Belgium

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Introduction to software protection under Belgian law

Body of law

Copyright protection of software is regulated in Belgium under the Software Act of 30 June 1994[1]. This law transposes the Council Directive of 14 May 1991 on the Legal Protection of computer programs (91/250/EEC) into Belgian national law (hereinafter referred to as the "Software Directive")[2]. The Software Act is the lex specialis with respect to the general Belgian Copyright Act as lex generalis[3]. This means that the general Copyright Act will apply to software, to the extent that the Software Act does not contain any specific provisions.

Software Act: Object of protection

Computer programs (including the preparatory material[4]) are protected by copyright and are equivalent to literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works[5]. According to article 2 of the Software Act only original computer programs benefit copyright protection. Computer programs that are not original don't benefit copyright protection. The ideas and principles behind computer programs or technical interfaces are explicitly denied copyright protection[6].

The originality requirement means that the computer program needs to be an own intellectual creation of the author. No other criteria may be used to determine whether the program can be subject to copyright protection[7]. There is no legal definition of the originality requirement. Legal doctrine established that the amount of work involved is not relevant. A computer program is only deemed to be the own intellectual creation of the author if the personal stamp of the author is visible in the work. Therefore it is required, but not sufficient, that the author has freedom of choice when he creates his work. If the author

[1]Act regarding the transposition into Belgian law of the European Directive of 14 May 1991 on the legal protection of computer programs of 30 June 1994, Belgian Official Gazette B.S., 27 July 1994.

[2]For a history of software protection in Belgium, see Keustermans, J., in International Computer Law (Matthew Bender & Company, December 2008), 7-29.

[3]Act regarding the copyright and neighbouring rights of 30 June 1994, Belgian Official Gazette B.S., 27 July 1994.

[4]See also President Brussels, June 30, 2003, 2004, p. 153; Criminal Court Hasselt, February 16, 1999, 1998-99, p. 1424.

[5]Law concerning the conversion into Belgian law of the European Directive of May 14, 1991 concerning the legal protection of computer programs, article 1.

[6]Software Act, art. 2.

[7]Copyright Act, Art. 2. Certain courts decided that registration of a computer program with the US Copyright Office is an indication of its originality, e.g., Pres. Liège, August 30, 1994, Computerr. 1994, p. 63.

has no choice but following a path that leads to one single outcome, no originality is involved. Thus, merely registering or copying the reality or executing a functional routine is not considered to be an original intellectual activity in the sense of the Copyright Act[8]. Where Belgian legal doctrine stresses the need that the personal contribution of the author must be sufficiently intensive ("Le droit d'auteur ne devrait s'appliquer qu'à des créations qui révèlent un niveau d'inventivité personnelle d'une certain intensité"[9]), they agree that the threshold as applied by the courts is fairly low[10].

Authors/Beneficiaries

The general Copyright Act provides that the copyrights on a work belong to the author, whether the author is an employee or not[11]. Article 3 of the Software Act however, provides that where computer programs are created by one or more employees or functionaries in the execution of their duties or following the instructions given by their employer, the employer will be deemed to be the right-holder of the economic rights in the computer programs so created, unless expressly provided otherwise[12].

Article 2.3 of the Software Directive provides that "the employer exclusively shall be entitled to exercise all economic rights". The wording "entitled to exercise" creates a certain ambiguity: is the employer the owner of the economic rights or merely the mandatory of his employees? Case law confirmed that the Belgian lawmaker has chosen for the first interpretation[13].

Exclusive rights

According to article 5 of the Software Act the economic rights comprise the exclusive right of (a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole, (b) translation, adaptation, arrangement or alteration of a computer program, and (c) distribution of the computer program, including the rental and lending, of the original computer program or copies thereof to the public. This is a slight diversion of the Software Directive, as article 4(c) of the Software Directive only mentions the rental of computer programs.

[8] J., KEUSTERMANS, Auteursrecht - Recente evoluties in capita selecta, Cahiers Antwerp Brussels Ghent 2009/2, p. 12.

[9] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Brussels, Larcier, 2008, p. 53.

[10] J., CORBET, APR, Antwerp, E. Story-Scientia, 1997, p. 27 and F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 18.

[11] Copyright Act, art. 1.

[12] Software Act, art. 3; H., VANHEES., "Auteursrechtelijk beschermde werken en software gemaakt in uitvoering van een arbeidsovereenkomst of statuut", Orientatie August/September 1994, p. 169.

