



ALAI International Congress 2016

Rome, 14-16 septembre 2016 - Roma eventi Fontana di Trevi

“Applied Arts under IP Law: The Uncertain Border between Beauty and Usefulness”

QUESTIONNAIRE
(Deadline May 31, 2016)

COUNTRY: **BELGIUM**

1) APPLIED ARTS

a) Is the term “Applied Arts” used in the Copyright Law and/or in other legal provisions in your country?

*The initial draft of the Copyright Act of 30 June 1994 sought to include the definition of “literary and artistic works” as provided in Article 2 (1) of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter: ‘**Berne Convention**’) and which explicitly mentions “works of applied art”.*

However, it was decided not to use this definition in the final version of the Copyright Act because such a definition might lead to interpretation issues, especially in rapidly-evolving areas of law such as copyright.

*As a result, Belgian legislation does not explicitly use the term “applied arts”, neither in the Code on Economic Law (hereinafter: ‘**CEL**’), which has replaced the Copyright Act on 1 January 2015, nor in any other piece of legislation.*

If so, is there is a legal definition of this term in your law? Please quote the relevant statutory provision and/or case law definition.

No, there is no legal definition of the term “applied arts”.

b) What is included in the scope of the term “applied arts” in your law:

Since Belgian legislation does not define the term “applied arts”, it can be assumed that it refers and relates to the (esthetical) design of all functional objects including, but not limited to, objects of:

- *industrial design (registered and unregistered)*
- *graphic design*
- *fashion design*
- *interior design*
- *decorative arts*
- *engineering design*
- *architecture*
- *photography*

Explain and quote/summarize relevant statutory and/or case law for each of the above. Whenever feasible, please attach the picture of the work/object considered in the case (or the relevant hyperlink).



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Introduction

*Intellectual property protection for the appearance of functional objects for the Belgian (or Benelux) territory is usually sought under the law on (industrial) designs, as established by the Benelux Treaty on Intellectual Property (hereinafter: '**BCIP**'), or under copyright law, as established under the CEL.*

*Protection for (industrial) designs (registered and unregistered) can also be granted on the basis of the Community Design Regulation (Council Regulation No 6/2002 of 12 December 2001 on Community designs) (hereinafter: '**Community Designs Regulation**'). Protection can (also be sought under trademark law and even under patent law and unfair competition law (cf. infra).*

As design law and copyright law are the most common intellectual property rights used for protecting the appearance of functional objects, the case law referred to below is mainly based on these two rights. Where possible, an example of case law on the basis of trademark law will also be given.

It should also be noted that the overview below focusses on the application of the statutory/legal requirements for protection as (developed), interpreted and applied by case law. To avoid unnecessary repetition, the content of relevant statutory provisions will be discussed further in this report (cf. supra).

Industrial design

In its judgment of 25 October 2011, the Court of Appeal of Brussels ruled that the design of a waffle iron and its support was novel and had a strong individual character (Brussels 25 October 2011, 2011/AR/119, www.darts-ip.com) and thus constituted a valid registered design. The design was also deemed original and thus protected by copyright law:



In its judgment of 3 January 2003, the Court of Appeal of Ghent ruled that the design of fencing was original and thus protected by copyright law.

The Court concluded that the technical function of the fence was not detrimental to its originality and its envisaged decorative function (Ghent 3 January 2002, A.M. 2003, 216, note by B. Michaux and N. Rijckenberg).



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In a more recent judgment of 2 February 2011, the Court of Appeal of Ghent refused to grant copyright protection to a terrace heater.

The Court found that the design of the terrace heater was dictated too much by technical or safety constraints as well as by elements of existing terrace heaters and therefore concluded that the design could not be considered as the author's own intellectual creation (Ghent 2 February 2011, unpublished).



In its judgment of 28 June 2011, the Court of Appeal of Brussels ruled that the design of Apple's iPod Nano was protected by copyright law.

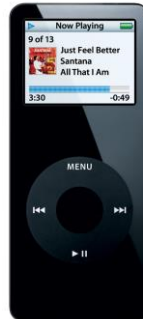
The Court established that the different design elements of the iPod Nano were not inseparable from their technical effect and their functionalities and that the technical effect and the functionalities could also be reached by using a different design. In other words, the Court found that it was possible to reach the same technical effect and functionalities with another design (this is an application of a doctrine also referred to the doctrine of the 'multiplicity of forms').

The Court also stated that, while the different elements of the design (a round control panel and a square-shaped screen, a limited size and a minimalistic representation) in themselves could not be considered an own intellectual creation, the design in its entirety could be considered as the author's own creation because it was the result of the author's choice, sequence and combination of these elements through which the author expressed his creativity in an original manner (Brussel 28 June 2011, I.R.D.I. 2012, 207).



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In its judgment of 29 April 2016, the President of the (Dutch-speaking) Commercial Court of Brussels ruled that the design of a massage matrass used for andullation therapy was protected by copyright law as well as an unregistered design.

The President started by reiterating that works of applied arts could be protected by copyright law and that the existence of freedom of choice in the expression was crucial to be eligible for protection. If there was a choice, then there was no room for originality.

The President then applied these principles to this case by stating: "The fact that each matrass has a certain basic shape (a length and width equaling those of the average human body, an armrest and headrest) does not detract from the possibility that these elements in themselves (as well as taken together) can be expressed in an own individual way. In the present case, that is the case for the rounded corners, both of the armrests and the basic shape, the square and concave shape of the headrest, the concrete design of the three blue-coloured pieces in the basic shape (which contain power sources) and the rippled design of the two upper pieces, the positioning and configuration of all these elements compared to one another, etc. Although the copyright protection enjoyed by such a functional object may be limited and cannot be extended to the basic geometric shapes of each massage matrass, there are sufficient original design elements present. There will be an infringement if all of these (or only a few) original elements have been reproduced. The fact that there was freedom of choice in the design is also illustrated by examples of other massage matrasses which can easily be found via a simple search on the internet" (Pres. Comm. Brussels 29 April 2016, unpublished).





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Graphic design

In its judgment of 31 May 2011, the Court of Appeal of Antwerp found the design of a coat-of-arms made for the famous dance festival, Tomorrowland, was original and thus protected by copyright law (Antwerp 31 May 2011, unpublished).



In its judgment of 16 May 2011, the Court of Appeal of Liège found that the design of the packaging of a medicinal product was original and thus protected by copyright law.

The Court held that the colour play and the lay-out of the inscriptions and drawings were the result of an intellectual effort in creating the packaging and which expressed the author's personality (Liège 16 May 2011, ICIP 2011, 193)



In its judgment of 5 January 2009, the Court of Appeal of Ghent ruled that a tattoo artist in principle enjoys copyright protection on the design of a tattoo if the design meets the requirements for copyright protection.

In this respect, the Court stated: "The person who designed the drawing on a computer or on paper, in its entirety or in a mould, before the tattoo is applied to the body could enjoy copyright protection on the design if it meets the requirements of the Copyright Act." (Ghent 5 January 2009, A.M. 2009, 413, note).



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Fashion design

In its judgment of 23 January 2012, the Court of Appeal of Antwerp found the design of several polo shirts, T-shirts and cardigans to be original and thus protected by copyright law.

The Court stated that originality could result from the combination of pre-existing elements, which were not protectable in themselves, but taken as a whole were clearly distinct from other models and had a personal stamp. The combination of these elements gave the whole an original character (Antwerp 23 January 2012, I.R.D.I. 2012, 374).



In its judgment of 26 January 2012, the Court of Appeal of Brussels was asked to rule on an alleged infringement on the design of a dress by the retailer Mango.

The claimant sought protection of his design both on the basis of a registered design and copyright law. The Court decided that the claim was unfounded due to the lack of protection by either of these two intellectual property rights.

The Court established that the dress for which protection was claimed was nothing more than a straight dress which was part of the common heritage of women's clothing. Regarding design protection, the Court ruled that none of the similarities which the claimant asserted were copied in the Mango dress were novel or had any individual character.

Regarding the alleged copyright protection, the Court found that the claimant's dress was a mere reproduction of an existing theme and that the design of the dress was not the result of a particular choice that reflected the author's personality. On these grounds the alleged infringement was dismissed (Brussels 26 January 2012, I.R.D.I. 2012, 368).





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In its judgment of 20 March 2014, the President of the Commercial Court of Brussels was asked to rule on an infringement claim by fashion designer Christian Louboutin against a retailer regarding the design of Louboutin's famous shoe with a red sole.

Louboutin had registered a European 'colour trademark' for the red sole and accused the retailer of having infringed that trademark by selling shoes with a similar sole.

The retailer made a counterclaim to have Louboutin's trademark nullified and the President declared the counterclaim founded because he was of the opinion that it had not been established that Louboutin had wanted to register a colour trade mark.

According to the President, Louboutin had the intention of having a 'shape trade mark' registered. The President also found that the sole gives substantial value to the goods and that the trademark should therefore be nullified.

Moreover, the President found that that the sole lacked distinctive character and that it had become common-ground (Pres. Comm. Brussels 20 March 2014, ICIP 2014, 230).



Louboutin successfully appealed the President of the Commercial Court of Brussels' judgment.

The Court of Appeal of Brussels reversed the President's judgment because it found that the trademark was indeed a colour trademark, and not a shape trade mark, which was not subject to the grounds of refusal for shape trademarks (including the ground of refusal for shapes that give substantial value to the goods).

The Court also found that the trademark was sufficiently distinctive for (high-heeled) women's shoes and thus eligible for trademark protection because it was different from what was perceived as common-ground in the sector. At least the distinctiveness would result from the use which had been made of it (Brussels 18 November 2014, I.R.D.I. 638).

Interior design

In its judgment of 29 May 2008, the Court of Appeal of Brussels ruled that the design of the interior of an establishment could be protected by copyright law if it reflected the author's personal stamp (Brussels 13 November 2008, J.L.M.B. 2009, 1029).

