Remix prohibited – How rigid EU copyright laws inhibit creativity

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ABSTRACT

With the emergence of the digital environment, the issue of "transformative uses" in copyright law has gained renewed interest in legal literature.

While many authors emphasized the challenge that these transformative practices constituted for copyright law, there has been a clear lack of comprehensive study of the extent of copyright law's (in)hospitality to such practices. In addition, too little attention has been paid to possible solutions to resolve this conflict inside the copyright regime.

This paper aims to contribute to fill these two gaps. In this first paper, we will provide a comprehensive assessment of the status transformative uses in EU, Belgian and French law, informed by a vast body of case law. In a second paper, we will discuss potential solutions drawing inspiration from Canadian copyright law, which has recently experienced both the introduction of a legal exception for user generated content, and a court-led shift from a traditional closed-list fair dealing system to a broader, semi-open system of exceptions and limitations..

INTRODUCTION

It has become almost cliché to recall that copying is an integral part of artistic creation. Yet it apparently needs some repeating, as it is a reality that copyright systems have failed to fully acknowledge to this day.

Great painters have always transformed pre-existing works to turn them into something of their own[1]. In the 20th century, artists started to borrow more than ever and after Duchamp, developed comprehensive practices fully based on the reuse of existing works: Dada, Pop Art,

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1 See *e.g.* the catalog of the exhibition *Copier Créer – De Turner à Picasso : 300 oeuvres inspirée par les maîtres du Louvre*, Paris, Edition de la Réunion des musées nationaux, 1993.

Conceptual Art, etc. which fit in a broad category, the so-called "Appropriation art". Hosted by the greatest Museums, works by Duchamp and his heirs are considered among the most important works of art of the last century. In the early 90's, the *Rogers v. Koons*[2] case drew some attention to the legal aspects of Appropriation Art.

The increased accessibility of the means of creation and dissemination of intellectual creations has led to a popularization of these practices of reuses. These new technological tools create the opportunity for a transition to a more active culture, where users actively engage in the creation of meaning by playful re-creation and critical re-interpretation of existing intellectual creations[3]. These new practices of remix, mash-ups, fan fiction, modding, etc. also offers new opportunities for learning and empowering individuals through cultural participation[4].

These transformative practices are marginalized by the copyright regime : indeed, such creative practices based on the reuse of existing works are at odds with a legal regime based on the prohibition of unauthorized reproduction. However the goal of a copyright regime is to encourage all forms of creativity, however alien they are to the traditional model of original creation and authorship. Copyright law should be designed in a way that makes it as much as possible agnostic to the forms of creation, and allow it to accommodate (or even support) the ever-changing cultural practices.

This paper is the first installment in a series of two. The aim of this first paper is to substantiate the claim that copyright law is inhospitable to transformative use, by drawing up a compehensive inventory of the many legal issues that may arise in the path of transformative uses of existing works. In addition to European law, we will focus on Belgian and French national laws (both representative of the rigidities of european copyright regimes), with an emphasis on case law. Although the case for allowing more breathing space for transformative use has already been made by other scholars[5], our hope is that a detailed overview helps drawing

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2 *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

3 See L. LESSIG, *Remix – Making Art and Commerce Thrive in the Hybrid Economy*, New York, The Penguin Press, 2008; C. Lankshear, M. Knobel, Ch. Bigum & M. Peters (eds), *A new literacies sampler*, New York: P. Lang, 2007

4 See H. JENKINS, "Confronting the challenges of participatory culture: Media education for the 21st century". MacArthur Foundation, 2008, available on http://digitallearning.macfound.org (last access November 25, 2014)

5 See *e.g.* M. SENFTLEBEN, "Bridging The Differences Between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine", *57 J. Copyright Soc'y U.S.A.* 521 (2010); P.B. HUGENHOLTZ, M.R.F. SENFTLEBEN, "Fair use in Europe. In search of flexibilities", Amsterdam Law School Legal Studies Research Paper No. 2012-39, Institute for Information Law Research Paper, available on www.ssrn.com (last access March 11, 2014); L. Lessig, *Free Culture,* New York, The Penguin Press, 2004.

attention to the extent of the problem.

In a second paper, we will consider two possible way forward inspired by recent evolutions in Canadian copyright law.

In this paper, we will define broadly "transformative uses" as encompassing all derivative creations based on pre-existing works without authorization of the author of the first work, whether they are as such protected by copyright or not. This paper will focus on transformative uses of works belonging in the field of visual art, including sculptures, paintings, photography and other graphic works. Although musical and cinematographic works raise particular problems that we cannot reasonably cover in this article, notably with regard to related rights[6], the main issues will be for the most part quite similar with visual works. Moreover, although we are concerned by both artistic transformative uses and emerging remix practices in the digital environment, the discrepancy in the volume of case law will drive us to concentrate more on the former. In general, our conclusions will be largely applicable to other types of works.

WHERE DO WE STAND? TRANSFORMATIVE USES UNDER EU, BELGIAN AND FRENCH LAW

Relevant legislation. – Copyright provisions in Belgium and France can be found respectively in the Book XI "Intellectual Property" of the Code of Economic Law, inserted by the law of 10 April 2014[7] ("Code de droit économique" hereafter CDE) and the *Intellectual Property Code*, created by the Law No. 92-597 on the Intellectual Property Code (Legislative Part), July 1st, 1992 [8] ("Code de la propriété intellectuelle" hereafter CPI). Since then, both have been amended to implement the InfoSoc Directive 2001/29, respectively through the Law transposing into Belgian Law the European Directive 2001/29/EC of May 22, 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, May 22, 2005[9] and the Law No. 2006-961 on Copyright and Related Rights in the Information Society, August 1st,

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[6] Internationally, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, the WIPO Performances and Phonograms Treaty (WPPT) of 1996 and more recently the Beijing Treaty on Audiovisual Performances of 2012 entitle performers (*i.e.* actors, singers, musicians, dancers, ...) with economic and moral rights on their performances.

[7] *M.B.*, July 21, 1994, p. 19297.

[8] *J.O.*, July 3, 1992, p. 8801.

[9] *M.B.*, May 27, 2005, p. 24997.

2006[10].

The elusive originality criterion. – Discussing transformative uses implies first defining the originality criterion, being the very condition of copyright. The originality criterion has received a certain level of harmonization in European law[11] with the adoption by the Court of Justice of the European Union (CJEU) of its (vague) standard of originality as the "author's own intellectual creation"[12]. The Court further held that this same criterion applied to every type of work[13] and also clarified that the criterion has to be understood according to the "continental tradition", that is, to reflect the personality of the author[14]. Since then, Belgian and French case law have nominally sticked to this interpretation[15].

However, although this "personal stamp of the author" criterion has sometimes been considered as a high threshold, the case law of lower courts in both Belgium and France largely invalidates this conclusion. Indeed, in recent years, creations that have been considered original

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[10] *J.O.*, August 3, p. 11529.

[11] See generally E. ROSATI, *Originality in EU Copyright – Full Harmonization through Case Law*, Cheltenham (UK), Northampton (MA, USA), Edward Elgar Publishing, 2013.

[12] CJEU, July 16, 2009, *Infopaq International v. Danske Dagblades Forening*, C-5/08, § 37. For the most recent case, see CJEU, January 23, 2014, *Nintendo v. PC Box and 9Net*, C-355/12, § 21.

[13] See CJEU, December 22, 2010, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, C-393/09, § 46 (applying the same standard to graphic user interface); CJEU, May 2, 2012, *SAS Institute Inc. v. World Programming Ltd*, C-406/10, § 45 (applying the same standard to programming language and data files format).

[14] CJEU, December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 92 and 94; CJEU, March 1st, 2012, *Football Dataco Ltd c. Yahoo! UK Ltd and others*, C-604/10, § 38.

[15] For the first decisions in Belgium at the highest judiciary level, see Benelux Court of Justice, May 22, 1987, *Ing.-Cons.*, 1987, p. 139; Court of cassation, 27 avril 1989, *Pas.*, 1989, I, p. 908, No. 492 ; October 25, 1989, *Pas.*, 1990, I, p. 239, No. 122. In a recent case, the Court of cassation endorsed the European definition but surprisingly considered that the stamp of the author's personality is not required, see Court of cassation, January 26, 2012, *Pas.*, 2012, I, p. 202, No. 69, *I.R.D.I.*, 2012, p. 199, note F. GOTZEN, *J.L.M.B.*, 2012, p. 977, obs. A. JOACHIMOVICZ, *A&M*, 2012, p. 336, note F. BRISON. Commentators suggested this was a slip of the pen. The Court of cassation has confirmed their opinion and therefore departed from this last mentioned case in two decisions from October 31, 2013 (*J.L.M.B.*, 2014, p. 445) and March 17, 2014 (available on www.juridat.be), holding that the creation should reflect the author's personality.

In France, see the leading commentators A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *Traité de la propriété littéraire et artistique*, 4th ed., Paris, LexisNexis, 2012, p. 118 and following, and references.

include neologisms[16], titles[17], slogans[18], press dispatches[19], food photographs[20], insurance general terms[21], etc. In the state of positive law, a clear understanding of what is actually original is elusive. It seems that almost everything could potentially be considered original.

a. Rights of the author potentially involved in transformative uses

Generalities. – EU copyright law has partly harmonized economic rights whereas Belgian and French copyright laws grant authors economic and moral rights. We will review these different rights, since transformative uses can in fact infringe most of them. Let's recall that consistent with EU law, the duration of economic rights in Belgium and France is 70 years *post mortem auctoris*[22].

i. Economic Rights

1. Right of reproduction

EU law. – First and foremost, transformative uses touch on the right of reproduction. The scope of the right of reproduction in EU law is very wide, since it covers any "direct or indirect, temporary or permanent reproduction [of a work] by any means and in any form, in whole or in part" (article 2 InfoSoc Directive). In addition, the CJEU, consistently with the stated objective of ensuring legal certainty within the internal market, reads recital 21 of the directive as requiring that the acts covered by the right of reproduction be construed broadly[23].

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16 See *e.g.* Court of First Instance of Brussels, June 17, 2002, *A&M*, 2004, p. 252 ("Chaisard" to indicate a wheel-chair user).

17 See *e.g.* Court of Appeal of Antwerp, June 25, 2007, *A&M*, 2007, p. 461 ("Sterrenplukkers", roughly translated as "Stars Fisherman") ; Court of Appeal of Versailles, Jauary 11, 2001, *R.I.D.A.*, 2002/191, p. 280 ("Angélique"); Court of Appeal of Paris, June 19, 2009, *P.I.*, 2009, p. 365, obs. J.-M. Bruguière ("L'empreinte de l'ange", roughly translated as "The Stamp of the Angel");

18 See *e.g.* Court of Appeal of Antwerp, June 29, 2009, *A&M*, 2010, p. 187 ("Maten, Makkers, Maes"); Court of Appeal of Versailles, May 27, 2003, *R.I.D.A.*, 2005 ("Donnez du goût à votre communication", roughly translated as "Give some taste to your message")

19 Commercial Court of Paris, February 5, 2010, *P.I.*, 2010, p. 846, obs. J.-M. Bruguière.

20 Court of First Instance of Brussels, November 21, 2003, *A&M*, 2004, p. 156 (photographs of cheese croquette); Court of Appeal of Nîmes, March 29, 2011, *JurisData* n° 2011-015691 (photographs of pieces of meat).

21 Court of Appeal of Antwerp, February 5, 2007, *A&M*, 2007, p. 352.

22 Article 1 (1) of the Directive 2006/116/EC on the term of protection of copyright and certain related rights (codified version); XI.165(1) CDE; article L. 123-1, § 2 CPI.

23 See the recital 21 InfoSoc Directive and its interpretation by the CJEU, July 16, 2009, *Infopaq International v. Danske Dagblades Forening*, C-5/08, §§ 41-43; December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-

In *Infopaq*, the CJEU specified that to constitute a "reproduction in part", a work must contain elements of another protected work that expresses the author's own intellectual creation[24]. This would mean that the scope of the right of reproduction coincides with the scope of originality[25]. Therefore, as soon as original elements of a prior work can be found in a second work, then the right of reproduction of the prior work's author is infringed (save the independent creation defense[26] and the exceptions, see *infra*)[27]. Accordingly, and contrary to American copyright law, it seems that EU law does not require any substantial similarity requirement conclusive of an infringement, nor allows for any *de minimis* reproduction (but see *infra* on incidental reproductions), which are far harsher conditions for potential transformative use. These conclusions could however be challenged[28].

Belgian and French law. – The right of reproduction has always been interpreted broadly in Belgium and in France. The definition in the Belgian CDE closely resembles the definition in the directive (compare XI. 165 (1), § 1 CDE with art. 2 InfoSoc directive). The slightly different wording of the French definition (see art. L. 122-1 and 122-4 CPI) does

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145/10, § 96.

[24] CJEU, July 16, 2009, *Infopaq International v. Danske Dagblades Forening*, C-5/08, § 51. See also CJEU, October 4, 2011, *Football Association Premier League Ltd and others v. QC Leisure and others*, C-403/08 and C-429/08, § 159 ; December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 99 ; January 17, 2012, *Infopaq International v. Danske Dagblades Forening* (Infopaq II), C-302/10, § 22 ; May 2, 2012, *SAS Institute Inc. c. World Programming Ltd*, C-406/10, § 70.

[25] B. MICHAUX, "L'originalité en droit d'auteur, une notion davantage communautaire après l'arrêt *Infopaq*", *A&M*, 2009, p. 487; A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 308, n° 326.