[13] Court of First Instance Liège, September 22, 2000, JLMB 2001, p. 64.

Exceptions to exclusive rights

Article 5(c) of the law expressly provides that the first sale in the European Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right of that copy within the Community, with the exception of the right to control further rental of the program or a copy thereof.

The other exceptions are set forth in article 6 of the Software Act:

(1) In the absence of specific contractual provisions, no authorization by the rightholder is required for acts necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including error correction.

(2) The reproduction by way of a back-up copy by a person having a right to use the computer program may not be prevented, insofar as that copy is necessary to use the program.

(3) The person having a right to use a copy of a computer program is entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while lawfully performing any of the acts of loading, displaying, running, transmitting or storing the program.

This article basically restates the three exceptions of article 5 of the Software Directive.

Article 7 of the law explains in detail in which circumstances no authorization of the right holder is required to reproduce and/or translate a computer program in order to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs[14].

The law expressly provides that article 6, section 2 and 3 and article 7 are

[14]Software Act, art. 7: *§ 1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of article 5, a) and b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met: a) the reproduction or translation is performed by a person having a right to use a copy of the program, or on his behalf by a person authorized to do so; b) the information necessary to achieve interoperability has not previously been readily and easily available to the person referred to in subparagraph a); c) the reproduction and the translation are confined to the parts of the original program which are necessary to achieve interoperability. § 2. The provisions of the previous paragraph shall not commit the information obtained through its application: a) to be used for a goal other than to achieve the interoperability of the independently created computer program; b) to be given to third parties, except when necessary for the interoperability of the independently created computer program; c) or to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other acts which infringe copyright. § 3. The provisions of this article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices to rightholders legitimate intrests or conflicts with a normal exploitation of the computer program.* See also Dévelopements réecents concernant la distinction entre l'idée et l'oeuvre protégée par le droit d'auteur, in La protection des idées, A.L.A.I., Parijs, 1994, p. 75.

compulsory law[15]. Hence, contractual provisions to the contrary are deemed not to exist.

However, the exercise of these statutory rights is often difficult in practice because the licensee generally has no access to the source code of the application and it is not obvious to enforce access legally[16].

Moral rights

Article 4 of the Software Act specifies that the moral rights on software are regulated by article 6bis 1 of the Berner Convention. This Convention acknowledges a minimum protection, namely the paternity right and the right to oppose to modifications and applications which might affect the honor or reputation of the author[17]. These two rights remain in force after the transfer of the proprietary rights[18] and following the death of the author, at least[19] until after expiry of the proprietary rights[20].

The right of distribution has not been specified in the convention[21]. Nevertheless, some authors argue that this right also must be recognised as a moral right on software[22] as in the absence of a specific regulation in the Software Act, the general regime[23] for literary works needs to be applied.

Moral rights are generally considered to be inalienable. This does not mean that it is impossible to renounce moral rights[24]. It means that the global renouncement of the future exercise of moral rights is void, also concerning moral rights on software[25]. However, some authors wonder whether the principle inalienability of moral rights is desirable for technological applications such as software[26].

[15]Software Act, art. 8.

[16]See N., NAEYAERT, "De broncode en het faillissement van de softwareleverancier", Jura. Falc. 1995-96, p. 535.

[17]The Copyright Act also contains the right moral right to make the work known to the public.

[18]Berner Conventie art. 6bis 1.

[19]Berner Conventie art. 6bis 2.

[20]It is the question whether anyone will be able to demonstrate a sufficient interest in enforcing these moral rights more than 70 year after the death of the author. See F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 168.

[21]According to Prof. Berenboom the author of software will not be able to invoke this third right. See, A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 278.

[22]F., BRISON en J.P., TRIAILLE, "La nouvelle loi sur la protection du programme d'ordinateur, dans le sillage de la loi sur le droit d'auteur", 1995, p.142.

[23]Copyright Act, art. 1 §2.

[24]A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussel, 2005, p. 278.

[25]The Fiduciary License Agreement of FSFE expressly stipulates that it leaves the moral and/or personal rights of the author unaffected (FLA §1 (2)); also see Y., VAN DEN BRANDE, "The Fiduciary License Agreement: Appointing Legal guardians for Free Software Projects", IFOSS L. Rev., Vol 1, Issue 1, p. 11.

[26]See also K. J., KOELMAN, "Brothers in arms: Open source software en auteursrecht",

Term of protection

The same term as for works of literature and art applies: 70 years as of January 1 following the death of the author[27]. In case of co-authors, the protection of the work lasts until 70 years as of January 1 following the death of the longest living author.