In its judgment of 26 November 2013, the President of the Commercial Court of Antwerp ruled that the renovated interior of a chateau in a particular style was not eligible for copyright protection.



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According to the President, copyright protection would only be possible if the choice of the elements within that style was the expression of the author's creativity and the result of his intellectual effort. The President concluded that this was not the case here.

In reaching this conclusion, the President first considered that the choices made were dictated by the intention to safeguard the authenticity of the interior, which meant the use of typical elements of 18th century interior design. The President stated that, for this reason, the specific choices made (the freedom of choice) had been "diluted" in such a way that they could not be considered an expression of the author's creativity and the result of his intellectual effort.

The President continued by stating that this dilution also followed from constraints imposed by the structure of the building itself and the building master's specific expectations.

In line with the foregoing, the President also noted that the choices in the design of the interior were in the end made by the building master (upon the suggestion of, among others, the interior architect) (Pres. Comm. Antwerp 26 November 2013 I.R.D.I. 2014, 370, note by E. Laevens).

Decorative arts

In its judgment of 30 June 2003, the Court of Appeal of Ghent ruled that a carpet design of a scene with cats and mice was not original and thus could not be protected by copyright law, because the design merely reproduced elements that were already well-known in the children's world.



The case was brought before the Belgian Supreme Court (Cour de Cassation; Hof van Cassation), which upheld the Court of Appeal of Ghent's judgment. The Supreme Court ruled that the mere representation of existing themes without having made a choice that reflected the author's personality was insufficient to justify protection by copyright law (Cass 11 March 2005, I.R.D.I 2005, 238).

In its judgment of 27 June 2005, the Court of Appeal of Antwerp established that the design of the Viken chair was original and thus protected by copyright law because of its specific construction and dimensioning (Antwerp 27 June 2005 N.J.W. 2006, 851, note by J. Deene).



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In its judgment of 16 September 2005, the Court of Appeal of Brussels also found the design of a Longchamp towel hanger was original and thus protected by copyright law.

According to the Court, the towel hanger had a harmonious design that expressed an innovative intention completely independent of technical requirements (Brussels, 16 December 2005, Ing.-Cons. 2005, 370).



In its judgment of 17 May 2011, the President of the Commercial Court of Antwerp denied the existence of copyright protection for the Allure planter.

The President found that the specific size of the planter, as a magnification of the traditional planter, the trivial vertical latticework, the shape and cut of the upper part and the basis of the planter, neither individually nor in combination amounted to an original creation (Pres. Comm. Antwerp 17 May 2011, unpublished).





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In its judgment of 31 October 2008, the Court of First Instance of Antwerp also denied the existence of copyright protection for the Fatboy bean bag.

The Court found that the appearance of the design was mainly dictated by technical requirements and added: "It cannot be contested that the use of a pillow as a seat is an age-old custom and that a bean bag as a seating element has become common since the sixties. The design of the original Fatboy is a magnification of the world-wide know head pillow. The size of the pillow is dictated by functional requirements. A magnification of a famous element cannot be protected by copyright law because it is no expression of a creative effort on the basis of a choice rooted by mere subjective factors" (Court Antwerp 31 October 2008, unpublished).



In its judgment of 21 November 2011, the Court of Appeal of Brussels established that the Umbellae parasol was original and thus protected by copyright law.

According to the Court, the originality resided in the combination of the asymmetric shape and the uneven length of the arms with the slanting position of the bar, the distinct conic shape and the striking cuts in the sail (Brussels 21 November 2011, unpublished).



In its judgment of 6 December 2011, the Court of Appeal of Brussels ruled that the design of built-in-fire places was not novel because the design did not sufficiently differ from existing designs. Copyright protection was denied for basically the same reason (Brussels 6 December 2011, 2010/AR/2730, www.darts-jp.com):



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In its judgment of 14 January 2015, also with respect to fire places, the Commercial Court of Brussels found that the design in question was novel and had individual character and thus concluded the European registered design was valid.

The Court dismissed the argument that the design was dictated by technical constraints including the trend that consumers tended to require good visibility of the fire (Comm. Brussels 14 January 2015, unpublished):



Engineering design

In its judgment of 7 August 2009, the President of the Commercial Court of Ghent ruled that plans for some interior elements of a factory/company building and, among others, a conveyer-belt which was part of an installation used for separating cardboard pieces from old paper, could not be protected by copyright law.

The President established that plans could in principle be protected by copyright law, but stated that this could not be the case for elements that were dictated by technical requirements or constraints resulting from the design of the building in which the conveyer-belt was placed.

On these grounds the President concluded that neither the length of the conveyer-belt nor the fact that it had been spilt on several locations within the building could be considered as “creations of the mind” (Pres. Comm. Ghent 7 August 2009, R.A.B.G. 2011, 43).

Architecture

In its judgment of 20 December 1954, the Supreme Court (Cour de Cassation; Hof van Cassatie) ruled that an architect could enjoy copyright protection on his design when he had used different elements in an original and new – even already known – design that give his work a personal character (Cass. 20 December 1954, Pas. 1955, I, 396).



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In its judgment of 27 February 2008, the Court of Appeal of Antwerp ruled that a work of architecture could be protected by copyright law.

The Court stated that the fact that the design could be situated within a relatively common style, that the novelty of the design was limited, that the wishes of the master builder were taken into account and that account was also taken of technical requirements, could not lead to the conclusion that the design was not original (Antwerp 27 February 2008, unpublished).

In its judgment of 24 January 2005, the President of the Court of First Instance of Ghent ruled that building plans for an underground parking lot could not be protected by copyright law.

The President held that creating a technical work such as a parking lot was, to an important extent, dictated by different norms and requirements (such as entrances and exits, number of parking spaces, number of floors, etc.) leaving little room for originality and a personal touch by the author. According to the President, the architects had failed to show any personal touches in their design.

The President also established that there were pre-existing similar designs, thus concluding that the plans were not novel but mere used shapes that had become commonplace (Pres. Court Ghent 24 February 2005, I.R.D.I. 2005, 257, note by F. Petillion).

In a judgment of 17 May 2010, the Court of Appeal of Ghent ruled that copyright protection of works of architecture extended to both the architect's plans and to the building realised on the basis of these plans (Gent 17 May 2010, I.R.D.I. 2012, 204).

Photography

In its judgment of 17 March 2014, the Supreme Court (Cour de Cassation; Hof van Cassatie) ruled that for a photograph to be eligible for copyright protection it was necessary but sufficient that it was original in the sense that it constituted the author's own intellectual creation.

An intellectual creation was an author's own if it reflected the author's personality. This would be the case if the author was able to express his creative abilities in the production of the work by making free and creative choices. The Court found that this could be the case for photographs of old coins (Cass. 17 March 2014 J.L.M.B. 2015, 680).

In this judgment, the Supreme Court (Cour de Cassation; Hof van Cassatie) confirmed a judgment of the Court of Appeal of Brussels which had ruled in the same way. The Court of Appeal specified that a photograph could be original when there was room for choices in taking and adapting the image and when the author had developed a particular design. The originality could be the result of lighting, the related duration, image taking, diaphragm, the developer and the paper, whereas content, objective, artistic or esthetic character were not at all relevant for assessing originality.

The Court of Appeal found the photographs to be original because the appearance of the coins in the photographs differed from their appearance in reality (Brussels 22 December 2011 J.L.M.B. 2012, n° 21, 1001).



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Quote any legal provisions and/or case law highlighting the relationship and/or distinction between:

- applied arts and fine arts:

Legislation and case-law only indirectly touch upon the relationship/distinction between applied arts and fine arts; for instance, when it concerns the possibility of cumulative protection by design law (which is traditionally seen as the most appropriate intellectual property protection for applied arts) and copyright law (which is traditionally seen as the most appropriate intellectual property protection for fine arts) (cf. infra).

It is worth noting that, under Article 21 of the Uniform Benelux Design Act of 25 October 1965 ('UBDA') (which has in the meantime been replaced by the Benelux Convention on Intellectual Property of 25 February 2005 (hereinafter: 'BCIP') (cf. infra)), a design or model "with a markedly artistic character" might simultaneously qualify for protection under the UBDA and copyright law provided that the conditions for the application of both laws are satisfied. Therefore, under the ancient legislation, designs and models without a markedly artistic character were excluded from copyright protection (Article 21.2 of the UBDA). In a landmark judgment of 1987, the Benelux Court of Justice however held that the wording "markedly artistic character" does not require the design to have a specific artistic value and that this expression only reiterates the general requirement for copyright protection, namely that the design should present a form of originality marked by the personality of the author (Benelux Court of Justice, Screenoprints/ Citröen Nederland, 22 May 1987, Jur. 1987, 13).

- applied arts and technical solutions for products/methods or principles of construction:

Article 2.1 BCIP states that "signs solely comprising a shape which is imposed by the very nature of a product, which gives the product substantial value, or which is necessary for obtaining a technical result, may not be regarded as trademarks."

Article 3.2.1 BCIP states that design protection excludes the: "(a) characteristics of the appearance of a product which are exclusively imposed by its technical function; (b) characteristics of the appearance of a product whose shape and dimensions must necessarily be reproduced as exact dimensions for the product in which it is incorporated or to which the design is applied to be connected mechanically to another product, be placed within or around another product, or be placed in contact with another product in such a way that each product can fulfill its function."

Article 3.2.2 BCIP provides the following exception to the rule laid down in Article 3.2.1. paragraph (b) BCIP: "Notwithstanding paragraph 1(b), characteristics of the appearance of a product the purpose of which is to permit multiple assembly or connection of interchangeable products within a modular system shall be protected by rights in a design complying with the conditions laid down in Article 3.1(1)."



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Apart from this last provision (which contains an exception to the rule), all of these provisions contain the principle that products of which the appearance is dictated exclusively by technical requirements are not eligible for trademark and/or design protection. As has already been shown above, case law tends to apply this principle relatively consistently and correctly (cf. supra).

