libraries, archives and museums : S. DUSOLLIER, "The limitations and exceptions to copyright and related rights for libraries, research and teaching uses" in J.P. TRIAILLE e.a. Study On The Application Of "Directive 2001/29/Ec On Copyright And Related Rights In The Information Society" (The "Infosoc Directive"), available at http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf , p. 258 et s.
2. [^](#) In TU Darmstadt, the CJEU stated that the core mission of publicly accessible libraries is the dissemination of knowledge. In relation to this mission, the exception contained in art. 5(3)(n) promotes "the public interest in promoting research and private study" (judgment in TU Darmstadt ECLI:EU:C:2014:2196, par. 27).

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

yes

If yes, in relation to what activities? :

Yes. In the course of teaching and research, many activities may have some copyright relevance^[1]:

- **Teachers** may reproduce protected subject matter while preparing their classes, include some in the teaching materials, they may hand out protected subject matter (such as newspaper articles or graphic illustrations) as study material, they may make such protected material available in an electronic version (by e-mail or e-learning platforms) and they may display protected creations in the class room (e.g. powerpoint presentations, show videos or listen to audio fragments).
- **Students** may copy works while preparing exercises, exams or (written) assignments, they may quote fragments for the same purposes or otherwise use existing materials in school projects, they may display protected works in presentations in the class room and make such available to their fellow students (via e-mail, the e-learning platform of the school or otherwise),...
- **Researchers** may copy materials while conducting their research (e.g. while preparing a research paper or a conference presentation), they may include some protected elements in their "output" (e.g. quoting existing materials in articles or presentations), distribute this output (e.g. publication in a journal) or make it available to the public (online publication, possibly through "open access" or other repositories). "Data mining" is also relevant in this context (be it by the researcher or her institution).
- The **teaching or research institutions** may deploy activities in support of the teaching and research by their teachers and students.

These activities are commonly considered as a public interest objective and can be related directly to fundamental rights as protected in the EU Charter, e.g. freedom of expression and information, freedom of the arts and sciences, right to education.

The protection of these fundamental rights is (and should be) accommodated in copyright in the form of statutory exceptions.

The precise formulation of the exceptions should reconcile the interests of the various stakeholders, including the protection of the exploitation of protected works (also through new business and exploitation models) and the legitimate interests of the right holders. This may be a delicate matter, especially for authors and publishers of educational and scientific works (e.g. school books, teaching material, educational software,...).

Footnotes

1. [^](#) S. DUSOLLIER gives an extensive overview of the acts teachers, students, researchers and institutions may engage in: S. DUSOLLIER, l.c., 353-355.

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

yes

Why?:

At the legislative level, it is a useful test: it requires the legislature to draft a carefully formulated exception, with precise conditions in order to achieve the delicate balance between the various stakeholders.

After that, the courts assess whether any given use falling within the scope of an exception also complies with the three-step test.

19) Should the exception or limitation be capable of being overridden by contract? Why? Why not?

Under Belgian law, the application of an exception cannot be overridden by contract (exceptions to the exclusive rights being mandatory – see art. XI.193 CEL). It should be verified whether that rule is actually in compliance with the balance of interests of the various stakeholders and whether it is reasonably justified on the ground of the public interest objective of the exceptions concerned.

20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not?

The need for a compensating remuneration right should be assessed on the economic effect that any exception could have on the author or right holder, in conformity with the CJEU decisions on this point. It could be argued that the exception allowing libraries or archives without commercial or economic objective to make specific reproductions in the context of their public interest mission (e.g. preservation of the collection) is not likely to have a significant impact on the exploitation of the work. By contrast, other uses such as the (digital or analogue) copying of protected works by students, teachers, researchers or the teaching or research institution may have a bigger impact, which justifies a compensation by means of a remuneration.

21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

A number of questions should be further examined in relation to the exception for libraries and archives, in order to improve the current law where needed:

- **Digitisation of collections and making these accessible to the public.** Libraries and archives are increasingly involved in (international, European) projects pursuing the preservation and opening up of their collections. It is uncertain whether such large-scale digitisation efforts fall within the scope of the exception covering reproductions for the preservation of cultural or scientific heritage. It is certain that such projects exceed the scope of the exception for communicating the library or archive collection via dedicated terminals on the premises of the establishments where the digitised collections are accessible to the general public (online, using their own devices). The strict conditions imposed by the exception under current law constitute an important obstacle to such projects and therefore it should be verified whether these conditions cannot be replaced by other conditions which would enhance the

accessibility of the collection without compromising the exploitation of the work.

- **E-lending.** Libraries are experimenting with e-lending initiatives¹¹. Such experiments are currently not so much based on the exception for lending by public libraries but on negotiated licences with publishers. It should be examined whether the limitation to the rights for the purpose of public lending should also cover works in electronic formats (books, music, video, video games,...), considering the educational and cultural objective of the exempted use and the beneficiary of the exemption (public institutions).