[26] Independent creation seems a valid defence in EU copyright law since a work created independently is obviously the own intellectual creation of its author. Now, it seems the CJEU could share this view, at least regarding computer programs, see CJEU, May 2, 2012, *SAS Institute Inc. c. World Programming Ltd*, C-406/10, § 41.

[27] Compare with the Opinion of Advocate General TRSTENJAK delivered on April 12, 2011, in the case *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 133: "(...) the publication of a photo-fit based on a copyright portrait photo constitutes a reproduction within the meaning of Article 2 (a) of Directive 2001/29 where the elements comprising the original intellectual creation of the template are also embodied in the photo-fit".

[28] See the Opinion of Advocate General TRSTENJAK delivered on April 12, 2011, in the case *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 130: "(...) the further removed from the template the photo-fit is, the more readily it can be accepted that the elements comprising the personal intellectual creation of the template are repressed in the photo-fit to an extent that they are no longer significant and are thus no longer worthy of consideration"; Opinion of Advocat General Bot delivered on November 29, in the case *SAS Institute Inc. c. World Programming Ltd*, C-406/10 (several references to a "substantial part of the elements of the first program which are the expression of the author's own intellectual creation").

not bear any real consequences.

The author enjoys protection against both literal and nonliteral copying. Hence, there is as such no formal distinction between reproduction and adaptation since the latter is deemed a particular aspect of the former. This point will be further discussed *infra*[29].

French and Belgian case law seems consistent with the CJEU's interpretation, since according to both countries highest court (the Court of cassation), reproduction of original elements of a prior work in a second work falls within the scope of the right of reproduction[30]. As with EU law, the scope of protection corresponds with that of originality[31].

However, in finding an infringement courts will often emphasize the similarities over the differences[32]. Particular illustration of this procedural means of interpretation can be found in the abundance of case law finding infringement where a same "global impression" is triggered by the comparison of the works[33]. Significance of this rule is not clear, nor is its consistency with *Infopaq*. Indeed, where the mere act of borrowing falls within the meaning of reproduction, there is no room at the infringement stage for an assessment of the extent of the similarities[34].

Despite this potential discrepancy between the definition of reproduction and the infringement test, the length of the borrowed element is not relevant. Consequently, there is normally no *de minimis* threshold for infringement. Transformative uses will therefore almost always make a prima facie case of infringement (that is, before considering if the use is

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[29] A. Berenboom, *Le nouveau droit d'auteur et les droits voisins*, 4th ed., Brussels, Larcier, 2008, p. 126, n° 72; A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 251, n° 254.

[30] See *e.g.*, Belgian Court of cassation, September 25, 2003, *Pas.*, 2003, I, p. 1470, No. 453; French Court of cassation, June 14, 2007, *R.I.D.A.*, 2007/214, p. 309.

[31] See *supra*, note 25.

[32] See in general C. Bernault, "Droit des auteurs – Contrefaçon et étendue du droit d'auteur", *JurisClasseur Propriété littéraire et artistique*, LexisNexis, Fasc. 1267, n° 8 and following.

[33] In Belgium, this test has been endorsed by the Court of cassation (September 25, 2003, *Pas.*, 2003, I, p. 1470, No. 453) and is frequently used in the case law, for one example, see Court of Appeal of Antwerp, February 28, 2011, *I.R.D.I.*, 2012, p. 405. In France this variant of the test is rejected, see *e.g.* Court of cassation, June 17, 1997, *R.I.D.A.*, 1997/174, p. 247. More recently, see Court of Appeal of Paris, May 20, 2011, *JurisData* n° 2011-010913. But see *e.g.* Court of Appeal of Paris, October 12, 2005, *R.I.D.A.*, 2006/207, p. 385.

[34] A somewhat related issue has been raised in the UK following *Infopaq*, as to know how the harmonized originality requirement and the copy of a "substantial part" requirement relate to each other, see E. Rosati, *Originality in EU Copyright – Full Harmonization through Case Law*, Cheltenham (UK), Northampton (MA, USA), Edward Elgar Publishing, 2013, pp. 110-111.

covered by an exception). In France however, case law has developed that considers "accessory reproduction" as falling outside the right of reproduction (see *infra*).

Finally, only the very act of borrowing infringes on the right of reproduction, not similarity per se. Independent creation is therefore a valid defense[35]. This defense is however of little interest for the admissibility of transformative uses according to our definition (where borrowing is assumed).

2. Right of adaptation

a. Adaptation as a reproduction

EU law. – Contrary to the Software Directive (article 4 (b)) and the Database Directive (article 5 (b)), the InfoSoc directive does not harmonize the right of adaptation. Many scholars emphasize this point[36]. Even though they seem to consider that the law is clear on this point, we do have some concerns since the CJEU has defined the originality standard without giving a definition of what is an "expression". It is known that only expressions (when original) can be protected. It's obviously beyond the scope of this paper to attempt to define this notion. Yet such a definition would seem useful (if not necessary) to define the right of adaptation[37].

How do the right of reproduction and the right of adaptation relate to each other? At first sight, they seem to largely overlap. Yet, a rough division can be drawn between them seeing the first as protecting against literal copying of the expression and the second against non-literal copying. If one reads the word "expression" as relating only to the exact wording, depiction or playing, then adaptation does not fall within the concept of reproduction as interpreted by the Court. However, if one reads "expression" more broadly as relating to very similar wording, depicting or playing as well, then the right of reproduction could be seen as encompassing the right of adaptation (at least in part, see *infra*).

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[35] Belgian Court of cassation, September 3, 2009, *I.R.D.I.*, 2009, p. 411; French Court of cassation, May 16, 2006, *R.I.D.A.*, 2006/210, p. 321.

[36] Some leading scholars argue that its regulation is therefore left to national lawmakers, see P.B. Hugenholtz, M.R.F. Senftleben, "Fair use in Europe. In search of flexibilities", Amsterdam Law School Legal Studies Research Paper No. 2012-39, Institute for Information Law Research Paper No. 2012-33, available on www.ssrn.com, p. 26 and references.

[37] Similarly, it is beyond the scope of this study to define the adaptation or derivative right. On this issue, see recently D. Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 Vand. J. Ent. & Tech. L. 785 (2013).

According to the first reading, any copying that is not a slavish copy of what is original in the first work, would fall outside the right of reproduction. This seems rather at odds with the requirement of a broad interpretation of the right of reproduction made by the CJEU[38]. According to the second reading, close copying would be covered. In particular, borrowing of elements lying beyond the exact expression of a work would fall within the scope of the right of reproduction when they are the author's own intellectual creation.

Neither the InfoSoc Directive nor the CJEU have provided any definition of "expression". Only the Software Directive mentions the opposition between the protected "expression in any form of a computer" and the unprotected "ideas and principles which underlie any element of a computer program, including those which underlie its interface" (article 1 (2)), but this hardly qualifies as a definition. Interpreting this provision (under the former Software Directive), the Court of Justice considered that "the object of protection conferred by that directive is the expression in any form of a computer program which permits reproduction in different computer languages, *such as* the source code and the object code"[39]. This suggests a broad understanding of the term "expression". However, no lesson can be learned with regards to general copyright law since, as previously mentioned, the right of adaptation is harmonized in the Software Directive (contrary to the InfoSoc one).

Nevertheless, the *Painer* case provides evidence that the right of reproduction might cover the right of adaptation. In the national (Austrian) proceedings, it was discussed whether a photo-fit based on a photograph should be considered an adaptation that requires the photographer's consent or a free use (*freie benutzung*). The CJEU, asked to determine the copyrightability of photographs under the InfoSoc Directive, referred in its preliminary ruling to the right of reproduction[40]. Although hypothetical, this could reveal that for the Court, adaptation has to be considered as falling within the right of reproduction.

In addition, the CJEU recently held in the *Deckmyn* case that a parody is an autonomous concept of EU law[41]. Yet, in several jurisdictions, parody is deemed an adaption[42]. It would be artificial to distinguish

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38 See *supra* note 23.

39 CJEU, December 22, 2010, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury*, C-393/09, § 35, recalled by CJEU, May 2, 2012, *SAS Institute Inc. v. World Programming Ltd*, C-406/10, § 35 (emphasize ours).

40 CJEU, December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10.

41 CJEU, Septemer 3, 2014, *Johan Deckmyn v. Helena Vandersteen and others*, C-201/13, , § 15.

42 *See* A. FRANÇON, "Questions de droit d'auteur relatives aux parodies et productions

between parodies "by reproduction" harmonized thorough EU and parodies "by adaptation" left to the national legislator. This could be seen as additional evidence that the Court considers the right of adaptation as a part of the right of reproduction.

Generally speaking, we think that to a large extent, considering adaptation separately from reproduction is a common mean to avoid the impossible task to draw the dividing line between idea and expression. We largely share the view of an American commentator, according to whom *"The idea-expression dichotomy was developed to apply to, and indeed only makes sense when applied to persons who infringe by making nonliteral copies of copyrighted works"*[43]. But surely EU harmonization would be excessively narrow if it was only concerned with protection against slavish copy[44]...

Belgian and French law. – According to the legal literature, adaptation can be defined as the reproduction of a work in an other genre, an other form, or an other language[45].

As mentioned previously, the right of adaptation under Belgian and French law is not considered separately from the right of reproduction. Where reproduction *stricto sensu* is material, adaptation is deemed an intellectual reproduction[46].

There is no doubt transformative uses will often qualify as adaptation (or intellectual reproduction). In one of the most relevant case where an artist borrowed the figure of the painter from James Ensor's work *Self-Portrait with Masks* and replaced most of the masks by Belgian novelists' faces, the judge held that it was an unauthorized adaptation[47].

b. Adaptation apart from reproduction

Belgian and French law. – A distinct issue is raised when the adaptation involves no reproduction whatsoever, but merely consists of a reworking of an existing copy of a copyrighted work (the *corpus mechanicum*).

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similaires", *D.A.*, 1988, p. 303.

43 E. SAMUELS, *The Idea-Expression Dichotomy in Copyright Law*, 56 Tenn. L. Rev. 321, 371 (1988-1989).

44 Let us remind however that the Berne Convention also provide for a minimal harmonization of the right of adaptation, see article 12 and 14 (adaptation) as well as 8, 11 (2) and 11*ter* (2) (translation).

45 F. DE VISSCHER, B. MICHAUX, *Précis du droit d'auteur et des droits voisins*, Brussels, Bruylant, 2000, p. 66, n° 84. See also P.-Y. GAUTIER, *Propriété littéraire et artistique*, 8th ed., Paris, Presses Universitaires de France, 2012, p. 606, n° 585.

46 A. BERENBOOM, *Le nouveau droit d'auteur et les droits voisins*, *op. cit*, p. 126, n° 72.

47 Court of First Instance of Brussels, March 2, 1999, *A&M*, 1999, p. 367.

What are, if any, the rights involved in such a situation? In Belgium and in France, the issue has been tackled from two different perspectives.

First, the reworking of a particular copy of a work could fall within the scope of the right of adaptation. There are only few cases since the issue is often tackled from the second perspective presented below. Particularly relevant, one French Court recently held that the reworking of an advertising poster by a famous Belgian artist who has drawn tattoos with a felt pen on the body of the represented model (Kate Moss) constitutes an infringing adaptation [48].

Second, some consider that this kind of transformative use could constitute an infringement to the so-called "right of destination" of the author. To our knowledge, the "right of destination" is a particularity in Belgian and French copyright law. It would entitle the author with the right to control the destination of a copy of his work, that is, to determine the uses that can be made of this copy. This construction stems from a doctrinal and jurisprudential theory based on a broad understanding of the right of reproduction[49]. Some scholars criticize this "right of destination" and its consistency with EU law is disputed[50].

The plasticity of the concept of a "right of destination" gave rise to its application in different contexts. Two Belgian cases seem particularly relevant regarding transformative uses. It has been held that a defendant who had bought an album of posters of Tintin, separated them one by one and sold them in separate frames, actually infringed on the author's "right of destination", since the destination of the posters was to be sold to the consumer, together and attached to one another[51]. Another Court held that to integrate a statue located in the public space into a work of conceptual art by surrounding the statue with a ribbon bearing the mention "Kijkverbod" ("Looking prohibited") infringes on the destination right of the sculptor, since its destination is to be on display in the public space and not to be integrated into another work[52]. Commentators have however suggested that these situations would be better considered as

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[48] Court of Appeal of Paris, January 13, 2010, unpublished, *Moerman et Galerie Gokelaere et Janssen c/ Sarl L'Office et Isserman*, *P.I.*, 2010, p. 716 (comments by A. Lucas).

[49] See the founding fathers of this theory F. Gotzen, *Het bestemmingsrecht van de auteur*, Brussels, Larcier, 1974; F. Pollaud-Dullian, *Le droit de destination: le sort des exemplaires en droit d'auteur*, Paris, L.G.D.J., 1989.

[50] See S. Dusollier, "Heurs et malheurs du droit de destination", *A&M*, 2010, p. 455.

[51] Court of First Instance of Brussels, 15 février 1996, *A&M*, 1996, p. 319. A similar cas can be found in France, see Court of Grand Instance of Paris, September 11, 1996, unpublished, *Brasiliser et ADAGP c/ Galerie de Villiers*, comment by A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 261, n° 268, note 216.

[52] Court of Appeal of Antwerp, March 29, 2010, *A&M*, 2010, p. 489, note Ph. Campolini, B. Michaux.

unauthorized adaptations[53].