This same principle has been developed by case law in the field of copyright. Whereas the CEL remains quiet on the subject, case law (as well as legal doctrine) accepts that works of authorship of which the design is imposed by technical requirements cannot be protected by copyright law. Application of this principle follows from the definition of originality as developed by (both Belgian and European) case law (cf. supra and infra).

- **applied arts and products of craftsmanship:**

Only patent protection requires craftsmanship (inventive step). Also patent law explicitly excludes aesthetic creations from protection (cf. infra). Craftsmanship is no legal requirement for any of the other intellectual property rights that can be used for the protection of the design of works of applied arts.

Regarding the lack of any requirement of craftsmanship in copyright law, reference can be made to a judgment of the Supreme Court (Cour de Cassation; Hof van Cassatie) in which the Court refused to grant copyright protection to a catalogue for electronic household appliances because the catalogue “certainly has helped [the claimant] to develop a certain skill in tracking parts fast, but the catalogue only contains data that can come to the attention of any experienced craftsman if so as long as he does extensive and difficult research”. The Supreme Court concluded that the catalogue was not marked with the author’s personal stamp and thus cannot be deemed original (Cass. 25 October 1989, Arr. Cass. 1989-90, 272).

In this respect, reference can also be made to the legal provisions concerning sui generis database protection. Article XI.306 of the CEL states a database must be the result in a qualitatively and/or quantitatively substantial investment in either the obtaining, verification or presentation of the contents.

Sui generis database protection can be cumulated with copyright protection for the appearance of a database (provided for in Article XI.186 of the CEL). A database (e.g. a phone book) could be considered as a work of applied arts.

Craftsmanship and/or “skill and labour” can constitute and/or contribute to the substantial investment required for protection by the sui generis right. At least to a certain extent, this could be seen as a relationship between applied arts and craftsmanship.

- **applied arts and the role of computer aided design (CAD software)**

There are no legal provisions that explicitly highlight the relationship and/or distinction between applied arts and the role of computer aided design.



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Works (of applied arts) can be protected by intellectual property rights for as long as the legal requirements are met. Works that are automatically created by a computer or software (i.e. in which the design has been automatically generated without any human interference) will not be eligible for protection. However, the mere fact that a work (of applied arts) is created with the help of a computer and/or software, will not necessarily exclude protection (cf. supra: Ghent 5 January 2009, A.M. 2009, n° 4, 413, note).

2) TYPES OF PROTECTION APPLICABLE TO APPLIED ARTS

a) What forms of protection are granted by law or case law in your country for each of the items under 1.b) above?

Depending on the nature of the objects, protection can be sought and obtained on the basis of:

- *copyright law*
- *industrial designs law (registered and unregistered)*
- *trademark law*
- *unfair competition*

Some types of functional objects can also be protected by patent law on condition that they can be considered as an invention within the meaning of patent law (this will however not be the case for most types of objects under 1.b) above).

In this respect, it should be underlined that the finality of patent law is entirely different to that of copyright law and design law: whereas copyright law and design law basically seek to protect appearance and design (of works of authorship and functional objects), patent law rather seeks to protect technical and functional elements (of inventions).

As was already set out above and will be further clarified below, technical and functional elements (or at least the appearance of these elements) are excluded from protection both under copyright law and design law (and under trademark law as well). In turn, patent law explicitly excludes "aesthetic creations".

This difference in finality implies that an overlap/cumulation of patent law with copyright law and/or design law will not be common. However, such overlap/cumulation is not impossible or prohibited.

Although Article XI.6 paragraph 1 CEL states that, among other things, aesthetic creation cannot be considered as invention, paragraph 2 clarifies that the provisions of paragraph 1 shall exclude patentability of the subject matter or activities referred to in that provision only to the extent to which a patent application or a patent relates to such subject matter or activities as such (cf. also Explanatory Memorandum of the (old) Uniform Benelux Designs Law and District Court Amsterdam 13 February 2002, B.I.E. 2002, 433).

b) Can more than one form of protection be granted to one product? Under which conditions? Cumulatively or exclusively?

Yes.



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It is possible to cumulate copyright, design, trademark and patent protection for one object.

The possibility and the extent of such cumulation will depend on the nature of the object and the fulfilment of the legal requirements for (each of) the cumulated regimes. In other words, cumulation is possible if and to the extent that all the legal requirements for the application of the different types of protection are (individually) met.

Regarding copyright and (registered) design protection, it should be noted that cumulation is not only allowed but even compulsory in Belgium under legislation and European case law (cf. recital 8 of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, Article 17 of the Community Designs Regulation and CJEU, 27 January 2011, Flos SpA/ Semeraro Casa e Famiglia SpA, C-168/09).

Article 3.28 BCIP contains some specific rules in the case of cumulation of copyright and design protection:

- “1. Authorisation given by the creator of a work protected by copyright to a third party to file a design in which that work of art is incorporated shall imply the assignment of the copyright attached to that work to the extent as it is incorporated in the design.*
- 2. The party filing a design shall be presumed also to be the owner of the copyright relating thereto; this presumption shall not, however, apply regarding the true creator or his beneficiary.*
- 3. The assignment of the copyright relating to a design shall result in the assignment of the right in the design and vice versa, without prejudice to the application of Article 3.25.”*

Intellectual property rights can also be cumulated with unfair competition law (Cass. 29 May 2009, Arr. Cass. 2009, 1496).

On the one hand, an intellectual property infringement will usually automatically amount to an act of unfair competition. On the other hand, the rules on unfair competition can also be used as a safety net for acting against the copying of (functional) objects that are not protected by intellectual property law.

In this respect, the Supreme Court (Cour de Cassation; Hof van Cassatie) has clarified that copying in itself is not prohibited by unfair competition law, because the freedom to copy constitutes one of the basic principles of the freedom of commerce. Copying can only be illegitimate under unfair competition law if it is accompanied by “attended circumstances” contrary to fair market practices (Cass. 29 May 2009, Arr. Cass. 2009, 1496).

c) Specify for each form of protection:

- **the types of rights granted**
- **limits and exceptions**
- **duration of the protection**
- **threshold requirements for protection, e.g. originality, novelty, distinctiveness**



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- formalities to obtain the protection (if any)
- original owner of the right
- who has the right to sue
- treatment of foreigners
- any other element affecting/determining the protection

Copyright

Requirements and thresholds for obtaining protection:

Copyright protection is granted without formalities. It comes into existence by the mere creation of the work.

To be eligible for protection, a work must be original.

The CEL contains only two references to originality, i.e. regarding photographs and databases. However, it does not provide for a definition of originality. It is a concept developed by case law.

Following the judgments of the Court of Justice of the European Union (hereinafter: 'CJEU') in the Infopaq and Painer cases (CJEU, 16 July 2009, C-5/08, Infopaq / Danske Dagblades Forening and CJEU, 1 December 2011, C-145/10, Eva-Maria Painer / Standard VerlagsGmbH) Belgian case law considers a work to be original when it is the author's own intellectual creation. An intellectual creation is an author's own if it reflects the author's personality. This will be the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (Cass. 31 October 2013, R.W. 2013-14, 1464 note by H. Vanhees).

The same principles apply when copyright protection is sought for the design of functional objects. In view of these principles, however, originality of the design of functional object will often imply that the design is not solely dictated by functional or technical constraints. If that were the case, the author will not be able to express his creative abilities in the creation of the work by making free and creative choices. However, the mere fact that a design also has a functional or technical purpose will not automatically lead to denying copyright protection.

Duration of the protection:

The general rule is that copyright protection is granted for a term of 70 years post mortem auctoris (i.e. during the life of the author and then until 70 years after his/her death).

When a work is the result of collaboration, the copyright remains for the benefit of all successors in title for 70 years after the death of the last surviving joint author.

The term of protection for an audiovisual work expires 70 years after the death of the last survivor of the following persons: the main director, the author of the screenplay, the author of the dialogue and the author of the musical compositions with or without words specifically composed for the work.



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In the case of anonymous or pseudonymous works, the term of copyright is 70 years from the time the work has lawfully been made accessible to the public. However, where the pseudonym adopted by the author leaves no doubt as to his/her identity or if the author discloses his/her identity during the period referred to in the general rule, the term of protection of the work shall be equal to term provided by that general rule.

In the case of anonymous or pseudonymous works that have not been lawfully made accessible to the public during the 70-year period following their creation, protection shall expire at the end of that period

Where a work is published in volumes, parts, issues or instalments and the 70-year period begins at the time the work is made accessible to the public, the term of protection shall run separately for each element.

Original owner of the right:

The original owner of the copyright is always the natural-person who created the work ('the author').

The types of rights granted:

The author essentially receives two types of exclusive rights: economic rights (reproduction, including adaptation and translation, communication to the public, distribution, renting and lending; a resale right for visual artists) and moral rights (divulgence, integrity and paternity).

Limits and exceptions:

There are numerous exceptions and limitations (to the economic rights) which can be subdivided into 5 major categories:

- Exceptions and limitations for educational and scientific purposes (citations, anthologies, communications to the public in the framework of educational activities, reproductions and communications to the public as an illustration for education or scientific research, reprography, use in public exams);*
- Exceptions and limitations for libraries, museums and archives (consultations via terminals in libraries or museums, copying for preserving cultural and scientific patrimony, reprography by library visitors, use of orphan works);*
- Exceptions and limitations for private copying (communications in the family circle, private copying and reprography for private use);*
- Exceptions and limitations for the use of information (citations for illustrative purposes, reproductions by broadcasters of their own broadcasts, reproductions of works in public spaces, caricature, parody and pastiche, news reporting);*
- Other exceptions and limitations (of disabled persons, hospitals, prisons, youth and disabled persons institutions, promotion for public exhibitions and sales, temporary reproductions in the digital environment).*



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Another exception/limitation that is worth noting is the exhaustion of the distribution right after first sale of a product in the territory of the European Union or the European Economic Area by the author or with the author's consent.