- **Teaching and research.** The exceptions covering teaching and research are fairly large and allow the students, teachers, researchers and institutions to pursue their studying, teaching or researching activity. Some conditions could be clarified, such as the exemption of protected acts for teaching or research to the extent that such is justified by the "non-profit objective", the beneficiaries of some exceptions (institutions recognised or founded by the government") or the type of activities covered ("school activities").

Footnotes

1. ¹¹ S. DUSOLLIER, "A manifesto for an e-lending limitation in copyright", JIPITEC 2014, Vol. 5. (urn:nbn:de:0009-29-40961), available at <http://www.jipitec.eu/issues/jipitec-5-3-2014/4096>[<http://www.jipitec.eu/issues/jipitec-5-3-2014/4096>]

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

see below.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

Libraries, archives or other institutions that are publicly accessible, without commercial purpose (direct or indirect), with a public interest mission (preservation of cultural or scientific heritage, restoration and dissemination of culture and/or science).

b) to what activities should these exceptions or limitations apply;

- Constitution and preservation of the collection, including digitisation of the collection;
- Accessibility of the collection through onsite consultation (including through dedicated terminals on the premises, possibly relaxing this condition in the current technical environment); considering the international and European efforts on digital libraries and the e-accessibility of scientific and cultural heritage, the definition of the exception should be aligned to these objectives;
- Lending (including possibly e-lending on strict conditions).

c) under what conditions should the activities be undertaken or the copyrighted work used?

- Non-commercial use;
- The exception should not compromise the normal exploitation of protected works, including future or developing exploitation models in an online environment nor unreasonably prejudice the legitimate interests of the right holders;
- Accessibility restricted to a defined public (e.g. researchers, member of the library/archive,...);
- Compensation through remuneration if the exception is likely to affect the exploitation of the work (in particular for lending and e-lending);
- Possibly additional services (e.g. document delivery services), under a collective licensing regime.
- ...

The objective of harmonisation requires in the first place that all harmonising States (EU or international harmonisation) impose the same conditions (with no or little margin to deviate from the adopted text), as to enable international/European projects. Alternatively, another mechanism should be adopted to neutralise the effects of the territorial nature of copyright.

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;

Educational and research institutions with a public interest mission. Attention should be paid to the non-commercial nature of their activities. A first option could be that the exceptions and limitations do not apply to institutions which pursue a commercial purpose in general. If a distinction has to be made between those institutions and others, useful indications should be provided to make that distinction. In this context, it could be considered that the mere fact that an institution imposes an enrolment fee does not imply in itself that the institution pursues a commercial purpose in general. Apart from the distinction above, it should be clarified that the exceptions and limitations do not apply to the specific activity at stake if that activity gives rise to a payment the amount of which goes beyond what is necessary to cover the operating costs of the institution¹.

Footnotes

1. [^] See recital (11) of the Directive 2006/115 on rental right and lending right, in relation to lending not made for a direct or indirect economic or commercial advantage.

b) to what activities should these exceptions or limitations apply;

Non-commercial teaching, research, school activities (where the public is restricted to the students/pupils, researchers, teachers and institutions).

c) under what conditions should the activities be undertaken or the copyrighted work be used?

Taking into account the interests of the right holders, the applicable conditions should include

- The non-commercial nature of the activities (cf. a))
- A fair compensation in case of harm to the exploitation of the work
- In appropriate cases, a limitation of the size of the work used, depending on the type of work
- Mention of source and respect of moral rights to a reasonable extent

The objective of harmonisation requires in the first place that all harmonising States (EU or international harmonisation) impose the same conditions (with no or little margin to deviate from the adopted text), as to enable international/European projects (e.g. researcher and student mobility within EU). Alternatively, another mechanism should be adopted to neutralise the effects of the territorial nature of copyright.

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

26) Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?

Automatically.

27) How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made?

On the basis of the use of the work and the (potential) harm to the exploitation of the work.

28) What special treatment, if any, should there be for use of orphan works within such exception or limitation?

Cf. Implementation of EU directive.

29) In what circumstances should the exception or limitation be capable of being overridden by contract?

The circumstances in which the exceptions or limitations could possibly be overridden by contract should be directly related to the need for the protection of the normal exploitation of the work and, to a reasonable extent, of the legitimate interests of the right holders.

It should be considered whether it is wise to provide that, as a general and mandatory rule, the exceptions and limitations cannot be overridden by contract.

30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

In cases where it is not clear whether the exception or limitation apply, it might still be useful for the stakeholders to address the use of works through the conclusion of contractual arrangements.

Summary

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.

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