In addition to these two legal hypotheses, the right of distribution found in EU law (as within national laws) can be raised any time the reworked copy is put on the market in the EU. This issue is discussed in the next section.

3. Right of distribution

EU law. – Under EU law, the author is entitled to the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise (article 4 (1) InfoSoc Directive). This right is limited by the exhaustion rule, enshrined in the article 4 (2) of this Directive.

The exhaustion rule is generalized in EU IP law but with slight differences among the various IP rights. One relevant difference is that whereas trademark law and patent law allow the right holder to oppose further commercialization of the marked goods or patented product for legitimate reasons[54], there is no such reservation in copyright law (nor in design law). The Trademark Directive and Regulation specify these legitimate reasons by saying they are met *"especially where the condition of the goods is changed or impaired after they have been put on the market"*. To some commentators, the same solution should apply to copyright law[55]. If so, it would mean that a reworked copy of a work that is subsequently put on the market in the EU would infringe on the distribution right of the author of the work embodied in the said copy.

The Dutch Supreme Court recently raised this issue before the CJEU[56]. The case concerns paper posters of works of art put on the EU market with the consent of the right holder, then legitimately acquired by a company that proceeded to the transfer of these posters' ink onto canvas, which were then sold. In brief, the Dutch Supreme Court referred the case to the CJEU as to know whether the right of distribution governs this situation and if so, whether the right is exhausted.

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[53] Ph. CAMPOLINI, B. MICHAUX, "Le droit de destination : un appendice davantage qu'un droit spécifique", *A&M*, 2010, p. 500, n° 24, p. 502, n° 35.

[54] Article 7 (2) of the Directive 2008/95/EC of October 22, 2008, to approximate the laws of the Member States relating to trade marks (codified version) and article 13 (2) of the Regulation (EC) No 207/2009 of February 26, 2009 on the Community trade mark (codified version); article 6 of the Regulation (EU) No 1257/2012 of December 17, 2012, implementing enhanced cooperation in the area of the creation of unitary patent protection and article 29 of the Agreement of February 19, 2013, on a Unified Patent Court.

[55] See F. DE VISSCHER, B. MICHAUX, *op. cit.*, p. 94, n° 108 ; Ph. CAMPOLINI, B. MICHAUX, "Le droit de destination : un appendice davantage qu'un droit spécifique", *A&M*, 2010, p. 497, n° 13.

[56] CJEU, *Art & Allposters International*, C-419/13.

In its recent ruling, the CJEU considered that this situation falls within the scope of the right of distribution since both the paper poster and the canvas transfer contain the image of a protected artistic work[57].
In our view, this amounts to a minimal harmonization of the adaptation right. Indeed, the act of transfering the ink from the poster to the canvas actually qualifies for adaptation in some jurisdictions, especially in Belgium and France[58] where adaptation right is considered a part of the reproduction right. In that regard, the Court notably held that a replacement of the medium is "... an alteration of the copy of the protected work ... that is actually sufficient to constitute a new reproduction of that work, within the meaning of Article 2(a) of Directive 2009/21 ..."[59].
Therefore, the author's right of distribution is not exhausted in that case because his initial consent "... does not cover the distribution of an object incoporating his work if that work has been altered in such a way that it constitutes a new reproduction of that work"[60]. According to the paragraph 45 of the decision, it seems that such an alteration can be found where the altered object itself, taken as a whole, is not, physically, the object that was placed onto the market with the consent of the rightholder.

Close reading of this last part suggests that some legitimate artistic practices such as 'collage' would be deemed infinging, contrasting on this point with the suggestion of the Advocate general[61]. In other words, it looks like the many contemporary artists who physically borrow from their surrounding world (see e.g. the Kate Moss 'tatoo' mentioned above) couldn't find no shelter under the exhaustion rule.

Belgian and French law. – Implementation of the distribution right and the exhaustion rule in Belgium follows closely the wording of the directive (article XI.165(1), §§ 5-6 CDE). In France, there is no explicit distribution right but some have argued that the right of destination may

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57 CJEU, January 22, 2015, *Art & Allposters International*, C-419/13, para 27

58 In support of this reasoning, see the position of the French Government in that case, and see also Opinion of Advocate General P Cruz Villalon, September 11, 2014, *Art & Allposters International*, C-419/13, para 31.

59 CJEU, *Art & Allposters International*, *op. cit.*, para 43.

60 CJEU, *Art & Allposters International*, *op. cit.*, para 46.

61 In his opinion, the Advocate General had distinguished between the facts of that case, that were not leading to a finding of exhaustion, and the hypothesis of a 'collage' which would have been protected under the exhaustion rule. This distinction seems to be based on the likelihood of confusion with the original word (in consideration of its medium), see Opinion of Advocate General P Cruz Villalon, *Art & Allposters International, op. cit.*, paras 54-60. However, nothing in the decision of the Court support such a distinction.

substitute it[62]. Others have claimed that the absence of implementation of a distribution right in French law does not matter, as that right stems from international law regardless[63]. The exhaustion rule, on the other hand, has been implemented in French copyright law (article L. 122-3-1 CPI). Questions regarding the scope of the distribution right in EU law receive a broadly identical treatment in Belgian and French law.

Finally, there will be no exhaustion for transformative uses of a copy of a work when the considered use consists in a reproduction of that copy. Since only the distribution right and not the right of reproduction is exhausted, it has been so held that an add showing a model wearing a copyrighted blouse, lawfully acquired on the market, infringes the right of reproduction of the designer[64].

4. Right of communication to the public, including the right to make available

EU, Belgian and French law. – It is beyond the scope of this article to deeply analyze the scope of the right of communication to the public, including the right to make available. Let's recall that to be an 'act of communication', "(...) it is sufficient (...) that a work is made available to a public in such a way that the persons forming the public may access it, irrespective of whether they avail themselves of that opportunity"[65]. Regarding the definition of the 'public', the CJEU held that this term "(...) refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons"[66]. It is not sure whether the pursuit of a profit is a necessary condition for the existence of a communication to the public[67], but a recent decision from the CJEU suggests that the profit-making goal would hardly be relevant[68].

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[62] See A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 1363, n° 1614.

[63] Article 6 (1) of the WIPO Copyright Treaty. See A. BERTRAND, *Droit d'auteur*, Paris, Dalloz, 3th ed., 2010, pp. 247, n ° 106.61.

[64] Court of Grand Instance of Paris, June 30, 2009, *P.I.*, p. 373, obs. A. Lucas.

[65] CJEU, February 13, 2014, *Nils Svensson and others v. Retriver Sverige*, C-466/12, § 19; CJEU, March 27, 2014, *UPC Telekabel Wien v. Constantin Film Verleih and Wega Filmproduktionsgesellschaft*, C-314/12, § 39 ("(...) it is not decisive that persons who make up that public have actually had access to that work or not"). See also CJEU, December 7, 2006, *SGAE v. Rafael Hotels*, C-306/05, § 43.

[66] CJEU, February 13, 2014, *Nils Svensson and others v. Retriver Sverige*, C-466/12, § 21. See also CJEU, December 7, 2006, *SGAE v. Rafael Hotels*, C-306/05, §§ 37-38.

[67] See CJEU, December 7, 2006, *SGAE v. Rafael Hotels*, C-306/05, § 44. The CJEU subsequently held that the communication to the public is of a profit-making nature, see CJEU, October 4, 2011, *Football Association Premier League Ltd and others v. QC Leisure and others*, C-403/08 and C-429/08, § 204. See also, regarding the right to equitable remuneration of the performers and phonogram producers, CJEU, March 15, 2012, *Phonographic Performance Limited v. Ireland*, C-162/10, § 36; CJEU, March 15, 2012, *SCF v. Marco Del Corso*, C-135/10, §§ 88-89.

[68] CJEU, February 27, 2014, *OSA v. Léčebné lázně Mariánské Lázně*, C-351/12, §§ 34-

In any case, we posit that communication to the public and making a transformative work available will constitute an infringement every time the transformative work infringes on the exclusive rights discussed above. Hence, there is no need to further analyze this point here.

5. Right to exhibit the work

EU law. – The right of communication to the public only covers communication to a public not present at the place where the communication originates and therefore does not cover local performances such as displays or exhibitions[69]. In addition, the CJEU specified that exhibiting reproductions of a work does not constitute distribution within the meaning of article 4 of the Directive[70].

Belgian and French law. – In Belgian and French law, by contrast, it is generally acknowledged that the right of communication to the public also includes the exclusive right to exhibit one's work [71]. On this point, the French Court of cassation has explicitly stated that exhibiting a photograph falls within the scope of the right of communication and therefore requires the preliminary authorization of the author[72]. Moreover, it seems that not only original (in the sense of unique) works of art are concerned but reproductions as well[73]. Therefore, to exhibit a

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69 See recital 23 of the InfoSoc Directive and its interpretation by the Court : CJEU, November 24, 2011, *Circus Globus Bucuresti v. UCMR – ADA*, C-283/10, §§ 35-41 ; CJEU, October 4, 2011, *Football Association Premier League Ltd and others v. QC Leisure and others*, C-403/08 and C-429/08, §§ 200-202.

70 CJEU, April 17, 2008, *Peek & Cloppenburg v. Cassina*, C-456/06, §§ 28-36.

71 In Belgium, see *e.g.* F. DE VISSCHER, B. MICHAUX, *op. cit.*, pp. 139-141, n° 165 ; J.-F. CARBONNELLE, "Le droit d'exposition du propriétaire d'une œuvre B.D.", *in* B. Van Asbroeck. (ed.), *Droit d'auteur et bande dessinée*, Brussels, Bruylant, Paris, L.G.D.J., 1997, pp. 311-312. *Contra :* A. BERENBOOM, *Le nouveau droit d'auteur et les droits voisins*, *op. cit*, p. 246, n° 154.
In France, see *e.g.* A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 287, n° 305 and references; A. BERTRAND, *Droit d'auteur*, Paris, Dalloz, 3th ed., 2010, p. 251, n° 106.69; P.-Y. GAUTIER, *Propriété littéraire et artistique*, 8th ed., Paris, Presses Universitaires de France, 2012, p. 322, nos 316-317.

72 Court of cassation, November 6, 2002, petition No. 00-21867 ; Court of cassation, November 6, 2002, petition No. 00-21868.

73 In Belgium, see F. DE VISSCHER, B. MICHAUX, *op. cit.*, p. 141, n° 165 ; J.-F. CARBONNELLE, "Le droit d'exposition du propriétaire d'une œuvre B.D.", *in* B. Van Asbroeck. (ed.), *Droit d'auteur et bande dessinée*, Brussels, Bruylant, Paris, L.G.D.J., 1997, p. 323, note 46.
In France, see Court of Appeal of Rennes, October 27, 1998, *JurisData* n° 1998-049521 (display of a photocopy). See also W. DUCHEMIN, "Réflexions sur le droit d'exposition", *R.I.D.A.,* 1993/156, p. 73; A. LUCAS, comments on Court of Appeal of Paris, October 27, 2010, *P.I.*, 2011, p. 92.

reworked copy of a work may be deemed an infringement[74].

A particular provision in the CDE entitles the acquirer of a work of art to the right to exhibit the work but only as such, under conditions that are not damaging to the honour or the reputation of its author (art. XI.173, § 1). Close reading suggests that exhibition of the work is prohibited any time it has been modified.

In France, nothing in the law entitles the acquirer of the work to the right to exhibit it. The author therefore retains his right. Scholars sometimes admit the idea of an implied transfer[75].

ii. Moral rights

Generalities. – Moral rights are not harmonized throughout the EU, but minimal harmonization is made through article 6*bis* of the Berne Convention that provides that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation".

As it is commonly known, Belgium and France go much further since they have a strong moral rights tradition, especially the latter. In Belgium and France, moral rights include the right of divulgation, the right of attribution and the right of integrity of the work, and, in the sole case of France, a right of retraction. In this article, we will mostly focus on the right of integrity of the work.

Moral rights are inalienable in both countries, but in Belgium the legal regime is less protective, as the author can partially renounce to the enforcement of these rights although he will in any event maintain the minimal right to oppose distortions that may damage his honour or reputation, similarly to the narrower Berne moral right. Similarly, while in France moral rights are "perpetual and imprescriptible" [76], in Belgium their term of protection is the same as economic rights, i.e. 70 years *post mortem auctoris*.

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[74] Even though one can very seldom be confronted with the situation where it's not a reproduction of a work that is transformed but the work itself, it can happen. One can find a great example with Marcel Broodthaers' *General with cigar* (1970, MoMA, New York), which consists in a portrait of a general on a canvas that the artist punctured at the level of the figure's mouth and in which he inserted a half-smoked cigar.

[75] See *e.g.* P.-Y. GAUTIER, *Propriété littéraire et artistique*, 8th ed., Paris, Presses Universitaires de France, 2012, p. 323, n° 317 ; W. DUCHEMIN, "Réflexions sur le droit d'exposition", *R.I.D.A.,* 1993/156, p. 85.

[76] Article L. 121-1, § 3 CPI.

1. Right of attribution

Belgian and French law. – Reproducing a work without mentioning the name of its author infringes his or her right of paternity. According to the French Court of cassation, to reproduce in whole or in part the work of an other author and to claim authorship upon it necessarily violates his or her moral right[77]. Some commentators have however suggested that so worded, the right of attribution may go too far[78].

Regarding reproduction in part, it's worth mentioning here that the right of attribution can be seen as the rationale for the requirement to indicate the author's name as a condition of the quotation exception[79] and that failure to meet this requirement is often condemned in France (see *infra*).