Who has the right to sue:

Infringement proceedings can be initiated by any person concerned (including, but not limited to, the author, heirs, (exclusive) licensee(s), the reseller of authentic copies, etc.), collecting societies, professional associations and interprofessional associations with legal personality.

Injunction proceedings on the merits can also be brought by the Minister of Economy or the Director-General of the general service for the Control and Mediation of the Ministry, profession-regulating organisations, professional or interprofessional associations with legal personality and consumer protecting associations.

Treatment of foreigners:

The CEL provides that the rights granted in Belgium also apply to foreign authors, but not for a longer term of protection than the term provided under Belgian law. If the foreign authors' rights expire after a shorter term in their own country, then these rights will also expire in Belgium. If Belgian authors are less protected in a foreign country, then the authors of that country will only enjoy the same lesser protection in Belgium. Belgium law thus follows a system of reciprocity.

However, the CEL clarifies that these principles apply without prejudice to international agreements. As the relevant international agreements (including, but not limited to, the Berne Convention) generally provide for equal treatment and non-discrimination (however, cf. Article 7 of the Berne Convention, which also contains a rule of reciprocity) these principles prevail over the principle of reciprocity.

Specifically for the European Union, reference can be made to Article 18 of the Treaty on the Functioning of the European Union ('TFEU') which explicitly prohibits any discrimination on grounds of nationality (cf. CJEU, 20 October 1993, C-92/92 and C-326/92, Collins en Patricia Im- und Export / Imtrat and EMI Electrola; CJEU, 6 June 2002, C-360/00, Land Hessen / G. Ricordi & Co. Bühnen- und Musikverlag GmbH. CJEU, 30 June 2005, C-28/04 Tod's SpA and Tod's France SARL / Heyraud SA. Application of this Article implies that, within the European Union, the principle of non-discrimination will always prevail over the principle of reciprocity.

Industrial designs

Requirements and thresholds for obtaining protection:

In principle, the protection of industrial design specifically for the Benelux territory (including Belgium) requires registration with the Benelux Organization for Intellectual Property (hereinafter also: 'BOIP'). However, by virtue of the Community Design Regulation, protection can of course also be granted to registered and unregistered designs (thus without requiring a registration) for the territory of the European Union (including Belgium).



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To be eligible for protection under design law (registered and unregistered) a design must be novel and have individual character.

A design is new if no identical design has been made available to the public before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority (for unregistered designs: before the date on which the design for which protection is claimed has first been made available to the public).

A design applied to a product or incorporated in a product that constitutes a part of a complex product shall be regarded as being novel and having an individual character only to the extent: (a) the part, once incorporated in the complex product, remains visible during normal use of the product; and (b) the visible characteristics of the part in themselves satisfy the conditions of novelty and individual character. A "complex product" is a product comprising multiple parts that may be replaced in such a way as to allow a product to be dismantled and reassembled.

A design is considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public before the date of filing the application for registration or, if a priority is claimed, the date of priority (for unregistered designs: before the date on which the design for which protection is claimed has first been made available to the public). In assessing individual character, the degree of freedom of the designer in developing the design will be taken into consideration.

Registration shall not grant the right to features of appearance of a product that are solely dictated by its technical function nor to the features of appearance of a product which must necessarily be reproduced in their exact form and dimensions to permit the product in which the design is incorporated or to that it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function. An exception to the last principle is foreseen for characteristics of the appearance of a product the purpose of which is to permit multiple assembly or connection of interchangeable products within a modular system.

*Registration shall not grant the right to a design either where: (a) the design is in conflict with a prior design which has been the subject of disclosure to the public after the filing or priority date and which has been protected, since a prior date, by an exclusive right deriving from a Community design, the registration of a Benelux filing, or an international filing; (b) a prior trademark is used in the design without the consent of that trademark's owner; (c) a work protected by copyright is used in the design without the consent of the copyright owner; (d) the design constitutes improper use of one of the elements listed in Article 6ter of the Paris Convention for the Protection of Industrial Property of 20 March 1883 (hereinafter: '**Paris Convention**') (e) the design is contrary to morality or public policy in one of the Benelux countries; (f) the filing does not sufficiently reveal the characteristics of the design.*

Duration of the protection:

The registration for an industrial design is valid for five years and can be renewed for four successive periods of five years up to a maximum of 25 years. The term of protection for an unregistered design is 3 years from the design's publication.



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Original owner of the right:

The right to a Benelux design is attributed to the applicant/owner of the registration, even if that person is not the actual creator of the design.

The creator or the person deemed to be the creator may, however, during the five years following publication of the registration of a filing claim the right to the Benelux filing of that design or the rights in the Benelux territory deriving from the international filing of that design if the filing was made by a third party without the creator's consent. The creator may on the same grounds and at any time invoke the nullity of the registration of the filing or of the rights referred to.

If a design has been created by a worker or an employee in the course of his employment, then the employer shall, unless specified otherwise, be regarded as the creator. If a design has been created on commission, the commissioning party shall, unless specified otherwise, then be regarded as the creator, provided that the commission was given with a view to commercial or industrial use of the product in which the design is incorporated.

The right to the Community design shall vest in the designer or his/her successor in title. If two or more persons have jointly developed a design, the right to the Community design shall vest in them jointly.

Where a design is developed by an employee in the execution of his duties or following the instructions given by his/her employer, the right to the Community design shall vest in the employer (unless otherwise agreed or specified under national law).

If an unregistered Community design is disclosed or claimed by, or a registered Community design has been applied for or registered in the name of, a person who is not entitled to it the person entitled to it on the basis of the foregoing may, without prejudice to any other remedy which may be open to him/her, claim to become recognised as the legitimate holder of the Community design. Where a person is jointly entitled to a Community design, that person may claim to become recognised as joint holder.

The person in whose name the registered Community design is registered or, prior to registration, the person in whose name the application is filed, shall be deemed to be the person entitled in any proceedings.

The types of rights granted:

The owner of a registered design enjoys an exclusive right allowing him to challenge the use of a product in which the design is incorporated or to which the design is applied, which has an identical appearance to the design as filed, or which does not produce a different overall impression on an informed user, having regard to the creator's degree of freedom in preparing the design. "Use" means, in particular, the manufacture, offer, marketing, sale, delivery, hire, importing, exporting, exhibiting, use or holding for one of those purposes.



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An unregistered design merely confers on its holder the right to prevent these acts if the contested use results from copying the protected design. The contested use shall not be deemed to result from copying the protected design if it results from an independent work of creation by a designer who may be reasonably thought not to be familiar with the design made available to the public by the holder.

Limits and exceptions:

The exclusive right to a design does not imply the right to contest: acts engaged in privately and for non-commercial purposes; acts done for experimental purposes; acts of reproduction for the purposes of illustration or teaching, to the extent these acts are compatible with honest commercial practice, do not unduly prejudice normal use of the design and provided that the source is indicated; equipment on ships or aircraft registered in another country when they temporarily enter the Benelux territory; the import into the Benelux territory of spare parts and accessories for the purpose of repairing such craft; the performance of repairs on such craft.

The exclusive right in a design constituting a part of a complex product does not imply the right to contest use of the design for the purposes of repair of that complex product to return it to its initial appearance.

Other exceptions or limitations are:

- exhaustion after first sale of a product in the European Union or the European Economic Area by the owner or with the owner's consent;*
- goods which were placed in circulation in Benelux territory prior to the filing. No actions can be taken against such goods;*
- the right of personal possession for third parties who, prior to the filing date for a design or to the priority date, manufactured (or who showed the intention of manufacturing) on Benelux territory goods having an appearance identical to the design filed or goods which do not produce a different overall impression on an informed user. The right of personal possession permits the owner to continue or to undertake manufacture of those goods and to carry out all the other acts that are normally prohibited under the exclusive right (cf. supra), with the exception of importing.*

Who has the right to sue:

According to the BCIP, infringement proceedings can be initiated by the owner of the design registration and/or a licensee provided that this is to protect the rights which the latter has been allowed to exercise and provided that it has obtained authorization from the owner.

The Community Designs Regulation states that, without prejudice to the provisions of the licensing contract, the licensee may bring proceedings for infringement of a Community design only if the right holder consents thereto. However, the holder of an exclusive licence may bring such proceedings if the right holder in the Community design, having been given notice to do so, does not himself bring infringement proceedings within an appropriate period.



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A licensee shall, for the purpose of obtaining compensation for damage suffered by him/her, be entitled to intervene in an infringement action brought by the right holder in a Community design.

According to the CEL, injunction proceedings on the merits can also be brought by the Minister of Economy or the Director-General of the general service for Control and Mediation of the Ministry, profession-regulating organisations, professional or interprofessional associations with legal personality and consumer protecting associations.

Treatment of foreigners:

Regarding the protection of foreign nationals, the BCIP provides that nationals of Benelux countries and nationals of countries that are not members of the Union established by the Paris Convention, who are resident in or who have real and effective industrial or commercial establishments on Benelux territory may claim application of the provisions of the BCIP, the Madrid Agreement and Madrid Protocol, the Hague Agreement and the TRIPS Agreement for their benefit throughout the Benelux territory.

Nationals of countries that are members of the Union established by the Paris Convention are entitled to equal treatment under Article 2 of that Convention.

Specifically for the European Union, reference can again be made to Article 18 TFEU which explicitly prohibits any discrimination on the grounds of nationality.

Trademarks

Requirements and thresholds for obtaining protection:

The protection of a trademark specifically for the Benelux territory (including Belgium) requires a registration with 'BOIP'.

Names, designs, stamps, seals, letters, figures, shapes of products or packaging and all other signs able to be represented graphically and used to distinguish the goods or services of a company are eligible for trademark registration (Article 2.1(1) BCIP, cf. infra).