Copyright assignment

The law[28] provides that the copyrights in works (other than software) made by employees in the course of the execution of their usual tasks are not automatically transferred to the employer. A written clause stipulating the transfer in the individual employment contract, the applicable statute or collective agreement is required. If the transfer relates to the exploitation of the work in a form that is still unknown, the employee is entitled to a share in the gain. Article 3 of the Software Act however, provides that where computer programs are created by one or more employees or functionaries in the execution of their duties or following the instructions given by their employer, the employer will be deemed by law to be the right-holder of the economic rights in the computer programs so created, unless expressly provided otherwise in a contract[29]. The moral rights are not transferred.

The exploitation rights on works can be freely transferred, e.g. in case of works made for hire. However, contracts on the transfer of copyrights do have some particularities under Belgian law. First of all, they must be in writing and be clear. When a clause is unclear, it will be explained restrictively and to the advantage of the author. The extent of the transfer (what rights, duration, methods of exploitation and compensation) needs to be described. Another particularity is that the assignment of rights in future works is only valid for a limited period in time[30]. A transfer of copyrights in future works that is temporally unlimited is not valid. Therefore under Belgian law, the wording "for the entire term of copyright protection" is more effective than "temporally unlimited". Further it is mandatory to stipulate the genre of the work that is the subject matter of the transfer[31]. The term genre is ambiguous and often leads to confusion. Is it meant to serve in a peer-to-peer environment, strictly on a mobile device, or merely as documentation? All these exploitation methods and uses of the same work may qualify as different genres under Belgian law and should be named in the agreement. The transfer of rights with respect to still unknown exploitation methods is void under Belgian law[32].

2004, p. 232.

[27] Software Act, art. 9.

[28] Copyright Act, art. 3.

[29] Software Act, art. 3; H., VANHEES., "Auteursrechtelijk beschermde werken en software gemaakt in uitvoering van een arbeidsovereenkomst of statuut", Orientatie August/September 1994, p. 169.

[30] Belgian Copyright law of 30 June 1994, article 3, §2.

[31] Belgian Copyright law of 30 June 1994, article 3, §1.

[32] Belgian Copyright law of 30 June 1994, article 3, §1.

In order to control the copyright situation better, it may be useful to collect all copyrights concerning a FOSS project within one organisation.

Special measures

The Software Act refers to the general Copyright Act regarding the measures to enforce copyrights. Besides these general measures, a specific criminal sanction has been created for those who bring into trade or possess for commercial purposes a copy of a computer program, of which they know or can reasonably presume that it concerns an unlawful copy, as well as for those who bring into trade or possess for commercial purposes tools which are exclusively aimed at facilitating the unlawful removal or avoidance of technical means which protect the computer program[33].

Unprotected software and public domain software

As set forth above, only software that is original in the sense that it is an intellectual creation of the author benefits copyright protection. Non-original software does not come into consideration for copyright protection and can, in principle, be used freely[34].

Under Belgian law, public domain software is considered as software to which the author has given up all rights and on which nobody is able to enforce any rights. This software can be used, reproduced or executed freely, without permission or the payment of a fee[35]. Public domain software can in certain cases even be presented by third parties as own work, and by modifying the original work, third parties can take certain versions of the public domain software out of the public domain again[36].

Legal theory states that the author of FOSS, contrary to the author of public domain software, has in no way whatsoever given up his rights on his work[37]. FOSS supports on the rights of the author (the copyright) to impose FOSS license conditions[38]. Under Belgian law, FOSS is considered as software to which users generally receive more rights via their license agreement, than they

[33] Software Act, art. 11.

[34] Note however that other laws and regulations such as competition law and patents might restrict the use (J., KEUSTERMANS, "Octrooieerbaarheid van computerprogramma's revisited", in Intellectuele rechten in de informatiemaatschappij (Ed. M.-C., JANSSENS), Brussels, Bruylant, 1998, p. 209 and M.-C., JANSSENS, "Bescherming van computerprogramma's: (lang) niet alleen maar auteursrecht", 1998, p. 420).

[35] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussel, 2005, p. 326.

[36] Y., VAN DEN BRANDE and J., KEUSTERMANS, "FOSS: een analyse naar Belgisch recht", I.R.D.I. 2007, p. 370.

[37] E.N.M., VISSER, "GNU General Public License — All rights reversed?", Computerr. 2004, p. 227.