2. Right of integrity of the work

Belgian and French law. – The right of integrity is an important hurdle to transformative uses. Indeed, its scope is not limited to modifications of the work "prejudicial to the author's honour or reputation" (as in article 6*bis* Berne Convention *supra*), but extend to any modification that the author deems a violation of the integrity of the work.

The Belgian Court of cassation recently outlined this right as follow:

> *"The right of integrity entitles the author with the right to oppose to any material modification made to the work considered as a whole, without the need to demonstrate any prejudice.*
> *To this regard, no matter if the modification lies in an addition, a subtraction or a reworking, in so far as it harms the integrity of the work. (...)*
> *The right of integrity also offers protection to the author against non-material modifications that harms the spirit of the work."*[80]

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[77] Court of cassation, April 3, 2007, *P.I.*, 2007, p. 332, obs. J.-M. Bruiguière. (our translation)

[78] These authors consider that there are cases where the borrowing shouldn't require attribution, in particular when the borrowing concerns the "composition" (the structure of the work), see A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 469, n° 534.

[79] See *e.g.* M.-C. Janssens, "Morele rechten: een algemeen overzicht met bijzondere aandacht voor de auteurs van stripverhalen", *in* E. Cornu (ed.), *Bande dessinée et droit d'auteur*, Brussels, Larcier, 2009, p. 25, n° 29; A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 394, n° 429.

[80] Court of cassation, May 8, 2008, *Ing.-Cons.*, 2008, p. 605, note Ph. Campolini, B. Michaux, *A&M*, 2009, p. 102, note F. Gotzen (our translation)

The same conclusion holds for French law[81]. Moreover, it seems that not only authentic works of art are concerned but reproductions as well[82]. Therefore, reworking of a copy of a work may be deemed infringing on the right of integrity[83].

Even though in theory the right of integrity is not discretionary and the theory of misuse of rights is supposed to be a valid defense[84], in practice it will often fail to avoid findings of infringement for even the slightest modifications.

Material modifications. – Examples of material modifications to a work that have been found to infringe include: poor reproductions of a work[85]; modification of the shape of a logo[86]; showing a movie using a video cassette instead of the 35 mm film (which modifies the rendering of the movie)[87]; cropping, deep-etching, shortening or in some other way

[81] See for example Court of cassation, December 5, 2006, *R.I.D.A.*, 2007/211, p. 359, note P. Sirinelli : " (...) any modification of a work, whatever its significance, infringes on the author's right of integrity".

[82] B. Vanbrabant, "*Corpus mechanicum versus corpus mysticum* : des conflits entre l'auteur d'une œuvre et le propriétaire du support", *Rev. dr. ULg*, 2005, pp. 495-496; A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 484, n° 548; N. Walravens, "La protection de l'œuvre d'art et le droit moral de l'artiste, *R.I.D.A.*, 2003/197, p. 37.

[83] Even though *Mona Lisa* is part of the public domain (but not necessarily its photograph), one can think about Marcel Duchamp's *L.H.O.O.Q.* (1919). For an other example, see the Kate Moss tattoo case (*supra* note 48). On the contrary, where the reworking concerns the work itself, see *supra* note 61.

[84] See *e.g.* A. Berenboom, *Le nouveau droit d'auteur et les droits voisins*, *op. cit*, p. 199, n° 109 ; A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, pp. 442-443, n° 511.

[85] Court of First Instance of Brussels, May 11, 2012, *A&M*, 2014, p. 105 (reproduction on a poor quality paper of a photography as broadcasted on TV); Court of Appeal of Versailles, September 17, 2009, *JurisData* n° 2009-024108 (poor reproduction of panels from Tintin albums, affecting the quality, sharpness and colours of the initial drawing);Court of Appeal of Brussels, September 21, 1994, *R.G.D.C.*, 1996, p. 33, note B. Vinçotte (reproduction of a photography on a poor quality paper that removes part of its aesthetic effect).

[86] Court of First Instance of Brussels, August 5, 1997, *A&M*, 1997, p. 290 ; Court of Appeal of Paris, December 12, 1988, *R.I.D.A.*, 1990/145, p. 333.

[87] Court of First Instance of Nivelles, May 4, 2004, *Ing.-Cons.*, 2004, p. 402.

modifying photographs[88]; reproducing an excerpt of a work[89]; etc. In another case, a defendant had touched up a photograph by dressing the represented naked model (viewed from the back) with a swimming suit onto which banknotes were reproduced. This is the kind of modification of a work one can easily find on the Internet. In this case, the Court of Appeal held this was infringing on the photographer's right. The French Court of cassation dismissed the petition[90].

Immaterial modifications. – Reuse of a work can be found infringing on the right of integrity even when there is no material modification, but a mere recontextualisation of the work, either by putting it in a new context or by changing its meaning. This can be caused through non-material modifications, but will often be coupled with a physical change of the work (reproduction in part or adaptation)[91]. Such immaterial modifications are often considered as harms to the spirit of the work in French and Belgian case law. Let us recall here the case, discussed above, of the statue integrated in a work of conceptual art by the addition of a ribbon, which was considered an infringement on the "right of destination". Some have however suggested that this act harmed the spirit of the work even though no physical change occurred[92]. Aside from this particular one, there is a large number of cases where transposing a

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[88] There is a great number of rulings from French courts on this issue: Court of Appeal of Nîmes, March 29 2011, *JurisData* n° 2011-015691; Court of Appeal of Paris, February 4, 2011, *Google France c/ Auféminin.com e. a.*, available on www.legalis.net; Court of Appeal of Paris, December 15, 2010, *JurisData* n° 2010-025065; Court of Appeal of Paris, July 3, 2009, *JurisData* n° 2009-010615 ; Court of Appeal of Paris, March 4, 2009, *R.T.D. com.*, 2009, p. 299, obs. F. POLLAUD-DULIAN ; Court of Appeal of Paris, April 9, 2008, *JurisData* n° 2008-364911; Court of Appeal of Paris, December 20, 2006, *P.I.*, 2007, p. 205, obs. J.-M. BRUGUIÈRE; Court of Appeal of Paris, May 5, 2006, *JurisData* n° 2006-308733; Court of Appeal of Paris, June 10, 1993, *R.I.D.A.*, 1993/158, p. 242 ; Court of Appeal of Paris, June 11, 1990, *R.I.D.A.*, 1990/146, p. 293. In Belgium, see recently Court of First Instance of Brussels, May 11, 2012, *A&M*, 2014, p. 105.

[89] Court of First Instance of Brussels (cess.), February 13, 2007, *A&M*, 2007, p. 107, confirmed by Court of Appeal of Brussels, May 5, 2011, *Ing.-Cons.*, 2011, p. 56.

[90] Court of cassation, December 17, 1991, *R.I.D.A.,* 1992/152, p. 190.

[91] Ph. CAMPOLINI, B. MICHAUX, "La protection de l'esprit d'une œuvre par le droit moral à l'intégrité", reporting on Court of cassation., May 8, 2008, *A&M*, 2009, p. 621, n° 9 ; A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, 2012, p. 479, n° 546.

[92] Notably, this seems to be the opinion of the Court of cassation (May 8, 2008, *Ing.-Cons.*, 2008, p. 605, note Ph. CAMPOLINI, B. MICHAUX, *A&M*, 2009, p. 102, note F. GOTZEN) that overturned a first decision holding there was no modification of the statue and therefore no violation of the right of integrity. See also Ph. CAMPOLINI, B. MICHAUX, "Le droit de destination : un appendice davantage qu'un droit spécifique", *A&M*, 2010, p. 502, n° 35.

work in another context (be it political[93], advertising[94], pornographic[95], associated with illegal practices[96] or causing a modification in the meaning[97]) has been considered an infringement. Concerning a video sampling of portions of documentaries (themselves based on cinematic archives), the Court of Appeal of Paris stated in general terms that "(...) the plain inclusion in a work of excerpts from an other work evidently leads to an alteration of the latter, since so shortened and put in a different context, this work receives through contact with the derivative a new look and meaning and therefore no longer reflects its author's personality"[98].

Intermediate conclusion: author's rights and transformative uses. – Author's rights in EU, Belgian and French law seem pretty invasive and their scope very broad. Both economic and moral rights appear to be major hurdles to transformative uses.

In copyright case law, the cases strictly related to Art or UGC are sparse. Nevertheless, if we consider a wider set of cases, we can conclude than most of practices widespread in the Art world or on Internet can be deemed to infringe on both economic and moral rights of the author of a prior work. Indeed, the extent of the definition of exclusive rights is such that they are almost always involved.

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93 Court of First Instance of Verviers, March 26, 1996, *Ing.-Cons.*, 1997, p. 188 (reproduction of a press article on a tract for the extreme right-wing); Court of Appeal of Versailles, December 20, 2001, *R.I.D.A.*, 2002/192, p. 448 (reproduction of photographs of works of art for campaign propaganda); Court of Appeal of Gent, January 3, 2011, *A&M*, 2011, p. 327 (use of the Lucky Luke characters for a campaign propaganda).

94 Court of Appeal of Brussels, November 19, 1996, *J.T.*, 1997, p. 201 (reproduction on a flyer of a photograph from a catalog, which modify its meaning). In France, commercial uses of musical works is often held infringing, voy. les décisions citées par A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 488, n° 550, notes 466-467.

95 Court of Appeal of Antwerp, October 11, 2000, *A&*M, 2001, p. 357 (use of the comic book character *Jommeke* in a pornographic context).

96 Court of Appeal of Antwerp, May 2, 2006, *A&M*, 2006, p. 257 (childish character *Nijntje* a.k.a. *Miffy* associated with drug consumption).

97 Court of Appeal of Brussels, September 21, 1994, *R.G.D.C.*, 1996, p. 33, note B. Vinçotte (reproduction in a newspaper of a photograph from a book, which modifies its meaning because of the link with the article); Court of Appeal of Paris, September 11, 1998, *JurisData* n° 1998-022800 (picture of an African family initially dedicated to express aspects of African culture then used to illustrate critical articles on polygamy) ; Court of Appeal of Paris, June 17, 2011, *JurisData* n° 2011-012995 (picture based on a photograph of Che Guevara and used in an other context, namely the promotion of a movie on feminist pornography); Court of First Instance of Brussels, May 11, 2012, *A&M*, 2014, p. 105 (reproduction in newspapers of a photogaphy intially published in an artistic context).

98 Court of Appeal of Paris, December 12, 1995, *R.I.D.A.*, 1996/169, p. 372, note A. Kéréver.

To illustrate this conclusion, let us consider three example cases.

Consider the works of famous pop artist Roy Lichtenstein, well known for his painted adpatation/appropriation of comic books[99]. The act of copying (in whole or in part) comic books thumbnails involves the reproduction and adaptation rights. Lack of attribution to the comic book authors involves the right of attribution. Cropping wider images (before enlarging the cropped excerpt) involves the right of integrity.

As a second example case, let us now have a look at one of the favorite IP blogs of many copyright lawers : the IPKat blog[100]. The blog features frequent insightful updates on intellectual property news, illustrated by adorable pictures of cats, which are most probably used without the authorization of their respective authors. This is a widespread practice among blog authors. But it is also a practice that intersects with many exclusive rights. Illustrating a blog post with a picture obviously involve the reproduction right. Lack of attribution to the original photographer involves the right of attribution. Modifying or transposing images in a thumbnail verion could also involve the right of integrity.

Finally, as our third example case, consider a mother that captures a cute video of her children dancing wildly in the kitchen while the radio is playing a great guitar solo ("Let's go crazy")[101], and decide to upload it on YouTube in order to share it with friends. Again, multiple exclusive rights are involved. The music in the background of the video involves the reproduction right. Making the video available on the public on a video hosting platform is tantamount to communicating the music to the public. Moreover, due to the poor quality of the recording, the author of the background music will probably also have a claim based on his moral right of integrity.

In jurisdictions such as Belgium or France, all these works and uses would most probably be held infringing.

This is not to say that these kind of transformative uses will necessary be prohibited by the copyright framework. Indeed, defining what uses fall within the scope of one of the aforementioned rights is only the first part of th inquiry. Subsequently, an exception to the rights of the author may

[99] *See* illustation (original from the comic books and Lichtenstein's work) : http://davidbarsalou.homestead.com/LICHTENSTEINPROJECT.html (Nov. 28, 2014).

[100] *See* http://www.ipkat.com (Nov. 28, 2014).

[101] *See* https://www.youtube.com/watch?v=N1KfJHFWlhQ (Nov. 28, 2014). This video has been at the center of the *Lenz v. Universal Music Corp.* case, on which we will come back *infra*.

prove a valid defense and therefore legitimate the reuse. Alas, as we will see, the european framework of exceptions and limitations leave little breathing space for the transformative user.

b. Exceptions and limitations[102] potentially allowing for transformative uses

Generalities. – We will focus on the main three exceptions that can provide the transformative artist with some leeway when confronted with someone's copyright, namely the exceptions for quotation, parody, and incidental uses.

Regarding the guiding principles, it is worth mentioning that the three-step test introduced in EU law by article 5 (5) of the InfoSoc Directive has been further implemented by the French lawmaker (article L. 122-5, § 4 CPI), but the Belgian lawmaker explicitly rejected such implementation in national law[103].

According to the CJEU exceptions must be interpreted strictly[104]. The Court however has considerably nuanced this view in a number of subsequent rulings, stating notably that the interpretation of exceptions "must also enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed"[105] (a qualification that the French Court of cassation had also made[106]). This strict interpretation

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[102] In this article we will use the conventional expression "exceptions and limitations" often used by the literature, without taking position on whether there is a meaningful distinction between those terms or whether they are essentially synonyms.