Signs solely comprising a shape which is imposed by the very nature of a product, which gives the product substantial value, or which is necessary for obtaining a technical result, may not be regarded as trademarks (Article 2.1(2) BCIP), cf. infra).

No right in a trademark can be acquired by (Article 2.4 BCIP, cf. infra): (a) the registration of a trademark which, regardless of the use made thereof, is contrary to morality or public policy in one of the Benelux countries or in respect of which rejection or invalidation is provided for by Article 6ter of the Paris Convention; (b) the registration of a trademark which is likely to mislead the public; (c) the registration of a trademark resembling a collective trademark registered for similar goods or services, which benefited from a right which lapsed during the three years preceding filing; (d) the registration of a trademark resembling an individual trademark registered by a third party for similar goods or services, which benefited from a right which lapsed during the two years preceding filing as a result of expiry of the registration, unless the third party consents or there has been a failure to use the trademark "normally" on the Benelux territory for an uninterrupted period of five years; (e) the registration of a



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trademark which might give rise to confusion with a well-known trademark, within the meaning of Article 6bis of the Paris Convention, belonging to a non-consenting third party; (f) the registration of a trademark which was filed in bad faith; (g) the registration of a trademark for wines which includes a geographical indication identifying wines or which comprises such indication, or the registration of a trademark for spirits which includes a geographical indication identifying the spirits or which comprises such indication, in respect of wines or spirits which do not have that origin, unless the filing leading to such registration was made in good faith prior to January 1, 2000 or before onset of the protection of the said geographical indication in the country of origin or in the Community.

The BOIP shall refuse to register a trademark if it considers that (refusal on absolute grounds): (a) the sign may not constitute a trademark as defined in Article 2.1(1) and (2) (cf. supra); (b) the trademark is devoid of any distinctive character; (c) the trademark comprises only signs or indications which may be used in trade to indicate the kind, quality, quantity, intended purpose, value, geographical origin or time of manufacture of the product or provision of the service, or other characteristics thereof; (d) the trademark comprises only signs or indications which have become customary in everyday language or in the bona fide and established practices of the trade; (e) the trademark is a trademark referred to under Article 2.4(a), (b) or (g) (cf. supra).

Duration of the protection:

Registration of a trademark filed in the Benelux territory (Benelux filing) shall be for a period of 10 years with effect from the date of filing. Registration can be renewed on request for further periods of 10 years

Original owner of the right:

The trademark right is owned by the registrant.

The types of rights granted:

A registered trademark shall provide its owner with an exclusive right. Without prejudice to the possible application of ordinary law in matters of civil liability, the exclusive right to a trademark shall permit the owner to prevent any third party, without its consent, from (Article 2.20(1) BCIP, cf. infra): (a) using in the course of trade a sign that is identical to the trademark for goods or services that are identical to those for which the trademark is registered; (b) using in the course of trade a sign in respect of which, because it is identical or similar to the trademark and because the goods or services covered by the trademark and the sign are identical or similar, there is a risk of confusion in the mind of the public which includes the risk of association between the sign and the trademark; (c) using in the course of trade a sign which is identical or similar to the trademark for goods or services which are not similar to those for which the trademark is registered, where the trademark enjoys a reputation in the Benelux territory and where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark; (d) using a sign for purposes other than those of distinguishing the goods or services, where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark.



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Use of a similar trademark or sign shall mean in particular: (a) attachment of the sign to products or their packaging; (b) offering, marketing or holding goods for these purposes or offering or providing services under the sign; (c) importing or exporting goods under the sign; (d) use of the sign in business papers and advertising.

Limits and exceptions:

The exclusive right to a trademark does not imply the right to challenge a third party over the use in business of: (a) its name and address; (b) indications relating to the kind, quality, quantity, intended purpose, value, geographical origin or time of manufacture of a product or provision of a service or other characteristics thereof; (c) the trademark, where it is necessary to indicate the purpose of a product or service, particularly as an accessory or spare part; provided that such use is made in accordance with fair use in the conduct of industry or business.

The exclusive right to a trademark does not imply the right to challenge use in business of a similar sign which draws its protection from a prior right of local scope, if such right is recognised by the legal provisions of any Benelux country, within the limits of the territory in which it is recognised.

The exclusive right does not imply the right to challenge the use of the trademark for goods that have been marketed in the European Community or European Economic Area under that trademark by the owner or with his consent, unless there are legitimate grounds for the owner to object to further marketing of the goods, in particular where the condition of the goods has been altered or adversely affected after they have been marketed (exhaustion).

Any other element affecting/determining the protection:

Loss of right through tolerance and objections to use:

The owner of a prior trademark who has tolerated the use of a later registered trademark during a period of five consecutive years and is aware of such use may no longer object to the use of the later trademark under Article 2.20(1)(a), (b) and (c) (cf. supra) regarding goods or services for which the trademark has been used, unless the later trademark was filed in bad faith.

Tolerance of the use of a later registered trademark as defined above does not give the owner of the later registered trademark the right to object to the use of the prior trademark.

Lapse of right:

The right to a trademark shall lapse: (a) through voluntary cancellation or expiry of the trademark's registration; (b) through cancellation or expiry of the international registration, or through renunciation of protection for Benelux territory or, in accordance with the provisions of Article 6 of the Madrid Agreement and Madrid Protocol, as a result of the fact that the trademark no longer benefits from legal protection in the country of origin.

The lapse of right of a trademark can be invoked by any interested party if, following the date of registration: (a) there has been no normal use of the trademark, without due cause, on Benelux territory for the goods or services in which the trademark is registered, for an



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uninterrupted period of five years; (b) the trademark has become the normal commercial description of a product or service for which it is registered as a result of the activity or inactivity of its owner; (c) as a result of the use made of it by the owner or with his consent, regarding the goods or services for which it is registered, the trademark is likely to mislead the public, particularly as regards the nature, quality or geographical origin of the goods or services.

“Use” of the trademark in the sense of the foregoing should also be understood to mean: (a) use of the trademark in a form which differs through elements which do not adversely affect its distinctive character in the form in which it has been registered; (b) attachment of the trademark to goods or their packaging for the sole purpose of export; (c) use of the trademark by a third party with the consent of the owner of the trademark.

Who has the right to sue:

According to the BCIP, infringement proceedings can be initiated by the owner of the design registration and/or a licensee provided that this is to protect the rights which the latter has been allowed to exercise and provided that it has obtained the owner's authorisation.

According to the CEL, injunction proceedings on the merits can also be brought by the Minister of Economy or the Director-General of the general service for Control and Mediation of the Ministry, profession-regulating organisations, professional or interprofessional associations with a legal personality and consumer protecting associations.

Treatment of foreigners:

Regarding the protection of foreign nationals, the BCIP provides that nationals of Benelux countries and nationals of countries that are not members of the Union established by the Paris Convention, who are resident in or who have real and effective industrial or commercial establishments on Benelux territory may claim application of the provisions of the BCIP, the Madrid Agreement and Madrid Protocol, the Hague Agreement and the TRIPS Agreement for their benefit throughout the Benelux territory.

Nationals of countries that are members of the Union established by the Paris Convention are entitled to equal treatment under Article 2 of that Convention.

Specifically for the European Union, reference can again be made to Article 18 TFEU which explicitly prohibits any discrimination on the grounds of nationality.

Patents

Requirements and thresholds for obtaining protection:

The right to a patent specifically for the Belgian territory requires an application with Industrial Property Office of the Ministry of Economic Affairs (hereinafter: ‘IPO’).

Only inventions that are new, that involve an inventive step and that are capable of industrial application are eligible for protection.

An invention shall be considered to be new if it does not form part of the state of the art. The state of the art shall be held to comprise everything made available to the public by means



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of a written or oral description, by use, or in any other way, before the date of filing of the patent application. An invention shall be considered as involving an inventive step if having regard to the state of the art, it is not obvious to a person skilled in the art. An invention shall be considered as capable of industrial application if it can be made or used in any kind of industry, including agriculture. Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body shall not be regarded as inventions that are capable of industrial application within the foregoing meaning. This does not apply to products, in particular substances or compositions, for use in any of those methods.

Excluded from patent protection are: discoveries, scientific theories and mathematical methods; aesthetic creations; schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; new plant varieties of species or varieties covered by the protection set up by the law for the protection of new plant varieties; animal varieties; essentially biological processes for the production of plants or animals (this last exclusion does not apply to microbiological processes or to the products obtained thereby).

Patents shall not be granted for inventions the exploitation of which would be contrary to public policy or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.

Duration of the right:

A patent is in principle granted for 20 years from the filing date of the application, subject to payment of the renewal fees (6 years in the case of non-timely payment of a search fee or the non-timely submission of the search report to the IPO).

Original owner of the right:

The right to a patent shall belong to the inventor or his successor in title.

The types of rights granted:

When the subject matter of the patent is a process, the rights conferred by the patent shall extend to the products directly obtained by such process.

The patent shall confer on its owner the right to prevent all third parties that do not have his consent from: (a) making, offering, putting on the market or using a product which is the subject matter of the patent, or importing or stocking the product for those purposes; (b) using a process that is the subject matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the owner of the patent, from offering the process for use on Belgian territory; (c) offering, putting on the market, using, or importing or stocking for those purposes the product obtained directly by a process that is the subject matter of the patent.

The patent shall also confer on its owner the right to prevent all third parties not having his consent from supplying or offering to supply on Belgian territory a person other than the parties entitled to exploit the patented invention with means, relating to an essential element of that invention, for putting it into effect, when the third party knows, or it is obvious in the



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circumstances, that those means are suitable and intended for putting that invention into effect.