[38] J., TRIAILLE, "L'application de la loi aux logiciels", 2004, p. 437.

would normally have with a proprietary software license[39]. However, the FOSS license conditions need to be respected by the user.

Analysis of FOSS under Belgian law

The FOSS license deviates so much from conventional license agreements that under Belgian law it needs to be considered as a sui generis license agreement[40]. However, it is still based on the same mechanisms.

Copyrights

Although FOSS can be written by one person or be owned by one legal entity[41], generally speaking, after some time the software is the result of the work of several authors who can make claims to it. The question is whether later additions create a collaborative work (a work created by collaborating authors), or whether the original software is the end work and every contribution created during the further development of the software, a derivative work. The legal consequences are different.

Qualification of FOSS

For it to be work that was created following collaboration it is not necessary for every co-author to have contributed equally[42]. In the case of FOSS this is rarely the case. Nor is it required that the co-authors worked on it at the same time. In most cases this will not be the case. However, to be a co-author, the contribution needs to be copyright protected. The provider of an idea is not a co-author, nor the person who corrects a technical error or merely follows instructions[43].

It is also necessary that the work was made by two or more people who created the software in consultation, from the same mind. Prof. Berenboom[44] summarises it as follows: *The thing that characterises a co-author is the intimate entanglement ('intimité*) of his contribution with the contributions of other authors, which is expressed by the indispensable character in the entire work:

[39] Y., VAN DEN BRANDE and J., KEUSTERMANS, "Open source software: een analyse naar Belgisch recht", I.R.D.I. 2007, p. 371.

[40] Y., VAN DEN BRANDE and J., KEUSTERMANS, "Open source software: een analyse naar Belgisch recht", I.R.D.I. 2007, p. 373; see also S., VAN CAMP, "FOSS: de ondraaglijke lichtheid van een concept", T.B.H. 2006, p. 499.

[41] Such as software developed by employees (Software Act, art. 3), and software developed for hire under a contractual transfer of copyrights.

[42] F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 37.

[43] See J. CORBET, Auteursrecht, A.P.R., E. Story-Scientia, Antwerpen, 1997, p. 19 and A., STROWEL, "Régime de l'oeuvre de collaboration", in Huldeboek Jan Corbet, De Belgische Auteurswet, Artikelsgewijze commentaar, ed. F., BRISON and H., VANHEES, Larcier, Ghent, 2006, p. 33.

[44] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 197; see also. Court of first instance Brussels, 17 June 2002, AM 2004, p. 252.

without this contribution the work would certainly not have seen the light of day, and it would have been different.'

Whereas the first version of the software, if written by several people, can in many cases be qualified as a work created following a collaboration, this seems much less the case for the later versions, which are based on the original work, without, however, there being any "consultation" between the authors. These later versions will be qualified as derivative works. Therefore, in terms of the legal consequences, a distinction needs to be made between the rights of the original co-authors and the rights of people who carry on based on the original work.

Rights of the original co-authors

Unless the components of the software can be clearly distinguished, it usually concerns "indivisible works"[45]. This concerns work whereby it cannot be concluded clearly what the individual contribution of every author is, e.g. when two authors write a text together.

In the case of indivisible works the authors are free to regulate the exercise of the copyrights by agreement. This freedom goes very far[46]. The co-authors can agree how the program is made public (e.g. as "FOSS") and how decisions regarding the copyrights are made, e.g. by normal or special majorities, or give one of them the right to make all decisions regarding this work[47]. They can also reach all kinds of agreements relating to the moral rights[48], such as under whose name the work will be published.

If the co-authors have not reached an agreement, neither of the authors is allowed to exercise the copyright separately. Unanimity is required. In the absence of unanimity the court decides. The court will decide equitably and according to custom. The court will take into account good faith[49] and apply it to the (verbal) agreement which in fact constituted the basis for the collaboration and the production of the software. You don't work together accidentally.

Belgian law stipulates one exception. Every author has the right to, in his name and without intervention of the other authors, institute legal proceedings for an infringement of copyright and demand damages for his part[50]. This right also

[45] "Indivisible works" are governed by article 4 of the general Belgian Copyright Act. "Divisible works" are governed by article 5 of the same act. For an analysis of "divisible works", see J. CORBET, Auteursrecht, E. Story-Scientia, Antwerp 1997, p. 19 and A., STROWEL, "Régime de l'oeuvre de collaboration", in Huldeboek Jan Corbet, De Belgische Auteurswet, Artikelsgewijze commentaar, ed. F., BRISON and H., VANHEES, Larcier, Ghent, p. 36.