[103] S. DUSOLLIER, "L'encadrement des exceptions au droit d'auteur par le test des trois étapes", *I.R.D.I.*, 2005, p. 213

[104] In the EU, see CJEU, July 16, 2009, *Infopaq International v. Danske Dagblades Forening*, C-5/08, §§ 56-57; CJEU, October 4, 2011, *Football Association Premier League Ltd and others v. QC Leisure and others*, C-403/08 and C-429/08, § 162 ; December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 109 ; January 17, 2012, *Infopaq International v. Danske Dagblades Forening* (Infopaq II), C-302/10, § 27; April 10, 2014, *ACI Adam v. Stichting de Thuiskopie*, C-435/12, §§ 22-23.
In Begium, see Constitutional Court, April 18, 2007, No. 59/2007, point B.4; Court of cassation, November 21, 2003, *Pas.*, 2003, p. 1869 (concerning private use in the "family circle").
In France see A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 326, n° 346.

[105] CJEU, December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 133. See also CJEU, March 1st, 2012, *Football Association Premier League Ltd and others v. QC Leisure and others*, C-403/08 and C-429/08, § 163. CJEU, June 5th, 2014, *Public Relations Consultants Association c. Newspaper Licensing Agency*, C-360/13, §24.

[106] Court of cassation, June 14, 2005, *P.I.*, 2005, p. 438, obs. A. LUCAS (concerning neighbouring rights): "strict application of a derogatory provision does not preclude its application to all the extent of its rationale".

must also be weighed against the increasing role played by the fundamental rights paradigm in copyright law, and in particular the requirement by the CJEU in cases Painer and Deckmyn that the application of exceptions "strike a fair balance" between "the right to freedom of expression of users" and "the interest and rights" of authors and right holders[107].

1. Quotation

EU law. – Article 5 (3) (d) of the InfoSoc Directive allows *"quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose"*[108]. This exception is optional but every Member State either already had such an exception at the time they implemented the Directive or has introduced it since[109].

The CJEU has given little additional information regarding the interpretation of this exception. Only in *Painer* did the Court address this exception by specifying that there is no need for the quoting work to be protected by copyright (§ 136). In addition, the Court gave some explanations on the impossibility to indicate the author's name (but under special circumstances). Generally it seems that indication of the source is required even when the author's name is unknown (§§ 139-149).

Besides, the Advocate General interestingly suggested in her opinion in *Painer* that in the case of photos, full quotation (*i.e.* reproduction in whole) can also be a quotation within the meaning of that provision[110].

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[107] CJEU, December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 134. CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, § 27.

[108] See also directive 2001/29, article 5 (3) (c), concerning the reproduction and communication to the public of works in connection with the reporting of current events.

[109] See J.-P. TRIAILLE (ed.), *Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, 2013, p. 465 and following, available on http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf (09/01/2014).

[110] Opinion of Advocate General TRSTENJAK delivered on April 12, 2011, in the case *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 212. Some have suggested the Court refused to rule on this point (§ 123), see M.-C. JANSSENS, "Art. 21", *in* F. BRISON, H. VANHEES (eds.), *Hommage à Jan Corbet – La loi belge sur le droit d'auteur – Commentaire par article*, 3th ed., Brussels, Larcier, 2012, p. 139, note

Belgian and EU law. – It is worth recalling that long before the InfoSoc Directive, the Berne Convention provided for an exception for quotation (article 10), as did Belgian and French law. For those two countries, such an exception can currently be found in article XI. 189(1) CDE and L. 122-5, 3° (a) CPI respectively[111].

Generally speaking, licit quotation supposes fulfilling specific requirements regarding the purpose, length, and form of the quotation. Moreover, the nature of the work can be relevant (in particular in France, *see below*).

Purpose of the quotation. – The quotation shall be made for one of the purposes specified in the law. Those can be grouped into three categories: scientific, critical and informative purposes[112]. Other purposes such as commercial[113], advertising[114], campaign propaganda[115] or humorous[116] do not fit with the authorized ones enshrined in the law. The same conclusion is reached for artistic or aesthetic ones. In the case discussed above regarding borrowing from James Ensor's work, the borrower invoked his right as an artist to quote others' works[117]. As mentioned, the Court held this was an unauthorized adaptation. Close reading suggests that the Court may have considered that the artistic purpose is not an authorized one.

To fit in one of the authorized purposes, quotation must remain accessory to a larger work. A glance at a few cases where this requirement was not considered satisfied may bring some light on this condition: a solfeggio method whose essential part consisted of excerpts from music sheets with only few commentaries, therefore failing the

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111 See also art. XI.190(1), 1° CDE (reproduction and communication to the public of works in connection with the reporting of current events), article L. 122-5, 3° (b) (for press review) and (e) (for teaching and education) CPI.

112 Compare with L. BOCHURBERG, *Le droit de citation*, Paris, Masson, 1994, pp. 29-30, n^{os} 39-42.

113 Court of Appeal of Antwerp, 25 juin 2007, *A&M*, 2007, p. 461; Court of First Instance of Brussels (Pres.), July 28, 2000, *A&M*, 2002, p. 353.

114 See L. BOCHURBERG, *Le droit de citation*, Paris, Masson, 1994, p. 35, n° 51; Y. GAUBIAC, "La liberté de citer une œuvre de l'esprit", *R.I.D.A.*, 1997/171, p. 35.

115 Court of First Instance of Verviers, March 26, 1996, *Ing.-Cons.*, 1997, p. 188.

116 Court of Appeal of Brussels, November 15, 2006, *A&M*, 2007, p. 103 (holding there's no parody and that quotation for purpose of humour does not pursue one of the legitimate goals enshrined in the law), reversed by Court of Appeal of Brussels, July 29, *A&M*, 2010, p. 547 (holding there's a lawful parody).

117 Cf. *supra*, note 47. More specifically, the artist claimed this was an "aesthetic quotation" within the meaning given to this by Belgian surrealist artist Marcel Mariën.

accessory requirement of the exception[118] ; a newspaper insert composed solely of excerpts from various articles, with no explanations or comments[119]; a press overview through Google News services, reproducing parts of newspaper articles, sorted by section, without any comment or link[120]; etc. Following a similar rationale with regard to the particular quotation exception for reporting on current events, it has been held that where the photographs are not used to show the event itself but rather as purely illustrative, then there is no lawful quotation[121].

Length of the quotation. – Quotation in Belgium is no longer interpreted as limited to literary works[122] and it is now assumed that the exception is extended to works of all kind. This extension has been greatly helped by the implementation of the Directive and the consequent suppression of the requirement that the quotation has to be "short". French law left that "short quotation" requirement untouched. Hence, the possibility of quoting works other than literary ones is highly controversial, in particular regarding works of visual arts[123]. The transformative user is actually caught between a rock and a hard place: either the work is reproduced only in part, which is taken as an infringement of the moral right of integrity, or it is reproduced in whole and then it violates the short quotation requirement[124]. Indeed on this last point, the French Supreme Court relentlessly repeats that "reproduction in whole of a work of art, in whatever size, can't by any means be considered a short quotation" [125]. Hence, any quotation of a work of art is infringing under French copyright law. In Belgium, only full quotation remains controversial[126].

Form of the quotation. – Quotations can only be taken from lawfully

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[118] Court of Appeal of Paris, May 22, 2002, *P.I.*, 2003/6, p. 44, obs. A. LUCAS, *R.I.D.A.*, 2002/194, p. 320.

[119] Court of First Instance of Brussels, November 8, 2005, *A&M*, 2006, p. 60.

[120] Court of Appeal of Brussels, May 5, 2011, *A&M*, 2012, p. 202.

[121] Court of Appeal of Brussels, May 3, 2005, *A&M*, 2005, p. 419. See also Court of Appeal of Brussels, October 14, 2003, *A&M*, 2004, p. 40.

[122] This was the former position of the Court of cassation (December 4, 1952, *Pas.*, 1953, I, p. 215) under previous law.

[123] It seems that musical and audiovisual quotes are nowadays admitted, see B. GALOPIN, *Les exceptions à usage public en droit d'auteur*, Paris, LexisNexis, 2012, p. 296, n° 401; A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 395, n° 429. However, case law referenced by these authors seems to us poorly relevant.

[124] A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 393, n° 428.

[125] Court of cassation, January 22, 1991, *R.I.D.A.*, 1991/148, p. 119. See recently Court of cassation, May 26, 2011, application n° 09-71083.

[126] See M.-C. JANSSENS, "Art. 21", *in* F. BRISON, H. VANHEES (eds.), *Hommage à Jan Corbet – La loi belge sur le droit d'auteur – Commentaire par article*, 3th ed., Brussels, Larcier, 2012, p. 139. Before implementation of the Directive, one judge has hold the same way the French Court of cassation did (Justice of the Peace of Brussels, April 30, 1997, *A&M*, 1997, p. 405).

published (Belgium) or divulged (France) works. The source and the author's name shall be indicated. Contrary to the case in Belgium, in France there are no exception to the attribution requirement in the case it turns out to be impossible. Therefore in France, the lack of such mention leads necessarily to a finding of infringement which happens frequently in case law[127].

Conclusion. – In the current state of the law, the exception for quotation will generally be of little help for allowing truly transformative uses. The "*Lescure Report"* commissioned by the French Government recently reached the same conclusion in the context of French law[128]. We are not aware of any relevant case in Belgium or in France where the exception has been admitted for transformative uses.

Hence, in our second example case, it is doubtful that Merpel could invoke the quotation exception as a valid defense for the thumbnails used on the IP Kat blog. Considering these cat pictures are not used for scientific, critical or informative purposes, but merely for the sake of illustrating law blog posts with pictures of cute cats, considering also that no attribution to the original authors is made, and that a reduced size would not make them "short" quotations in French law, these cats pictures would probably not constitute lawful quotations under Belgian or French law.

2. Parody

EU law. – The parody exception appears to provide the most important breathing space within copyright law with regard to transformative uses. But is it sufficient?

EU law provides an optional exception for the *"use for the purpose of caricature, parody or pastiche"* (art. 5 (3) (k) InfoSoc Directive). A number of Member States have not implemented the exception, though some consider parodies are covered by freedom of expression or by general principles of law[129].

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[127] According to A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 394, n° 429. See for example Court of Appeal of Paris, July 3, 2009, *JurisData* n° 2009-010615.

[128] P. Lescure, *Mission "Acte II de l'exception culturelle" – Contribution aux politiques culturelles à l'ère numérique*, May 2013, p. 428, available on http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm (February 26, 2014).

[129] See J.-P. Triaille (ed.), *Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, 2013, p. 476 and following, available on http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

Recently, the parody exception was the center of an important ruling by the CJEU in the *Deckmyn* case. In its ruling, the Court decided to harmonize the parody exception, by holding that the concept of parody was an autonomous concept of European law, along with other copyright concepts such as originality[130] or fair compensation[131]. It then went on to elaborate its meaning. The court crucially held that the fact that Article 5(3)(k) of the InfoSoc directive is an exception (and therefore subject to the strict interpretation doctrine) does not imply that its scope be restricted by conditions that do not follow from the everyday meaning of the word "parody" or from the wording of the directive[132]. Therefore, the court dismiss a number of conditions suggested by the referral court, namely that the parody "should relate to the original work itself or mention the source of the parodied work"[133]; that it "could reasonably be attributed to a person other than the author of the original work itself"; or that "the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work". The court therefore only retain two essential characteristics of a parody: "first, to evoke an existing work while being noticeably different from it, and secondly, to constitute an expression of humour or mockery".

But the most striking lesson from the *Deckmyn* ruling is certainly how the Court conceived the application of the parody exception within the fundamental rights paradigm. The Court begins by recalling that freedom of expression and the public interest were among the objectives of the InfoSoc Directive, and frames parody as an exercize of freedom of expression, by noting that parody is an appropriate way to express an opinion »[134]. The Court then holds that "the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a

(09/01/2014).

130 CJEU, July 16, 2009, *Infopaq International v. Danske Dagblades Forening*, C-5/08.

131 See *e.g.* CJEU, October 21, 2010, *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)*, C-467/08 (fair compensation for private copy); June 30, 2011, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v. Belgium*, C-271/10 (remuneration for public lending); February 6, 2003, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, C-245/00 (equitable remuneration for performing artists and phonogram producers).

132 CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, § 24.

133 Indeed, the Court in Painer ruled similarly that mention of the source was not a condition for the exception for security purposes, as no such condition exists in the wording of the directive December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*, C-145/10, § 145-146.

134 CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, § 25.

protected work who is relying on the exception for parody [...]"[135].

In this *Deckmyn* ruling, the Court seems to go further than what it held in *Painer*, in that the balancing between the freedom of expression of the users and the interests of authors and right holders is not presented as a mere remedy of an extremely restrictive interpretation of an exception, but rather as the normal procedure for the application of the parody exception by lower judges. In a way, the Deckmyn ruling appears to open the door for a more flexible application of the parody exception, in that it is saying that a finding of a parody is inherently an issue of freedom of speech.

But in another sense, one could say that the court is also curtailing this opening, by including reasons to object to a finding of parody in this freedom of speech framework. This comes from the particular circumstances of the Deckmyn case, where the defendant was an activist member of the Belgian extreme-right party Vlaams Belang, and the disputed parody was picturing people of colour or wearing the islamic veil receiving money from a city mayor.