Limits and exceptions:

The rights conferred by the patent shall not extend to: (a) acts done privately and for non-commercial purposes; (b) acts done for experimental purposes relating to the subject matter of the patented invention; (c) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared; (d) the use on board vessels of countries of the Paris Union for the Protection of Industrial Property, other than Belgium, of the subject matter of the patented invention in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of Belgium, provided that the said subject matter is used exclusively for the needs of the vessel; (e) the use of the subject matter of the patented invention in the construction or operation of aircraft or land vehicles of countries of the Paris Union for the Protection of Industrial Property other than Belgium, or of accessories of such aircraft or land vehicles, when those aircraft or land vehicles temporarily or accidentally enter Belgian territory; (f) acts covered by Article 27 of the International Civil Aviation Convention of 7 December 1944, when such acts concern the aircraft of a State, other than Belgium, enjoying the provisions of that Article.

The rights conferred by a patent shall not extend to acts concerning a product covered by that patent that are made on Belgian territory after that product has been put on the market in Belgium by the owner of the patent or with his express consent.

Reasonable compensation appropriate to the circumstances may be demanded by the patent applicant from any third party who, between the day on which the patent application was made available to the public at the request of the applicant, or a copy of the application was made available to the third party involved, and the date on which the patent was granted, has exploited the invention in a manner that would be prohibited after that period by reason of the patent.

Any person who, prior to the filing date or priority date of the patent, in good faith, used or possessed on Belgian territory the invention that is the subject matter of the patent shall, despite the existence of the patent, enjoy a personal right to exploit that invention.

In some cases and under certain circumstances compulsory licenses can be given.

Who has the right to sue:

The owner or usufructuary of a patent shall be entitled to institute infringement proceedings. However, the holder of a compulsory license may institute infringement proceedings if, after due notification, the owner or usufructuary of the patent does not institute such proceedings.

Unless otherwise stipulated in the licensing contract, the preceding subparagraph shall also apply to the holder of an exclusive license. Any licensee shall be entitled to take part in the infringement proceedings instituted by the owner or usufructuary of the patent in order to obtain compensation for injury that he has personally sustained.



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According to the CEL, injunction proceedings on the merits can also be brought by the Minister of Economy or the Director-General of the general service for Control and Mediation of the Ministry, profession-regulating organisations, professional or interprofessional associations with legal personality and consumer protecting associations.

Treatment of foreigners:

The principles of international law (such as those the Paris Convention) which provide in equal treatment of foreigners are applicable.

Specifically for the European Union, reference can again be made to Article 18 TFEU which explicitly prohibits any discrimination on the grounds of nationality.

3) 3D PRINTING

A session of the Congress is devoted to the analysis of the problems raised by the development of the 3D printing technology, the increasing availability of 3D printers and the digital dissemination of 3D modeling software both for commercial purposes and for private usage.

The expression “3D printing” is currently used to indicate various processes employed to synthesize and reproduce a three-dimensional object. It is also known as additive manufacturing (AM), but this definition is reductive since, from a file, there may also be a manufacturing process obtained by removing material. In the 3D printing, successive layers of material are formed under computer control to create or reproduce an object. A 3D printer is a type of industrial robot, controlled by specific software that can be either proprietary, or acquired by license, or open source.

The 3D printing could stem from a 3D modelling or a tridimensional digitalization of a pre-existing object (that can be a model or a work). The 3D modeling is the process of developing a mathematical, three-dimensional representation of all the surfaces of an object via specialized software. The 3D model can be displayed as a two-dimensional image or can be physically created using 3D printing devices. The objects are produced from a 3D model, or file, or from other electronic data source.

The 3D technology can be used also for the 3D digitalization of existing physical objects, resulting in digital files (the reverse of 3D modeling).

The issues relating to the applicability of Intellectual Property in 3D printing can be subdivided into two categories:

- i) Issues and rules relating to the software, designs and devices employed for the production of 3D objects. This category is not affected by the features and the nature of the printed 3D object.
- ii) Issues relating to the applicability of Intellectual Property in the creation of files and in the 3D printing of objects that are protected by Intellectual Property. For example, in Museums, the use of the 3D printing technology (digitalization and printing) can extend both to the replication and restoration of artifacts for on-site display and to the educational mission of the institutions with outside delivery of their artifacts.

This Section of the questionnaire is meant to survey the current situation and trends (possible evolution of solutions) in the legal framework applicable to the 3D printing ecosystem. For this purpose, please take into consideration the description above, but feel free, if you believe it useful, to add any other details and comments that you deem necessary.



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You are requested to you answer the following questions to the end of showing the practices, the questioning and the legal responses, existing or expected. These latter can result from the application of legal or regulatory solutions - general or specific - or from court judgments or soft law. *NB: The questionnaire is long enough to enable a better understanding of the issues and answers. It is obvious that those people called to respond can do so synthetically and answer only some of them.*

1) Overview

- a) **Is there reason to distinguish, in legal terms, depending on whether the three-dimensional object is reproduced by an additive manufacturing process or by a material-removing manufacturing process? Do you believe that additive manufacturing requires a special legal treatment?**

At this stage, we see no reasons to treat additive manufacturing differently.

Both under copyright law and design law, reproductions of protected objects are, in principle, prohibited irrespective of the technology used. Patent law also does not make a difference as to the technique used to reproduce a patented method. Copyright law even explicitly states that the author has the right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part ("technological neutrality").

- b) **Are there been, in your country, public or private initiatives aiming at supporting and legally framing the printing of three-dimensional objects? If this is the case, can you summarize the main lines and conclusions?**

There have been and are some initiatives aimed at supporting 3D-printing as an industry and at raising awareness about this upcoming technology, arranged by organising workshops, training providers and (legal) seminars.

One of the initiatives supported on a political level (in Flanders) is the establishment of The Strategic Initiative Materials ('SIM') (<http://www.sim-flanders.be/>) which is a virtual research centre, initiated in 2009 by the Flemish Materials Industry and the Flemish Universities.

SIM's mission is to further strengthen the scientific materials base and to build technology platforms in relevant areas with sufficient critical mass.

One of SIM's research programs, i.e. STREAM, is devoted to 'additive manufacturing'. STREAM is an acronym for STRuctural Engineering materials through Additive Manufacturing: 3D printing of structural materials by increasing the knowledge base about additive manufacturing of polymers and metals, with emphasis on the material properties.

STREAM aims at tackling current barriers to breakthrough on a large scale of additive manufacturing by building up understanding of materials (screening methodologies, design and production of dedicated AM materials, enlarging the AM material palette for both polymers and metals, etc.) and processing and end product properties (increased density,



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consistent properties throughout the parts, decreased cost of production, recyclability, etc). To strengthen and support the industrial consortium, all relevant knowledge centres in Flanders with scientific and technological expertise concerning Additive Manufacturing and/or post-processing are combined in the STREAM consortium.

Another initiative that is also supported on a political level (in Flanders) is the establishment of the Flanders Make (<http://www.socmaakindustrie.be/>).

Flanders Make is the strategic research centre for the manufacturing industry. There are establishments in Lommel and Leuven and they collaborate with research labs at the 5 Flemish universities. Flanders Make collaborates with major companies and SMEs. Together they focus on product and process innovation based on the challenges and needs of the industry. The research focus is on 4 technological domains: power electronics & energy storage; mechatronics & design methods; production processes; and people-driven system development. This will, as a first step, yield product and process innovations in 3 fields of application: vehicles, machines and factories.

One of Flanders Make's research programs is 'Additive Manufacturing for Serial Production'. Flanders Makes describes its research objectives as follows:

The top priority is creating a modular platform. This will in future be the basis for developing specific modules. The selection of these specific modules will be determined by the actual industrial needs.

- *Open and modular research infrastructure – We develop an open platform that allows new Flemish technology companies to test new modules and processes in a controlled environment. The open approach allows for accelerated innovation. The modular structure enables the integration of new breakthroughs in the overall system.*
- *Subsequent topics – We expect that the creation of an open platform will lead to the development of new modules and machines, which in turn will result in faster and better production processes. This will obviously generate new research issues involving the following aspects:*
 - *Robustness – Additive manufacturing is still not reliable enough for many applications in high-end markets such as the aerospace, automotive or medical industry. For this, the consistency within the processes must be improved (less defective pieces), control and monitoring methods must be implemented and a more active simulation is an absolute necessity.*
 - *Production speed – We want to increase the production speed (cubic centimetre per hour) by a factor 10 to 100. This will improve the cost-efficiency and economic viability of additive manufacturing (AM). To realise this, we will have to improve the layer deposition time, the drying time between layers, the start-up time, etc. Think of multi-laser machines, increased scanning speed, machines with extra printing heads, etc.*



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- *Integrated process chains – AM still requires significant manual post-processing steps, which makes processes slow and expensive. The integration of AM in novel process chains can increase the overall flexibility of the AM process, lead to a continuous flow, reduce production times and eliminate steps. Significant steps forward are particularly required for the feeding and cleaning stages, but also the direct integration of finishing processes such as coating and surface modification should be possible.*
- *Part size – The production of larger components in plastic or metal, up to two cubic metres in size, offers a major opportunity for AM.*
- *Efficient use of resources – The whole idea of AM is not to use more material than is strictly necessary. However, the AM processes themselves have not yet been fully optimised: recycling and waste reduction are still virtually unexplored territory.*
- *Pushing the limits – Many client-ordered features and properties must be realised after the AM process as the production method itself is still inadequate for this. Research into the limits of the technology may lead to tighter geometrical accuracies (up to approximately 1 micron), superior material properties, etc.*
- *Flexibility – AM processes are still not flexible and can often be used only for the purpose for which they were originally designed. Hybrid machines must make the technology more flexible and easily deployable.*

The overall objective of these initiatives is to put additive manufacturing in Flanders on the map internationally. In this respect, the intention has been expressed to come to an action list that can translate policy into action: legislation, regulation, financing, experimenting, demonstrating, stimulation, education, internationalizing, etc.

We are not aware of any legislative actions that have effectively been taken in the field of 3D-printing thus far.