[46] E., Laevens, "Onderlinge contractuele vrijheid van coauteurs met betrekking tot hun gemeenschappelijk werk, vroeger en nu", I.R.D.I. 1996, p. 19.

[47] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 198; J. CORBET, Auteursrecht, E. Story-Scientia, Antwerp 1997, p. 19.

[48] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 198.

[49] Articles 1134 and 1135 Belgian Civil Code.

[50] Copyright Act, art. 4, al. 2.

implies the right to stop an infringement[51]. However, in some cases the lack of unanimity may result in the inadmissibility of this claim, e.g. if heirs of a programmer are unable to agree as to whether to institute a claim[52].

Authors of derivative works

After some time FOSS will, in most cases, be a derivative work or a composed work. Derivative works and composed works are works the originality of which is supported on existing work(s), of which original characteristics are copied[53].

The author(s) of the derivative or composed work are the only persons with a copyright on their work. This is an independent and full copyright, which is restricted, however, because the derivative or composed work cannot be operated without the consent of the holder of the copyright on the original work. For usual FOSS licenses this consent is not a problem, subject to respecting the terms and conditions (e.g. regarding further distribution of the derivative work)[54]. Both authors can enforce their own copyrights in court.

The assignment of copyrights

In order to control the copyright situation better, it may be useful to collect all copyrights concerning a FOSS project within one organisation. The existence of this organisation will simplify the management and enforcing of the joint rights[55]. The collective management of copyrights is perfectly possible under Belgian law, and is usually, but not necessarily, regulated by the fiduciary transfer of copyrights. The fiduciary transfer means that the party to whom the copyrights are assigned shall not act for himself but on account of others who have transferred the rights (the original authors)[56].

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[51] A., STROWEL, "Régime de l'oeuvre de collaboration", in Huldeboek Jan Corbet, De Belgische Auteurswet, Artikelsgewijze commentaar, ed. F., BRISON and H., VANHEES, Larcier, Ghent, p. 36.

[52] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p.198, nr. 115, footnote 10; Pres. Brussels, 12 februari 1980, Ing. Cons. 1980, p. 20, Pas. 1980, III, p. 63.

[53] F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 41.

[54] The copyright holders on the original work don't obtain any rights in the derivative work. They can however, restrict or stop the exploitation of the derivative work (F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 42).

[55] FSFE (Free Software Foundation Europe) recommends that developers of Free Software projects use its Fiduciary License Agreement (FLA) to assign their rights to a fiduciary (preferably the FSFE). For an analysis of the FLA also under Belgian law, see Y., VAN DEN BRANDE, "The Fiduciary Licence Agreement: Appointing legal guardians for Free Software Projects", IFOSS L. Rev., Vol 1, Issue 1, p. 9.

[56] F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 405.

Moral copyrights

FOSS originated in the United States, and therefore attaches less importance to the moral rights of the author[57]. The Open Source Definition specifies that the author of software distributed under a FOSS license cannot oppose the use of the software by certain people and groups[58] or for certain areas of application[59].

Whether an author is able to give up all his rights on a work is a difficult question under Belgian law in view of the principal indefeasibility of the moral rights[60]. Although renouncement of moral rights is possible in principle[61], the global renouncement of the future exercise of moral rights is void, also concerning moral rights on software[62].

The author of a work distributed under the FOSS license shall therefore probably be able to oppose any use of his work by people or groups or for certain purposes which affect his honour or reputation, based on his moral rights.

Moral rights are reflected in derivative works[63]. The author of the original work will therefore, based on his moral rights, not only be able to oppose the use by third parties of his work, but also the use of derivative works which affect his honour or reputation.

Enforcing FOSS licenses

The question whether a FOSS license can be enforced under the Belgian legal system depends on whether a valid license was issued. The essential questions are: (i) between whom is a license reached, and (ii) has the license been validly reached?

Contracting parties

If one author makes his work available under a FOSS license, the answer is clear: the license is reached between the licensee and the author. In case of different

[57]Creative Commons tried to solve the moral rights issue by transposing the -original American- licenses to local law. See N., HENDRIKS, "Creative commons in Nederland: flexibel auteursrecht", Tijdschrift voor Auteurs-, Media- & Informatierecht, 2006, 1, p.6.

[58]OSD Clause 5.