In these circumstances, the Court quickly noted that "all the circumstances of the case must be taken into account", and drew attention to the fact that the principle of non-discrimination was an important principle of EU law. The Court then adds that, were the disputed work deemed discriminatory, authors and right holders would have "a legitimate interest in ensuring that the work protected by copyright is not associated with such a message"[136]. With this last sentence, the Court seems to be venturing into

Of course, faced with such repugnant defendant, it is tempting for the Court to uncover legal arguments enabling the national court to reject the finding of a parody. One could wonder, however, if the Court didn't open a Pandora's box, by including in its reasoning a number of considerations that are essentially alien to the conditions for the finding of parody. Wouldn't moral rights provisions or even legal provisions against hate speech more suited to deciding whether a potentially discriminatory message should be prohibited?

Belgian and French law. – Let us now turn to the legal regime for parodies in national law, which will undoubtedly be impacted by the *Deckmyn* ruling. Before the implementation of the Directive, Belgian and French law were already providing an exception for "caricature, parody and pastiche". Scholars presently agree that those three terms have to be

[135] CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, § 27.
[136] CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, §28-31.

considered as synonymous or at the very least that formal distinguishing among them should bear no legal consequences[137]. In his opinion in the *Deckmyn* case, the Advocate general seemed to share this view[138]. It appears that the origin of those three words in EU law can be traced back to French law[139], where the exception can be found since 1957, and in Belgian law since 1994, but scholars already admitted it long before[140]. The Belgian Court of cassation even acknowledged (although later) that it was a valid defense under the previous law[141]. It appears nowadays in articles XI. 190 (1) 10° CDE and L. 122-5, 4° CPI. It is now acknowledged that it is a valid defense against both economic and moral rights[142].

Contrary to the InfoSoc Directive, these laws require parodies to comply with "fair practices"[143]. Due to the lack of any further definition, the void has been filled by courts, deeply influenced by some leading scholars.

French scholars traditionally distinguish between a material and a moral element of the parody, whereas Belgian scholars draw more elaborated distinctions[144]. For the sake of clarity, we will distinguish between three

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[137] See *e.g.* A. BERENBOOM, "Parodie", *in* E. CORNU (sous la coord. de), *Bande dessinée et droit d'auteur*, Brussels, Larcier, 2009, p. 104 ; B. MOUFFE, *Le droit à l'humour*, Brussels, Larcier, 2011, pp. 255-256 ; A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 404, n° 445 ; P.-Y. GAUTIER, *Propriété littéraire et artistique*, 8th ed., Paris, Presses Universitaires de France, 2012, p. 373, n° 368. For the former understanding, see H. DESBOIS, *Le droit d'auteur en France*, 2th ed. Paris, Dalloz, 1966, p. 288, n° 254 ; Court of Cassation, 12 janvier 1988, *R.I.D.A.*, 1988/137, p. 98, note A. Françon.

[138] Opinion of the Advocate General P. Cruz Villalon, *Johan Deckmyn v. Helena Vandersteen and others*, May 22, 2014, case C-201/13, § 46.

[139] Regarding Belgium, one leading commentator contends that the lawmaker simply copied the French law, see A. BERENBOOM, "Parodie", *in* E. CORNU (ed.), *Bande dessinée et droit d'auteur*, Brussels, Larcier, 2009, p. 104.

[140] See in Belgium *e.g.* A. BERENBOOM, "La parodie", *Ing.-Cons.*, 1984, p. 78, n° 5, and references; see in France *e.g.* E. POUILLET, *Traité éthorique et pratique de la propriété littéraire et artistique et du droit de représentation*, Paris, Imprimerie et Librairie Générale de Jurisprudence, 1879, pp. 437-438, n° 545.

[141] Court of cassation, April 5, 2001, *A&M*, 2001, p. 400, note B. Michaux.

[142] See *e.g.*, F. DE VISSCHER, B. MICHAUX, *op. cit.*, p. 151, n° 189 ; D. VOORHOOF, "La parodie et les droits moraux – Le droit au respect de l'auteur d'une bande dessinée : un obstacle insurmontable pour la parodie ?", *in* B. Van Asbroeck. (ed), *Droit d'auteur et bande dessinée*, Brussels, Bruylant, Paris, L.G.D.J., 1997, pp. 259-261 ; A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 407, p. 448 ; B. SPITZ, "Droit d'auteur, copyright et parodie, ou le mythe de l'usage loyal", *R.I.D.A.*, 2005/204, p. 93. The issue concerning the interconnection with moral rights remains however complex.

[143] "Usages honnêtes" (Belgium) or "lois du genre" (France).

[144] This dichotomy in France can be credited to A. FRANÇON, "Questions de droit d'auteur relatives aux parodies et productions similaires", *D.A.*, 1988, p. 302 ; see more recently in France A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.,* p. 404 and s., n° 445 and s.

elements: the target of the parody, the characteristics of the parody, and the aim of the parody. We will then examine how this traditional understanding of the concept of parody is affected by the *Deckmyn* ruling.

The target of the parody. – It is generally held that the targeted work has to be (to a certain extent) famous at the time of the parody. Although it is not always set up as a condition as such, scholars seem to largely agree on this factor[145]. To fall within the concept of parody, an alleged parody must be recognizable as such by an observer. This will not be the case if the targeted work is largely unknown to the public. Moreover, limiting parodies to famous works strikes a certain balance between the interests of successful authors and those of the public: the ransom of success is that a famous author must to accept teasing, and therefore a cut in his copyright[146]. In any case, we are not aware of any decision finding a lawful parody in the case of an unknown work[147]. The CJEU in *Deckmyn* is silent on this criterion, but it could be held that it follows from the usual meaning of the term "parody". This is suggested by the Opinion of the Advocate general[148].

The characteristics of the parody. – It has tradionally been held that the parody itself must present certain characteristics, namely being original, and limited in the amount taken.

In Belgium, contrary to France[149], a number of courts had previously

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In Belgium, see *e.g.* A. BERENBOOM, "Parodie", *in* E. CORNU (ed.), *op. cit*, p. 104 ; D. VOORHOOF, "Parodie, kunstexpressievrijheid en auteursrecht", *A&M*, 2008, p. 34.

[145] In Belgium, see A. BERENBOOM, "Parodie", *in* E. CORNU (ed.), *op. cit*, p. 108 ; B. MOUFFE, *Le droit à l'humour*, Brussels, Larcier, 2011, p. 309.
In France, see S. DURRANDE, "La parodie, le pastiche et la caricature", *Propriétés intellectuelles – Mélanges en l'honneur de André Françon*, Paris, Dalloz, 1995, p. 138 ; A. FRANÇON, "Questions de droit d'auteur relatives aux parodies et productions similaires", *D.A.*, 1988, p. 302 ; B. SPITZ, "Droit d'auteur, copyright et parodie, ou le mythe de l'usage loyal", *R.I.D.A.*, 2005/204, p. 93-95

[146] Compare with A. FRANÇON, "Questions de droit d'auteur relatives aux parodies et productions similaires", *D.A.*, 1988, p. 302 ; B. MOUFFE, *Le droit à l'humour*, Brussels, Larcier, 2011, p. 242.

[147] At the very least, the target should be topical upon the time of the parody, see Court of Appeal of Paris, February 1st, 2006, *R.I.D.A.*, 2006/210, p. 376. An other recent case suggests that there is a lawfull parody where the person represented on a picture is a well known (though the picture itself is not) politician and the use is made in election campaign, see Court of Appeal of Ghent, May 13, 2013, *A&M*, 2013, p. 352.

[148] Opinion of the Advocate General P. Cruz Villalon, *Johan Deckmyn v. Helena Vandersteen and others*, May 22, 2014, case C-201/13, May 22, 2014, § 64 (basically saying that to perform the intended critics, parodist have always used previous works recognizable enough by the public).

[149] See J.-M. LÉGER, "L'exception de parodie est-elle recevable en matière publicitaire ?", *R.L.D.I.*, 2005/3, p. 56.

required that the parody be original[150]. This condition has been explicitly dismissed by the CJEU in the Deckmyn case, and replaced by the much weaker requirement of "displaying noticeable differences with respect to the original parodied work"[151].

Another characteristic required for a lawful parody is a limitation in the amount taken from the original work. The Belgian Court of cassation requires the parodist to take no more than necessary to achieve his goal[152], whereas the French one requires twisting or distortion of the prior work[153]. However, the more the parody distinguishes itself from the target, the less the observer is likely to make the connection between the two. Lawful parody is therefore located in a grey area between too close (hence infringing) and too loose (hence not a parody) similarities.

In this regard, the criterion used in both countries lies in the likelihood of confusion[154]. In the *Deckmyn* case, the author contended before the Court of Appeal of Brussels there was a risk of confusion among the public[155]. The CJEU appears to address this concern by requiring the "displaying [of] noticeable differences" with the original work.

Another important question is left unresolved by the CJEU in *Deckmyn*. National case law suggests that literal copying cannot benefit from the exception. In particular, have been held to infringe: the reproduction in a talk show of photographs onto which guests were supposed to make

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[150] Among these decisions was the first judge's holding in the *Deckmyn* case referred to the CJEU, see Court of First Instance of Brussels (Pres.), February 17, 2011, *A&M*, 2011, p. 340. For other examples, see *e.g.* Court of Appeal of Ghent, May 13, 2013, *A&M*, 2013, p. 352; Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327; Commercial Court of Brussels (Pres.), March 4, 2009, *R.A.B.G.*, 2009, p. 1441; Court of Appeal of Antwerp, May 2, 2006, *A&M*, 2006, p. 257.

[151] CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, §33.

[152] Court of cassation, April 5, 2001, *A&M*, 2001, p. 400, note B. MICHAUX. For this commentator, this condition refers to the likelihood of confusion (p. 404). Subsequently, one commentator has further distinguished between the two, see D. VOORHOOF, "Brussels hof van beroep met parodie naar HJEU", *A&M*, 2013, p. 356.

[153] "Traverstissement" in the wording of the Court, see *e.g.* Court of cassation, March 27, 1990, *Bull. Civ.*, 1990, I, p. 54, n° 75; Court of cassation, June 3, 1997, *Bull. Civ.*, 1997, I, p. 123, n° 184.

[154] There is a large consensus among scholars on this point. In the case law, see recently in Belgium *e.g.* Court of Appeal of Ghent, May 13, 2013, *A&M*, 2013, p. 352; Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327; Court of Appeal of Brussels, July 29, 2010, *A&M*, 2010, p. 547; Commercial Court of Brussels (Pres.), March 4, 2009, *R.A.B.G.*, 2009, p. 1441; Court of Appeal of Antwerp, May 2, 2006, *A&M*, 2006, p. 257. In France *e.g.* Court of Appeal of Paris, September 21, 2012, *JurisData* n°2012-021857; Court of Appeal of Paris, September 21, 2012, *JurisData* n°2012-021858 (concerning neighbouring rights); Court of Appeal of Paris, January 25, 2012, *JurisData* n° 2012-001122; Court of Appeal of Paris, February 18, 2011, *JurisData* n° 2011-011965.

[155] See Court of Appeal of Brussels, April 8, 2013, *A&M*, 2013, p. 348.

funny comments[156]; the reproduction on a website of war photographs with funny captions [157]; the reproduction on a website of pages from a magazine with addition of teasing captions[158]. Those cases were mainly concerned with reproductions in whole but in the last case, the Court critically stated that "the benefit from the parody exception is excluded in any case of reproduction in whole or in part of the prior work, the which cannot be used as such". Some courts seem however less restrictive. In particular, it has been held that the reproduction in whole and communication of a poem during a comic radio program benefit from the exception[159]. Recently, the reproduction of a photograph in a photomontage has been considered lawful as well[160]. Under peculiar circumstances, it has been held that works of art borrowing from Belgian comic books author Hergé and surrealist painter René Magritte were original parodies[161]. In a somewhat related case, the French Court of cassation considered one can lawfully parody a song using the original music in so far as the lyrics are changed[162].

In any case, these strict findings of national case law with regards of the amount taken of the original work are a considerable impediment to the possibility of allowing remix practices, such as mash-ups (where multiple works are taken in their original form and seamlessly combined into a unified derivative work).

One could wonder whether the CJEU's "noticeable differences" criterion will provide more flexibility for allowing parodies even in cases involving literal copying. This suggestion might appear create a risk of allowing potential counterfeiters to masquerade unauthorized copying as parodies. However, it is important to note that even when there is a lawful parody with regard to copyright law, potential free riding still can be punished

156 Court of Appeal of Brussels, May 3, 2005, *A&*M, 2005, p. 419.

157 Court of Grand Instance of Paris, February 13, 2002, *Agence France Presse e.a. c/ M. Ivan Callot et Sarl Magnitude*, available on www.legalis.net.

158 Court of Grand Instance of Paris, February 13, 2001, *SNC Prisma Presse et EURL Femme c/ Charles V. et Association Apodeline*, available on www.legalis.net.

159 Court of Appeal of Brussels, July 29, 2010, *A&M*, 2010, p. 547. Significantly, this court has reversed a prior judgement holding that reproduction in whole could not benefit from the parody exception, which supposes a modification of the work (Court of First Instance of Brussels, 15 novembre 2006, *A&M*, 2007, p. 103).

160 Court of Appeal of Ghent, May 13, 2013, *A&M*, 2013, p. 352.

161 Court of Appeal of Brussels, June 14, 2007, *A&M*, 2008, p. 23, note D. Voorhoof, overturned by Court of cassation, June 18, 2010, *A&M*, 2010, p. 323, note B. MICHAUX and D. VOORHOOF. This case is further discussed *infra*. For a similar borrowing (but holding the opposite), see Court of Appeal of Versailles, 17 septembre 2009, *JurisData* n° 2009-024108, petition dismissed by Court of cassation, May 26, 2011, petition n° 09-71.083 (holding that covers of book aiming at analyzing Hergé's work are infringing since they "appropriate his artistic universe").