- c) Several different steps can be distinguished in the chain of 3D printing: modeling/scanning (by acquisition device or CAD software), digital distribution of 3D models, printing of three-dimensional objects. Do you believe that there are other important steps requiring specific legal analysis?**

Yes, the distribution of 3D-printed objects (and exhaustion of the distribution right). Distribution of objects that infringe intellectual property rights is in principle prohibited by the relevant intellectual property laws.

2) 3D modeling / Creation of the file that will allow, downstream, the reproduction of an object with a 3D printing process

- a) If a pre-existing (two or three-dimensional) object is scanned/digitalized or modeled, must we consider that the person who carried out the digitalization or modeling can claim rights to the file? If so, under what conditions?**



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As a principle, we believe that the mere scanning/digitalising of an object will in principle not give rise to an intellectual property right.

Scanning is basically an automated/computer-generated process and not an expression of an intellectual and creative effort. As such, the file will, for instance, probably not be protected under copyright law (including under software copyright law, which also requires originality for protection). After all, it is not possible to make creative choices in the creation of the underlying code of a computer file that is the result of a scan. The file owner might have a common law property right and such a right would protect the file owner from unlawful appropriation of the file itself, but will not protect him or her from unlawful reproduction(s) of either the file or the object contained therein.

However, the nature of the 3D-technology used for the scanning/digitalisation may require a more nuanced reply to this question. High-end professional 3D-technology (scanners) is (are) able to make a (nearly) perfect digital reproduction of an existing object, whereas more basic technology may still require more involvement and possibly creative efforts from the user concerning the scanning of the object or improving the digital reproduction. Some home scanners are merely able to reproduce the raw contours of an object or make imperfect reproductions and it is then necessary for the user to remedy these imperfections. In some cases, the user will even have to connect different pictures of the object taken from different angles to obtain an accurate reproduction of the object. One could argue that such intervention may constitute an intellectual and creative effort that could give rise to copyright protection as an adaptation of an existing object (in this respect, it could be possible to make an analogy with the copyright protection of photographs; cf. H. Dasari, "Assessing Copyright Protection and Infringement Issues Involved with 3D Printing and Scanning", AIPLA Quarterly Journal 2013, 298).

The same principles apply to the modelling of existing objects: to the extent this process implies an intellectual and creative effort, the result may be protected (e.g. under copyright law) (cf. Brussels 26 March 2009, J.L.M.B. 2009, 1041: in this judgment the Court of Appeal of Brussels ruled that the conversion of 2D images of characters of the Tintin comic book series to 3D statuettes was a mere technical process in which there was no room for a personal touch and as a result the 3D statuettes in themselves could not be protected by copyright law (as derived works)).

For all of the hypotheses set out above, reservation must be made for the possible rights arising from the existing object: if the object is protected by an intellectual property right, then the scanning and/or modeling may require obtaining the rights holder's prior authorization (cf. infra).

- b) Is the modeling and the 3D scanning/digitalization of an object for private use allowed by the law in your country, and if so under what conditions? Distinguish, if necessary, according to the nature of the modeled or scanned/digitalized object (work of the spirit, model, invention ...) or the source of the used object. What about acts made for non-private use?**

Copyright law:

3D scanning/digitalisation of an object can be considered as a reproduction (and/or adaptation) and can constitute copyright infringement if it happens without the right holder's



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consent. To give rise to an infringement, the scanned/digitalised object should, of course, be protected under copyright law (cf. supra).

Copyright law provides an exception for “the reproduction onto any type of support other than paper or a similar support of works made in and exclusively destined for the family circle” for works that have been lawfully made public (Article XI.190, 9° CEL).

On the basis of this exception, one could conclude that 3D scanning/digitalisation of an object within the family circle – i.e. for personal purposes or for family – is allowed under copyright law, provided that the object had lawfully been made available to the public.

As has already been set out above, copyright law also provides exceptions for reproductions concerning several non-private purposes (such as for educational purposes, cf. supra).

Design law:

As set out above, the infringement of a protected design requires “use” of a “product” in which the design is incorporated or to which the design is applied, which has an identical appearance to the design as filed, or which does not produce a different overall impression on an informed user (cf. supra).

The BCIP states that “use” means, in particular, the manufacture, offer, marketing, sale, delivery, hire, importing, exporting, exhibiting, use or holding for one of those purposes. A “product” is defined as meaning any industrial or craft article including, amongst others, parts designed to be assembled into a complex product, packaging, presentation, graphic symbol or typographic character. Computer programs are not regarded as a product.

One could argue that 3D scanning/digitalisation in itself does not amount to a “product” within the meaning of the BCIP. This could also be derived by analogy from the specific exclusion of computer programs. Moreover, one could argue that a scan/digitalisation of a material product does not constitute “use”.

Another question is whether such a 3D scan/digitalisation produces the same “overall impression” as the original object (cf. Rb.’s-Gravenhage 31 July 2008, IE Forum, 2008, www.ieforum.nl/index.php?//Eerst+even+voor+jezelf+lezen///20519 in which the court ruled that a 2D representation of a 3D objects produced a different overall impression on the informed user).

In any event, there can be no doubt that the 3D scanning/digitalisation of an object protected by design law for private use is not prohibited, as the BCIP contains a clear exception concerning the exclusive rights for acts engaged in privately and for non-commercial purposes (cf. supra).

Trademark law:

The trademark holder’s exclusive rights mainly extend to the right to prohibit use (of an identical or similar sign) in the course of trade (cf. supra Article 2.20.1 (a), (b) and (c) BCIP).



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Since the definition of “use” given in the BCIP (cf. *supra*) is not limited, one could – in theory – argue that scanning/digitalisation of a trademarked object (shape trademark) constitutes a “use” of that trademark.

However, infringing use supposes use for distinguishing goods or services (with a risk of confusion) or use by which unfair advantage is taken and/or that is detrimental to the distinctive character (or other functions) or repute of a trademark (cf. *supra*). In principle this will not be the case for the mere scanning/digitalisation of a trademarked object (cf. CJEU, 23 March 2010, C-236/08 and C-238/08, *Google France Sarl v. Louis Vuitton Malletier SA*: “The fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign”; CJEU, 22 September 2011, C-323/09, *Interflora Inc v. Marks & Spencer Plc*).

So in general, the scanning/digitalisation, even for non-personal purposes, will in itself probably not constitute a trademark infringement.

A fortiori, pure personal use will not constitute an infringement either. On the one hand, because there is no “use” within the meaning of the BCIP. On the other hand, because such use does not take place in the course of trade.

In this respect, the CJEU clarified that use “in the course of trade” must be interpreted as relating to use in the context of commercial activity with a view to economic advantage and not as a private matter (CJEU, 12 November 2012, C-206/01, *Arsenal Football Club v. Matthew Reed*).

It should be noted, however, that the trademark holder also has the exclusive right to use a sign for purposes other than those distinguishing the goods or services, in which use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark (cf. *supra* Article 2.20.1 (d) BCIP). This right is not subject to the condition of use in the course of trade.

The question is whether 3D scanning/digitalisation of a trademarked object for private use can be considered as a “due cause” that would exclude the application of this provision?

In this respect, reference can be made to the CJEU’s judgment in the *Bulldog*-case CJEU, 6 February 2016, C-65/12, *Leidseplein Beheer BV v. Red Bull GmbH* in which the CJEU clarified that “due cause” (in relation to trademarks with a reputation) may not only include objectively overriding reasons but may also relate to the subjective interests of a third party using a sign. According to the CJEU, the concept of ‘due cause’ is intended to strike a balance between the interests in question. One of the elements that can/should be taken into account is “the economic and commercial significance of the use for that product of the sign which is similar to that mark”.

By analogy, it is possible to argue that a strictly private use that entails 3D scanning/digitalisation of a trademarked object constitutes “due cause” and thus cannot be prohibited. Whether or not this actually is the case has yet to be decided by the courts.



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Patent law:

Patent infringement basically requires use/copy of the technical function claimed by the patent. The technical function of the (CAD/STL) file is to operate the 3D printer and thus differs from the technical function of the patent. Consequently, one could argue that the file itself will probably not infringe the patent.

In any event, there can be no doubt that 3D scanning/digitalisation for private use is not prohibited, as patent law contains a clear exception to the exclusive rights for acts engaged in privately and for non-commercial purposes (cf. supra).

- c) When modeling or three-dimensional scanning for private use is permitted by the law (application of general law or special text), is this accompanied by a compensation mechanism in favor of the right-holders of the printed object? If so, can you specify the methods of collection and distribution?**

In general, authors of copyright protected works are indeed entitled to compensation for the private reproduction of their works (via a compulsory license).

The compensation/levy is due by the manufacturer, importer or intracommunity acquirer of storage media and devices that are clearly used for the reproduction of protected works at the time such storage media and devices enter into circulation on the national territory.

Further rules and the list of the storage media (such as USB-keys) and devices (such as scanners and printers) that are subject to this compensation/levy are established by a Royal Decree of 18 October 2013.

In the field of 3D-printing, it might be difficult to speak of "storage media" in the case of 3D reproductions; the materials used for reproductions in that case are somehow different from storage media like USB-keys and they raise a number of questions as to the possibility to provide for a levy (they might only be taken into consideration when they are clearly used for the purpose of reproductions in 3D, e.g. in open spaces specifically dedicated to that purpose, like FabLabs).

At this stage, Belgian legislation does not provide for a levy on 3D printers. The levy for PC's (which can be used for 3D scanning/digitalization) is currently set at 0 EUR.

The author's right to compensation is inalienable.

3) Dissemination of 3D models / Making available of files for 3D reproduction

- a) Are there in your country websites legally distributing 3D files, for free or for a fee? If so, can you specify the business model and the legal model (licensing models, liability, etc.)?**

We are not aware of the existence of specific Belgian websites that (legally) distribute 3D files.