[59]OSD Clausule 6. Bruce Perens indicates, e.g., that an author of FOSS cannot provide a clause that prohibits the use of the software by regimes such as the former South African apartheidsregime (B., PERENS, "The FOSS Definition", http://perens.com/OSD.html).

[60]F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 147 iuncto p. 229.

[61]A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 278.

[62]The Fiduciary License Agreemet of FSFE expressly stipulates that it leaves the moral and/or personal rights of the author unaffected (FLA §1 (2)); also see Y., VAN DEN BRANDE, "The Fiduciary License Agreement: Appointing Legal guardians for Free Software Projects", IFOSS L. Rev., Vol 1, Issue 1, p. 11.

[63]F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 43.

co-authors, it becomes more complicated. With whom the licensee reaches a contract depends on the mutual agreement between the co-authors.

In most cases FOSS will be the work of several authors who did not work in joint consultation. After all, FOSS is usually realised via a chain of authors who all contributed to the realisation of the program. In so far a new author makes an original contribution to the work, a derivative work is produced[64]. The licensee of the eventual work will need to have the consent of every author in the chain who made an original contribution to the eventual work, starting with the author of the first work. This consent can be direct, or indirect by giving consent in the FOSS license to the next author to modify and distribute the work.

Most FOSS licenses solve this by creating a contractual bond between the licensee and all authors in the chain[65]. GPL version 3, for instance, contains the following clause: *Each time you convey a covered work, the recipient automatically receives a license from the original licensors, to run, modify and propagate that work, subject to this License*[66] and GPL version 2: *each time you redistribute the Program (or any work based on the Program), the recipient automatically receives a license from the original licensor*[67].

In this way the user of the software obtains a license of all authors in the chain. This chain of licenses is valid under Belgian law.

Validity of the FOSS licenses

An author chooses a FOSS license because he wants to distribute his work and make it available to others -possibly with certain restrictions. For him it is important that he can enforce these restrictions.

Conventional IT agreements are entered into by the explicit acceptance of the terms and conditions by the licensee following the signing of the terms and conditions, by opening the packaging, by clicking or selecting an "I agree" button or by any other action from which acceptance can be deducted. These methods to reach a licensing agreement have been sufficiently tried and tested and, at least between commercial parties, are generally considered to be valid[68]. FOSS licenses which were concluded in the same way will be valid.

[64] F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 41.

[65] C., De Preter and H., Dekeyser, "De totstandkoming en draagwijdte van open source-licenties", Computerr. 2004, p. 216.

[66] GNU GENERAL PUBLIC LICENSE (GPL) version 3, article 10, http://www.gnu.org/copyleft/gpl.html.

[67] GNU GENERAL PUBLIC LICENSE (GPL) version 2, article 6, http://www.gnu.org/licenses/old-licenses/gpl-2.0.html.

[68] See also the discussion under Dutch law in Computerrecht, M.W., SCHELTEMA and T.F.E., TJONG TJIN TAI, "Overeenkomsten sluiten door openen en klikken?", Computerr. 2003, p. 244; P.H., BLOK and T.J.M., DE WEERD, "Shrink-wrap- en click-wraplicenties zijn aanvaardbaar", Computerr. 2004, p. 126; R.J.J., WESTERDIJK, "Openen en klikken: overeenkomst gesloten", Computerr. 2004, p. 280.

Typically, in a FOSS environment, however, software is made available with the simple specification on a website or in the source code of the software that it concerns FOSS. The license usually does not need to be explicitly accepted. Having to click and confirm every time could in some cases interfere with the use of the software. The Open Source Definition opposes demanding explicit agreement with the license conditions with the aim of confirming the agreement between licensor and licensee[69].

The question is whether in these cases a valid license is entered into. The answer to this question is affirmative[70]. The reason is that the user of a copyright protected work needs to be able to indicate the grounds on which he is able to use the work. Using the software without the author's consent implies a copyright infringement[71]. This implies that everyone who wants to use software which they find via the internet, needs to actively look for a license. If the user cannot prove he has a license[72], he must refrain from using it. Renouncement of copyrights is not suspected but needs to be proven. The mere availability of a work on the internet does not mean it becomes public domain. It is doubtful whether a user would benefit from disputing the existence of a FOSS license. If the user disputes the conclusion of the FOSS license, this implies no legally valid copyright license was granted and the user therefore is not allowed to use the software[73].