162 Court of cassation, January 12, 1988, *RTD comm.*, 1988, p. 227, note A. Françon. See also Court of First Instance of Paris, May 14, 1992, *R.I.D.A.*, 1992/154, p. 174.

on other grounds (tort law, unfair competition)[163]. This supposes however that additional circumstances are met, that go beyond the ones with which copyright law is concerned[164].

The aim of the parody. – The last element considered in national law is the aim of parody. A recurring question is whether the prior work shall be the target of the mockery or could be used instead as a vehicle to comment on something else, along the US distinction between parody and satire[165]. The view that the prior work cannot be used to mock a third party, has been held by some scholars[166] and a number of concurring Belgian decision[167]. However, this view has been explicitly rejected by the CJEU in its *Deckmyn* ruling, by holding that the concept of parody is not subject to the condition "that it should relate to the original work itself"[168].

Therefore the *Deckmyn* ruling might cast doubt on the validity of the requirement that a parody must aim to criticize a work or its author, as

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[163] This is discussed in Belgium and case law admitting it is rare (but see Correctional Court of Antwerp, November 25, 2005, *A&M*, 2008, p. 45). On the opposite, this is widely acknowledged among Courts in France, see A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 22, n° 21. Especially in parody case, see *e.g.* TGI Evry, 9 juillet 2009, *S.A. Moulinsart Rodwell c/ Société Arconsil e.a.*, available on www.voxpi.info (reversed on this point by Court of Appeal of Paris, February 18, 2011, *JurisData* n° 2011-011965); Court of Grand Instance of Paris, March 5, 2008, *R.I.D.A.*, 2008/217, p. 338.

[164] See *e.g.* Court of Appeal of Paris, January 25, 2012, *JurisData* n° 2012-001122; Court of Appeal of Paris, February 18, 2011, *JurisData* n° 2011-011965; Court of Appeal of Paris, October 13, 2006, *JurisData* n° 2006-316456.

[165] See *e.g. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.,* 924 F.Supp. 1559, at 1567 n. 6 (S.D. Cal. 1996): "Parody appropriates commonly known elements of a prior work to make humorous or critical comment on *that same work*, whereas satire commonly known elements of a prior work to make humorous or critical comment on *an other subject*". See also *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, at 580-581 (1994): "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing".

[166] A. BERENBOOM, "Parodie", *in* E. CORNU (ed.), *op. cit*, p. 114 ; P.-Y. GAUTIER, *Propriété littéraire et artistique*, 8th ed., Paris, Presses Universitaires de France, 2012, p. 374, n° 368. See also A. FRANÇON, comments on Court of Appeal of Paris, May 11, 1993, *RTD com.*, 1993, p. 511

[167] Among these decisions was the first judge's holding in the *Deckmyn* case referred to the CJEU, see Court of First Instance of Brussels (Pres.), February 17, 2011, *A&M*, 2011, p. 340. For other examples (all from Flemish courts), see Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327, *I.R.D.I.*, 2011, p. 15; Court of First Instance of Antwerp (Pres.), May 12, 2005, *A&M*, 2005, p. 304 (affirmed by Court of Appeal of Antwerp, May 2, 2006, *A&M*, 2006, p. 257); Court of Appeal of Brussels, May 3, 2005, *A&M*, 2005, p. 419.

[168] CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, § 33.

is generally held in Belgium[169]. Courts previously held that placing comic books characters in an erotic or pornographic context[170], using the work for advertising[171] or political[172] purposes, as raw material in a collage[173], etc. cannot be allowed, because they do not aim to criticize the work or its author.

Recent Belgian decisions suggest a relaxing of the criticism requirement[174]. One could argue that with the *Deckmyn* ruling allowing the use of the original work as a vehicle to comment other topics, this criticism requirement has been largely voided.

But the CJEU retains one essential characteristic regarding the aim of a parody, namely that it must "constitute an expression of humour or mockery"[175]. Humour is the core of parody, regardless of it being smooth, black, sarcastic, dirty, nonsensical, etc. This requirement is critical in France, where scholars stress on its cultural and traditional significance[176]. Whether something is funny or not is however highly

[169] Among these decisions was the first judge's holding in the *Deckmyn* case referred to the CJEU, see Court of First Instance of Brussels (Pres.), February 17, 2011, *A&M*, 2011, p. 340. For other examples, see *e.g.* Court of Appeal of Ghent, May 13, 2013, *A&M*, 2013, p. 352; Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327; Court of Appeal of Brussels, July 29, 2010, *A&M*, 2010, p. 547; Commercial Court of Brussels (Pres.), March 4, 2009, *R.A.B.G.*, 2009, p. 1441; Court of Appeal of Antwerp, May 2, 2006, *A&M*, 2006, p. 257.

[170] Correctional Court of Antwerp, November 25, 2005, *A&M*, 2008, p. 45; Court of Appeal of Antwerp, October 11, 2000, *A&M*, 2001, p. 357, note D. VOORHOOF.

[171] Court of First Instance of Brussels, March 2, 1999, *A&M*, 1999, p. 374 ; Court of First Instance of Brussels, October 9,1996, *A&M*, 1997, p. 71.

[172] Among these decisions was the first judge's holding in the *Deckmyn* case referred to the CJEU, see Court of First Instance of Brussels (Pres.), February 17, 2011, *A&M*, 2011, p. 340. See also Court of Appeal of Brussels, January 16, 2012, *J.L.M.B.*, 2013, p. 688 ; Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327.

[173] Court of First Instance of Brussels, March 2, 1999, *A&M*, 1999, p. 367.

[174] See Court of Appeal of Brussels, June 14, 2007, *A&M*, 2008, p. 23, note D. VOORHOOF ; Court of Appeal of Brussels, January 16, 2012, *J.L.M.B.*, 2013, p. 688. One commentator has suggested this condition is not required any more, see B. MICHAUX, "La BD et la liberté d'expression face à la marque et au droit des tiers", *in* E. CORNU (coord.), *Bande dessinée et droit d'auteur*, Brussels, Larcier, 2009, p. 93.

[175] CJEU, September 4th, 2014, *Deckmyn v. Vandersteen and others*, C-201/13, § 20.
Before the Deckmyn case, this characteristic was already unanimously held by courts and scholars. In the case law, see recently in Belgium *e.g.* Court of Appeal of Ghent, May 13, 2013, *A&M*, 2013, p. 352; Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327; Commercial Court of Brussels (Pres.), March 4, 2009, *R.A.B.G.*, 2009, p. 1441; Court of Appeal of Antwerp, May 2, 2006, *A&M*, 2006, p. 257.
In France, see *e.g.* Court of Appeal of Paris, September 21, 2012, *JurisData* n°2012-021857; Court of Appeal of Paris, September 21, 2012, *JurisData* n° 2012-021858 (concerning neighbouring rights); Court of Appeal of Paris, January 25, 2012, *JurisData* n° 2012-001122; Court of Appeal of Paris, February 18, 2011, *JurisData* n° 2011-011965; Court of Appeal of Versailles, September 17, 2009, *JurisData* n° 2009-024108.

[176] See *e.g.* H. DESBOIS, *op. cit.*, p. 289, n° 254 ; A. LUCAS, H.-J. LUCAS, A. LUCAS-

subjective. Therefore, what matters only is the intent of the parodist, and not the result of the parody[177]. In two particular cases of transformative uses where the parodist did not claim such humorous intent, Courts refused to grant the application of the parody exception[178].

Finally, commercial aims appears to fall outside the scope of the parody under national law[179]. One French Court however held that freedom of expression object this denial of lawful parody in case the work is used solely for commercial purpose[180]. The question remains open since the CJEU did not address this issue.

Conclusion. – While the freedom of expression framework introduced by the *Deckmyn* case has provided a welcome relaxing of the conditions of the parody exception, it is fair to say that its scope remains quite narrow. In particular, where there is no humorous intent (and not every transformative use is intended to be funny), there is no parody. Other conditions (such as the amount taken from the original work) further limit its application and their interpretation by the courts appear to be particularly stringent in Belgium[181] as well as in France[182]. In many cases of transformative uses that do not conform with the traditional cultural practices, in the field of contemporary art or user generated content, the

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SCHLOETTER, *op. cit.*, p. 407, n° 448.

177 A. BERENBOOM, "Parodie", *in* E. CORNU (ed.), *op. cit*, p. 115; A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op. cit.*, p. 406, n° 447.

178 Court of First Instance of Brussels, March 2, 1999, *A&M*, 1999, p. 367 (concerning the collage based on James Ensor's *Self-portrait with masks* discussed above ; the publisher contended it was a parody but the artist argued he had no intent to poke fun at Ensor's work) ; Court of Appeal of Versailles, September 17, 2009, *JurisData* n° 2009-024108, petition dismissed by Court of cassation, May 26, 2011, petition n° 09-71.083 (where the author aimed at analyzing and enlightening Hergé's work).

179 In Belgium see *e.g.* Court of Appeal of Ghent, January 3, 2011, *A&M*, 2011, p. 327; Correctional Court of Antwerp, November 25, 2005, *A&M*, 2008, p. 45; Court of Appeal of Antwerp, October 11, 2000, *A&M*, 2001, p. 357. See also the Opinion of the General Prosecutor Leclercq delivered in the case before the Belgian Court of cassation, June 18, 2010, *A&M*, 2010, p. 323.
In France see *e.g.* Court of Appeal of Paris, September 12, 2001, *JurisData* n° 2001-159285.
On this regard, one may remember that the US Supreme Court held that the commercial character of a use doesn't necessarily bars a finding of *fair use*, see *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, at 584 (1994).

180 Court of Appeal of Paris, October 13, 2006, *JurisData* n° 2006-316456.

181 See D. VOORHOOF, "Brussels hof van beroep met parodie naar HJEU", *A&M*, 2013, p. 356. See also B. MOUFFE, *Le droit à l'humour*, Brussels, Larcier, 2011, p. 288.

182 See the pessimist conclusion of the Lescure Report with regard to the usefulness of the parody exception for allowing transformative uses in French Law: P. LESCURE, *Mission "Acte II de l'exception culturelle" – Contribution aux politiques culturelles à l'ère numérique*, May 2013, p. 428, available on http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm (February 26, 2014).

parody exception will most probably provide very little breathing space.

Uncertainties surrounding the exception for parody still remain substantial, and several scholars have denounced their resulting chilling effect on artistic creation[183]. While the CJEU has provided an outline of harmonized EU guidelines, there are numerous issues that still await clarification.

Getting back to our first example case mentionned above, are Lichtenstein's work parodies? Unless humour is widely understood by the CJEU as to include any criticism performed by pop art (if so...), the most important requirement is not met. Moreover, one can doubt the differences are noticeable (the most important ones being the change of scale and art means, but is it enough?). In addition, the target of the parody is left unknown (comic books in general?) and potential commercial aim could play a role (the frontier between pop art and advertisement drawing is somewhat elusive). Even after *Deckmyn*, we still doubt these works could be deemed lawful parodies under Belgian and French law.

3. Incidental uses

EU law. – Some incidental reproductions may be allowed under EU copyright law. The list of article 5 (3) of the Directive contains two exceptions encompassing this idea. The first one concerns the *"use of works, such as works of architecture or sculpture, made to be located permanently in public spaces"* (art. 5(3)(h)), whereas the second one concerns the *"incidental inclusion of a work or other subject-matter in other material"* (art. 5(3)(i)).

Belgian law. – Although the Belgian legislator did not implement the possibilities of exception for incidental use provided by the directive, Belgian law already provided an exception akin to the first one (but not limited to works permanently located in public spaces) that can be found nowadays in article XI.190(1) 2° CDE. However, this exception is of little help, due to its extremely narrow scope[184]. Incidental uses are otherwise

[183] See D. VOORHOOF, "Parodie, kunstexpressievrijheid en auteursrecht", note sous Brussels, 14 juin 2007, *A&M*, 2008, p. 34 ; B. MICHAUX, "La BD et la liberté d'expression face à la marque et au droit des tiers", *in* E. CORNU (coord.), *Bande dessinée et droit d'auteur*, Brussels, Larcier, 2009, pp. 92-93; A. STROWEL, "La protection des personnages par le droit d'auteur et le droit des marques", *in* B. Van Asbroeck. (ed.), *Droit d'auteur et bande dessinée*, Brussels, Bruylant, Paris, L.G.D.J., 1997, p. 48.

[184] In one case, the defendant contended Internet was a "public space" within the meaning of this exception, that would authorize him to freely borrow pictures he could find on the web. The argument has been rejected by the Court that held

not permitted by Belgian Copyright law.

French law. – By comparison, French Courts developed an important case law conflating to some extent the two exceptions found in the InfoSoc list. This "accessory reproduction theory" (also known as "background theory"), although it is quite old, was developed greatly over the past years thanks to several decisions from the Court of cassation.

The Court first endorsed this theory considering that where there is no "communication of the original distinguishing features of a work", there is no reproduction. The Court therefore considered that an advertisement for a car where a small part of an imposing fountain could be seen in the background did not infringe copyright law[185]. This was actually an application of basic copyright principles (protection extends only to original elements). In another case, the court held that "(...) the 'representation' of a work located in a public space is lawful only when it is accessory to the 'representation' or the treatment of the main subject". It affirmed the Court of Appeal's finding that intentional appearances of sculptures "presented for themselves" in a documentary were unlawful[186]. This decision suggests that assuming it is accessory, reproduction of original elements might not trigger copyright law.