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- b) Are there in your country platforms allowing users to share 3D files? If so, do these platforms raise legal problems (distribution licensing models, unauthorized making available ...)? Has there been any litigation? To your knowledge, did the right-holders conclude contracts with this type of platforms to authorize the making available of models created by users? If so, how the question of moral rights has been perceived.**

We are not aware of the existence of specific (legal) Belgian 3D printing market places/file sharing platforms. We assume Belgian users use the most common (foreign) online market places such as Thingivers Shapeways, MyMiniFactory, etc. However, there is i.materialise (cf. infra), which is a marketplace for buying and selling printed objects (in principle not the file).

We are not aware of any litigation in Belgium that specifically relates to making 3D files available on market places or FSPs. However, it should be noted that there has been litigation regarding a well-known FSP, The Pirate Bay, which has a specific page for “physibles” on which 3D files could be exchanged. The Pirate Bay has been blocked in Belgium as a result of multiple court orders imposed on Belgian ISPs (Internet Service Providers) (Cass. 22 October 2013, T. Strafr. 2014, 126, note by R. Schroefs; Antwerp 26 September 2011, R.A.B.G. 2011, 1269-1287, note by P. Van Eecke and A. Fierens).

Making available and exchanging 3D files could in theory be an intellectual property infringement provided that the object in the file is protected and that the making available happens without the rights holder’s consent.

Under copyright law, such making available may constitute an infringement of the exclusive making available right (communication to the public), the distribution right and, possibly, also the reproduction right (which even applies to temporary copies).

The making available could also constitute an infringement of the moral divulgation/publication right (which gives the author the right to decide if, how and when he or she would like to disclose the work), i.e. when this happens prior to the disclosure of the work by the author. Not mentioning the author’s name could also give rise to an infringement of the moral paternity right.

In this respect, it can be noted that Materialise guarantees not to make any uploaded designs available unless the designer authorized it to do so (cf. infra). They also guarantee that the designer’s name will be mentioned each time a design is made available.

The making available could, in theory, equally constitute an infringement of patent law and, more specifically, so-called indirect infringement prohibited as provided by Article XI.29 CEL.

This provision grants the patent holder the right to prevent all third parties not having his or her consent from supplying or offering to supply on Belgian territory a person other than the parties entitled to exploit the patented invention with means, relating to an essential element of that invention, for putting it into effect, when the third party knows, or it is obvious in the circumstances, that those means are suitable and intended for putting that invention into effect (cf. supra).

With respect to trademark law, the answer about whether or not the making available of the file constitutes infringement will depend on the specific circumstances of the case.



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A distinction could be made between the situation in which only the file is made available or if this is accompanied by other circumstances, for example a reference to a word mark that is also used to identify the trademarked object/shape mark) and, of course, whether these circumstances could lead to the conclusion that the specific requirements for infringing use under Article 2.20.1 (a), (b), (c) or (d) BCIP are met (identity, possibility of confusion, etc.).

However, in general, one could probably argue that the mere making available of the file cannot be a use of a trademark and certainly not an infringing use. After all, the file itself cannot equal the trademark contained therein. Contrary to patent law, trademark law does not have a similar concept of indirect infringement (cf. supra).

Considering what was stated above regarding design law, i.e. that the 3D file can probably not be considered a “product” and that the file will normally not produce the same overall impression that the object contained therein, then it can be assumed that the mere making available of the file cannot be considered as an infringement of design law.

4) 3D printing / Reproduction of a work, a model or any other object protected by intellectual property rights

- a) Is in your country the 3D printing of an object for private use authorized by law (special law or application of general law), and if so under what conditions? Distinguish, if necessary, according to the nature of the modeled or scanned object (work of the spirit, model, invention, etc.) or the source of the file used. What about acts made for non-private use?**

With respect to private use, we can refer to what was set out above (cf. supra)

Printing an object protected by any of the relevant intellectual property rights for non-private use can probably be considered as an infringement of the relevant right (cf. supra), provided that the object is protected and that the printing is not covered by an exception (other than the exceptions provided for private use) (cf. supra)

- b) When the 3D printing for private use is permitted by the law, is this accompanied by a compensation mechanism in favor of rights-holders of the printed object (and if so, which ones)? If applicable, can you specify the methods for collection and distribution? In general, do exist in your legislation legal license mechanisms or compulsory collective management benefiting different categories of intellectual property rights-holders (for example, copyright and designs and models)?**

Cf. supra.

- c) How does your legislation consider the activity of a service provider that prints 3D object at the request of an individual, for his private use? Is this service provider responsible for the acts of reproduction carried out? If so, can it absolve itself, totally or partially, of this responsibility?**

Belgian law does not clarify who should be considered as the copying person or ‘copier’ and who should thus be considered as the infringer in the hypothesis made.



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Some inspiration can be found in a judgment of the Court of Appeal of Ghent of 13 June 2003 in a case concerning a copy center that placed a CD-R burning device at its client's disposal. The Court ruled that the person who effectively makes the copy or who has the copy made by an employee should be considered as the copier under copyright law. In this case, the copy center was not considered as the copier (Ghent 16 June 2003, I.R.D.I 2003, 116. The judgement was confirmed by the Supreme Court (Cour de Cassation; Hof van Cassatie) (Cass. 27 May 2005, Arr. Cass. 2005, 1140).

Regardless of the uncertainty surrounding the question of whether or not the service provider can be considered as the 'copier', it must be noted that the service provider can in any event be sued as an "intermediary" in case of an intellectual property infringement (irrespective of whether or not the infringement was actually committed by the service provider itself).

- d) Are there in your country websites offering 3D printing services on demand? If so, do the users have the option to share the object transmitted for printing? Are these websites implementing control measures of the transmitted or shared objects (control keywords, fingerprinting ...)? What is under your legislation the liability regime applicable to those websites (distinguish, if necessary, according to the nature of the service provided)?**

Yes, there are websites that offer 3D printing services on demand. Some examples include:

- <http://www.b-art3dprint.be/3d-printing> (scanning, designing, printing);
- <http://www.dsignandmore.com/> (designing, printing);
- <http://www.3dee.be/> (scanning, design, printing, training, company workshops, etc.);
- <http://www.materialise.com> (scanning, designing, printing, offering of software, offering of a platform to buy and sell 3D printed objects, etc.);

Materialise is an important player in the industry. It was founded in 1990 as a spin-off from the Catholic University of Leuven and was the first 3D printing service in the Benelux. Materialise runs the biggest 3D printing service in Europe. It encompasses over 130 machines, producing more than 700,000 parts per year.

There are two types of web services associated with the manufacturing center. Some industrial customers order parts for themselves, whether prototypes or functional parts, through OnSite. On the other hand, designers and small businesses can upload (printed) designs to the i.materialise 3D printing marketplace.

Users/ designers can upload files for 3D printing. Uploads are intended for Materialise only. Materialise guarantees that other users will not be able to see or download uploaded files. They also guarantee that they will never sell the uploaded designs or use them without the uploader/designer's permission.

By submitting an order to i.materialise, the user confirms that he/she is the owner or that they have obtained the necessary rights to submit this order for a third party. If a design is submitted to i.materialise that risks infringing the intellectual property rights of third parties, i.materialise reserves the right to either not produce the design or produce the design without the part that risks infringing the rights of third parties.



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Generally speaking, the services can be divided into two categories: either the service provider is going to store information onto his platform/website, i.e. 3D files uploaded by customers (hosting provider), and/or it will provide actual printing services.

As a 'hosting provider', the service provider benefits from the limitation of liability as provided in Articles 14 and 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), and the Belgian law implementing this Directive.

As a provider of printing services, the service provider might be treated as in the above mentioned judgement of the Supreme Court of 27 May 2005 (Cass. 27 May 2005, Arr. Cass. 2005, 1140) (cf. supra).

In both cases, the service provider might be considered as an intermediary whose services could be used to infringe intellectual property rights and, to that extent, it might be subject to injunctions (cf. supra).

The service providers do not have a general duty to monitor their networks and/or actively search for possible infringements. They do have to act promptly whenever they gain knowledge of illegal activities and notify the competent authorities.

5) Technical protection and information measures

- a) In the light of possible precedents in your country, does it seem to you that the apprehension of 3D printing acts within the private sphere through technological protection measures implanted in 3D printing devices or software is appropriate and feasible?**

Implementing Technical Protection Measures ('TPM') or 'Digital Rights Management' ('DRM') (hereinafter both referred to as: 'TPM') could be useful for the rights owners to prevent unauthorized uses or uses beyond the limits of their consent (e.g. with regard to the number or reproductions, or the materials used for the printing).

However, the experience (in particular in the music industry) tends to show that the effectivity of TPM may be rather limited.

- b) Are there in your country regulatory precedents or soft law aiming to impose to an industrial sector the implementation of technological protection measures to prevent copying?**

There has been debate and research on DRM, but we are not aware of regulatory precedents or soft law aiming to impose the implementation of DRM to an industrial sector.

- c) Are there in your national legislation legal obligations to adapt certain categories of software to security standards? If so, how are these obligations applied in the field of free software?**

It is not unlikely that such legislation exists. However, we are not aware of the existence of such legislation that might be relevant specifically in the field of 3D printing. We have not researched this in depth, as such research might exceed the scope of the report.



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Are digital signature or watermarking techniques (fingerprinting, watermarking, etc.) likely to be implemented to monitor and control the distribution and/or printing of 3D models? Is there any of such devices in your country? If so, can you describe it? In case it is or will be used a database of protected 3D models, what are or will be the obligations of the technical service? And what is or will be the consequence of the lack of registration of a model in such a database

We assume that these techniques are available and perhaps already in use (cf. http://www.centexbel.be/files/project-file/fdm4tp_0.pdf on 3D printing in the textile industry; this document does not specify the nature of the technique that could be used). However, we do not have an insight in the extent to which these techniques are being used today.