However, not all infringements of license agreements are copyright infringements. An infringement only is a copyright infringement if the violation affects the exclusive rights of the author protected by copyright. Violations on clauses that are not based on the exclusive rights of the author do not consist copyright infringement. Typical examples hereof are the non-payment of royalties, insufficient exploitation of the work and the violation of non-competition obligations[74]. These consist mere contractual infringements. This raises the question of the validity of copyleft clauses: is violation of the copyleft clause automatically a copyright infringement? The answer is yes, as set forth under nr. 1.3.5.

[69] OSD Clausule 10.

[70] See also Pres. Rotterdam, 5 december 2002, 2003, p. 149, with note of A., LODDER.

[71] E.P.M., THOLE and W., SEINEN, "FOSS-softwarelicenties: een civielrechtelijke analyse", Computerr. 2004, p. 223; similarly, with respect to Creative Commons licenses on pictures, Court of first instance Amsterdam, 9 maart 2006, 2006, p. 273, with comment Y., VAN DEN BRANDE and J., KEUSTERMANS.

[72] Unless a legal exception applies.

[73] K. J., KOELMAN, "Brothers in arms: FOSS en auteursrecht", . 2004, p. 230; see also Y., COOL, "Interprétation de la principale licence de logiciel libre: liberté du code et contraintes de l'interprète", 2005, p. 32.

[74] Y., VAN COUTER and B., VANBRABANT, Handboek licentieovereenkomsten, Bibliotheek Handelsrecht Larcier, Gent, 2008, p. 92.

Waiver and liability

Typically, FOSS licenses contain very strong exoneration clauses, which discharge the author from all liability[75]. The reason for this is that FOSS is often made available without a fee, as a result of which the author generates insufficient income to pay for liability insurances and legal costs[76]. Although this reasoning is certainly valid for the amateur programmer, it applies much less for professional programmers who built their business model around FOSS[77]. Professional suppliers of FOSS or related services often provide guarantees[78].

One can wonder whether these exoneration clauses comply with the general validity requirements under Belgian law. These requirements are: (i) that the clause does not conflict with public order or compulsory law, (ii) does not cover up personal fraud or an intentional act of the debtor and (iii) does not take away every significance of the entered into obligation or the contract[79]. In this sense it is important to look at how the licensor presents the product. For a product that is presented as finished and ready for use, the exoneration clause will be considered invalid much sooner, than for a product for which the licensor clearly formulated a reservation[80].

In so far the three aforementioned conditions have been complied with, exoneration provisions will be enforceable in principle, unless the stipulating party could be considered as a professional seller. The professional seller is deemed to know the defect in the software, and in pursuance of article 1643 of the Belgian Civil Code, contractual provisions of non-indemnity for hidden defects have no effect if the seller knew about the defect at the time of the sale. The professional seller of FOSS will therefore be liable in principle, unless he can provide proof of invincible ignorance. In practice this proof will be hard to provide. The fact that the software was provided for free is no defence, but it can be part of the

[75] See e.g., the BSD license (http://www.opensource.org/licenses/bsd-license): THIS SOFTWARE IS PROVIDED BY <copyright holder> "AS IS" AND ANY EXPRESS OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE DISCLAIMED. IN NO EVENT SHALL <copyright holder> BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOSS OF USE, DATA, OR PROFITS; OR BUSINESS INTERRUPTION) HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY, OR TORT (INCLUDING NEGLIGENCE OR OTHERWISE) ARISING IN ANY WAY OUT OF THE USE OF THIS SOFTWARE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.

[76] B., PERENS, "The Open Source Definition", Open Sources: Voices from the Open Source Revolution, http://perens.com/OSD.html.

[77] See e.g., M., OLSON, "Dual Licensing", in Open Sources 2.0: The Continuing Evolution (Ed. C., DiBona, D., Cooper and M., Stone), O'Reilly, 2006, p. 35.

[78] The GNU General Public License expressly allows this (GPL v. 2, art. 11; GPL v. 3, art. 7).

[79] E., KINDT and K., WAGNER, "De transmillenniumproblematiek benaderd vanuit het Belgisch recht", Computerr. 1997, p. 272, note 66.

[80] S., VAN CAMP, "Open Source Software: de ondraaglijke lichtheid van een concept", T.B.H. 2006, p. 503 and 505.

proof that the author doesn't qualify as a professional seller. However, as also professional sellers provide software for free, more proof will be needed.