In the early 2000s, two decisions confirmed this assumption. The Court first reaffirmed a decision that the appearance of chairs in a commercial was illicit because "(...) their appearance, although succinct, was deliberate and repeated, which therefore excluded any incidental character"[187]. *A contrario*, this meant that reproduction of original elements could be deemed incidental (in the event it is not intentional). In the second case, the Court confirmed a decision that the appearance of a book cover in an advertisement promoting this book was not prohibited because it is "incidental to the main topic, that is, promoting the book"; hence there was no 'representation' of the photograph printed on the cover[188]. Yet in this last case, there was evident reproduction of the original features of the photograph.

Internet was not such a "public space". See Court of First Instance of Liège, February 27, 2007, *J.T.*, p. 804.

[185] Court of cassation, July 16, 1987, *R.I.D.A.*, 1988/135, p. 94 (reproduction of Yaacov Agam's fountain at the La Défense district in Paris).

[186] Court of cassation, July 4, 1995, *R.I.D.A.*,1996/167, p. 259, our translation (full reproduction in close-up of sculptures by Artistide Maillol in the Tuileries Garden in Paris).

[187] Court of cassation, December 12, 2000, *D.*, 2001, jur., p. 1530 (our translation), note E. Dreyer, *P.I.*, 2001/1, p. 62, obs. A. Lucas (use of chairs designed by Robert Mallet-Stevens in Ridley Scott's commercial for Barilla pasta entitled *Museo*).

[188] Court of cassation, June 12, 2001, *D.*, 2001, AJ, p. 2517, obs. J. Daleau, *P.I.*, 2001/1, p. 62, obs. A. Lucas, *R.I.D.A.*, 2002/192, p. 423

As mentioned, the first of these two last decisions suggested that where the reproduction is intentional, it is not accessory[189]. But more significantly, these two decisions departed from a restrictive interpretation of the "incidental reproduction theory" limited to works located in the public space (that is, buildings, memorials, sculptures, etc.). Indeed, since they were concerned respectively with a chair and a photograph, these decisions extended the theory to works located in private places.

With the adoption of the Directive and its comprehensive list of exceptions, it appeared critical to provide a legal ground for this restriction to an author's copyright. Before, the Court justified this cut with the idea that such accessory uses did not fall within the definition of reproduction or communication under French copyright law, which from a legal point of view is evidently wrong[190]. Nevertheless, the Court reaffirmed this assertion after the adoption of the Directive but before its implementation into national law[191]. In this case, the two EU provisions mentioned at the top of this section could have provided a legal ground for this theory, but the Court instead considered incidental reproductions as located outside of the copyright scope[192].

When implementing the Directive in 2006, the French lawmaker could have endorsed the two EU exceptions but didn't. Some scholars therefore suggested this was to put an end to the "accessory reproduction theory"[193]. Indeed, this has been the reasoning of one Court which decided that a documentary on education where pictures from a textbook appeared (displayed on the walls of the filmed classroom) constituted an

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[189] As the Court of cassation further evidenced in subsequent decisions: cf. Court of cassation, November 13, 2003, *D.*, 2004, p. 200, *R.I.D.A.*, 2004/200, p. 291, *JCP G*, 2004, II, 10080, *P.I.*, 2004, p. 549 (appearance of paintings by Maurice Utrillo in a TV coverage dedicated to an exhibition of the artist); Court of cassation, May 25, 2004, *JCP G*, 2004, II, 10170, note C. Caron, *P.I.*, 2004, p. 774, obs. A. Lucas.

[190] See *e.g.* A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, *op. cit.*, p. 302, n° 320; F. Pollaud-Dulian, obs. sous Cass. (1ère civ.), 15 mars 2005, *RTD Comm.*, 2005, p. 308 ; E. Dreyer, "Liberté de communication et droit d'auteur", *in La Loi DADVSI : des occasions manquées ?*, Première rencontres nantaises de la propriété intellectuelle, 9 février 2007, *R.L.D.I.*, suppl. 2007/25, p. 37, n° 26; P.-Y. Gautier, "Le triomphe de la théorie de l'arrière-plan", *Comm. com. élec.*, 2008/11, ét. 23, p. 21.

[191] Court of cassation, March 15, 2005, *JCP G*, 2005, II, 10072, p. 1065, note T. Lancrenon, *P.I.*, 2005, p. 165, obs. P. Sirinelli, *RTD Comm.*, 2005, p. 306, obs. F. Pollaud-Dulian, (edition of postcard representing the Place des Terreaux in Lyon as rearranged by Christian Drevet and Daniel Buren).

[192] Scholars in France sometimes distinguish between limitations (outside copyright law) and exceptions (inside copyright law), cf. note 93. With regard to this decision (previous note), see *e.g.* the comments by P. Sirinelli, *P.I.*, 2005, p. 167 ; F. Pollaud-Dulian, *RTD Comm.*, 2005, pp. 308-309.

[193] See *e.g.* A. Lucas, obs. sous CA Bordeaux, 13 juin 2006, *P.I.*, 2007, p. 320.

infringement[194]. The Court of Appeal reversed the decision on the basis of former case law[195]. The Court of cassation confirmed the Appeal decision but on other grounds that departed from its own previous decisions, considering such accessory reproductions as an "incidental inclusion" within the meaning of article 5 (3) (i) of the InfoSoc Directive[196]. In addition, the Court stated that according to the preparatory work of the law implementing the Directive, the lawmaker intended to transpose this provision (which is completely false[197]).

Since then, the Court of cassation specified that an "incidental inclusion of a work in other material" within meaning of the Directive has to be understood as an "accessory and unintentional 'representation' in relation to the main topic"[198]. A close reading suggests that the combination of the "incidental" and "accessory" requirements narrows down the scope of this exception beyond what was considered lawful under the Court's previous case law as well as what is foreseen by the directive[199]. This calls for more refinements.

Regarding the scope of this exception, already under previous law there was little space for the application of the exception to transformative uses (where borrowing is intentional). There are countless examples of reuse that have been held infringing for the sole reason that they were intentional: the appearance of a poster in the background of a movie [200]; the reproduction of pieces of furniture in a report on the decoration by Karl Lagerfeld of a Chanel salon[201]; the appearance of a table runner in commercials for chicken[202]; the appearance of lamps on photographs of an hotel's interior (the lamps were part of its decoration)[203]; a model wearing

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[194] Court of Grand Instance of Paris, December 20, *R.I.D.A.*, 2008/215, p. 370.

[195] Court of Appeal of Paris, September 12, 2008, *R.I.D.A.*, 2009/219, p. 384, obs. P. Sirinelli, *P.I.*, 2009, p. 53, obs. A. Lucas and J.-M. Bruguière (two notes), *RTD Comm.*, 2009, p. 140, obs. F. Pollaud-Dulian.

[196] Court of cassation, May 12, 2011, *JCP G*, 2011, p. 1360, note M. Vivant, *P.I.*, 2011, p. 298, obs. A. Lucas, *RTD Comm.*, 2011, p. 553, obs. F. Pollaud-Dulian.

[197] There is nothing in the law or the preparatory work to support this assertion, as all commentators pointed out. On the contrary, preparatory works suggest the opposite, see *e.g.* B. Galopin, "Accessoire : la Cour de cassation assume l'exception prétorienne", *R.L.D.I.*, 2011/73,pp. 23-24.

[198] Court of cassation, July 12, 2012, *P.I.*, 2012, p. 405, obs. A. Lucas (concerning the unauthorized upload of a photograph subsequently reproduced and displayed as a thumbnail by the Google Images services).

[199] See B. Galopin, *Les exceptions à usage public en droit d'auteur*, *op. cit.*, p. 249, n° 331, p. 249, n° 331; A. Lucas, obs. sous l'arrêt, *P.I.*, 2012, p. 406

[200] Court of Grand Instance of Marseille (ref.), April 2, 2001, *JurisData* n° 2001-144822.

[201] Court of Appeal of Versailles, March 31, 2005, *R.I.D.A.*, 2005/205, p. 478, *RTD Comm.*, 2005, p. 491, obs. Pollaud-Dulian.

[202] Court of Appeal of Paris, April 7, 2010, *P.I.*, 2010, p. 852, obs. A. Lucas.

[203] Court of Appeal of Paris, December 2, 2011, n° 10/15306, www.dalloz.fr

Louis Vuitton heels in an ad for an H&M dress[204]; a model wearing jewelry in an add for duty-free shops in Paris airports[205]; etc.

Conclusion under French Law. Since the latest decision of the Court of cassation, we are aware of two decisions, one concuring[206], the other opposing[207]. This shows how fuzzy the limits of this exception for incidental uses are under French law, which could cause a chilling effect among users. Case law suggests that this exception gives little wiggle room to transformative users. Significantly, in its assessment of the status of transformative uses under French law, the aforementioned *Lescure Report* didn't even mention this exception[208]. French law seems closer to "*de minimum minimorum"* than *"de minimis".*

Hence, in our third case mentionned above, it is doubtful that the music in the background of the dancing children video would be considered "accessory" or "incidental" according to French law. It is certainly not "accessory" to the main topic (since the music is as important to the video as the dancing children), nor "incidental", in the meaning of unintentional (since the background music is the reason why the children are dancing). It is fair to say that this would not constitute a lawful incidental use under French law.

CONCLUSION

Our overview of positive law at the EU level and in the case of Belgian and French national law clearly shows that our copyright laws are particularly inhospitable to transformative uses. We saw that the multitude of broadly defined exclusive rights constitutes a tremendous hurdles for creators of transformative works, as they can most of the time be found to infringe at least some of them. We also saw that the European framework of exhaustively enumerated and strictly interpreted exceptions and limitations was way too narrow to compensate for the far-reach of exclusive rights.

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[204] Court of Appeal of Paris, May 20, 2011, *P.I.*, 2011, p. 399, obs J.-M. BRUGUIÈRE.

[205] Court of Appeal of Paris, February 10, 2012, *RTD Comm.*, 2012, p. 776, obs. F. POLLAUD-DULIAN.

[206] Court of Appeal of Paris, March 13, 2013, *P.I.*, 2013, p. 292, obs. A. Lucas (held infringing: appearance of an armchair Le Corbusier in an add for a remedy against incontinence).

[207] Court of Appeal of Paris, May 31, 2013, *Henry B. c/ François Ben K., Société Dom, Société M. Dom Edizioni*, unpublished, RG n° 11/19345 (held not infringing: appearance in a photograph of a lamp, put in context among other furnitures).

[208] P. LESCURE, *Mission "Acte II de l'exception culturelle" – Contribution aux politiques culturelles à l'ère numérique*, May 2013, p. 428, available on http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm (February 26, 2014).

This issue of transformative uses has largely been a neglected one in copyright law. Not only does it appear that the spaces for many emerging practices are lacking, but even the more traditional practices of quotation or parodies are often excessively difficult to exercise without incurring legal hazards. This critical situation cannot be left unchanged. Imposing all the burden of legal uncertainty on authors of transformative works and confining them in a legal gray area hardly seems like a satisfying solution.

One can wonder whether European lawyers are fully aware of how critical the situation is. If we compare copyright laws from various jurisdictions on the issue of flexibility and freedom to create, current EU laws are clearly among the most restrictive. For example, looking at recent findings of fair uses in the US case law[209], one could very often reach the conclusion that the same facts would be held as infringing under Belgian, French and EU law.

It is appropriate to remind the lucid observation of Advocate General Colomer in its opinion in the trademark case *Arsenal Football Club v. Matthew Reed*: discussing important works such as *Campbell's Soup Cans* by Andy Warhol, he remarked that "*[a] radical conception of the scope of the rights of the proprietor of the trademark could have deprived contemporary art of some eminently expressive pictures, an important manifestation of pop art*"[210].

Similarly, one can fear that radical conception of the rights of the copyright owner already deprived society from great works of art. Or that it would deprive many individuals of the freedom to create and to participate to cultural life, at the very moment when, due to the digital revolution, the means of creation and dissemination of information have never been as accessible.

There is no good reason to passively accept this situation. In our

[209] *See* in particular recent Appropriation Art cases *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) ; *Seltzer v. Green Day*, 725 F.3d 1170 (9th Cir. 2013).
On the issue of thumbnails, s*ee* also the Google Images case (although the circumstances are not entirely analogue to our hypothetical example) *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007), *cert. denied Perfect 10, Inc. v. Google, Inc.*, No. 11-704 (2012). Compare with French Court of cassation, July 12, 2012, *P.I.*, 2012, p. 405, obs. A. LUCAS (Google Images services have no valid defense for reproducing and displaying thumbnails).
See also *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), that served as the basis of our third example case. Although the Court was not asked to rule on the issue of fair use, it seemed inclined in its opinion to agree that the disputed use was probably fair use.

[210] Opinion delivered on June 13, 2002, case C-206/01, § 63.

forthcoming article ("Remix Allowed – Avenues for copyright reform inspired by Canada", JIPLP, 2015), we will discuss two reform proposals inspired by the recent developments in Canadian law: first, an exception for non-commercial derivative creation (or User Generated Content), as introduced by the Copyright Modernization Act of 2012; second, a semi-open fair dealing provision, arising from the ambitious reversal of precedent by the Canadian Supreme Court since its CCH ruling[211].

[211] Supreme Court of Canada, *CCH Canadian Limited v. Law Society of Upper Canada*, 2004 SCC 13.