The copyleft principle

Principle

A characteristic found in different (but not all[81]) FOSS licenses is the so-called "copyleft" principle. FOSS licenses which incorporate the copyleft principle[82], lay down by contract that everyone in the chain of consecutive users, in return for the right of use that is assigned, needs to distribute the improvements he makes to the software and the derivative works he makes under the same conditions to other users, if he chooses to distribute such improvements or derivative works. In other words, software which incorporates copyleft FOSS, needs to be distributed in turn as copyleft FOSS. It is not possible to incorporate copyright protected parts of copyleft software in a proprietary licensed work.

The copyleft principle can restrict the commercial possibilities of the software[83]. Sometimes warnings are issued for the dangers that companies run if a negligent or vindictive employee were to incorporate a piece of copyleft code in the code of proprietary software. In theory this could mean that the company would be obliged to make its proprietary software available under a copyleft FOSS license. Although caution is necessary, one can ask oneself whether these worst-case scenarios are realistic under Belgian law[84]. The sanction for incorporating copyleft code in proprietary software will usually be restricted to a prohibition to distribute the software which is in breach[85] or the obligation to remove this piece of code from the program. If the unlawful use has caused damage to the author, this damage will need to be reimbursed, but not more than the actually suffered damage.

Validity

The question relating to the validity of the copyleft clause coincides with the

[81] Nor the principles (freedoms) of the Free Software movement, nor the Open Source Definition mandate the copyleft clause. Several FOSS licenses don't contain a copyleft clause. Examples hereof are the Berkeley Software Distribution (BSD) license and the Apache license.

[82] E.g., GPL version 3 Art. 5 stipulates: *You must license the entire work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7 additional terms, to the whole of the work, and all its parts, regardless of how they are packaged. This License gives no permission to license the work in any other way, but it does not invalidate such permission if you have separately received it.* GPL version 2 Art. 2 b stipulates: *You must cause any work that you distribute or publish, that in whole or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License.*

[83] See e.g., M., OLSON, "Dual Licensing", in Open Sources 2.0: The Continuing Evolution (Ed. C., DiBona, D., Cooper and M., Stone), O'Reilly, 2006.

[84] See also C., De Preter and H., Dekeyser, "De totstandkoming en draagwijdte van Open Source-licenties", Computerr. 2004, p. 220.

[85] S., VAN CAMP, "Open Source Software: de ondraaglijke lichtheid van een concept", T.B.H. 2006, p. 494.

question whether an author is able to validly lay down how derivative works need to be distributed. The answer to this question is affirmative. The author of the original work has no rights on the derivative work, but based on his rights on the original work is able to permit or prohibit the distribution of the derivative work. A derivative work can therefore only be operated subject to the consent of the copyright owner of the original work. The Visscher and Michaux phrased this as follows: *L'auteur ou les auteurs de l'oeuvre dérivée sont donc "pieds et mains liés" vis-à-vis du ou des auteurs de l'oeuvre première*[86].

Based on his copyrights an author is entitled to lay down the use of his work for a particular use, or link certain conditions to it. This right to determine the destination of a work was recognised in legal theory[87] based on an interpretation of article 1 of the old Belgian Copyright Act of 22 March 1886. As the old article 1 is an almost literal copy of article 1 of the current Copyright Act, this legal theory also remains valid under the new Copyright Act[88]. The right to determine the destination not only applies inter partes, but erga omnes[89], provided that the third parties, in all reasonableness, should know what the destination is[90]. The author can therefore lay down the copyleft condition based on his right to determine the destination of his work.

Certain authors claim that FOSS doesn't need the right of destination for its validity as the author can enforce the FOSS license directly on his economic copyrights[91]. Even though there is a certain merit in this reasoning, one must be cautious. A license infringement does not automatically imply a copyright infringement as this reasoning seems to imply. The non-payment of royalties e.g. is not a copyright infringement, but a "mere" contractual infringement[92]. The right of destination is a useful tool to explain why the copyleft clause

[86]"The author or the authors of the derivative work are 'bound by feet and hands' to the author(s) of the first work" (F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 43).

[87]Court of Cassation 19 januari 1956, Pas., 1956, I, 484-502.

[88]See e.g., F., BRISON, "Het bestemmingsrecht van auteurs en houders van naburige rechten", note under Brussels, 9 september 2002, 2004, p. 329; J., CORBET, APR, E. Story-Scientia, 1997, p. 46; F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 81; A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 215 ; regarding a critique on the right of destination, see S. DUSSOLLIER, Droit d'auteur et protection des oeuvres dans l'univers numérique, Brussels, Larcier, 2007, p. 337-356.

[89]See e.g., F., GOTZEN, "De algemene beginselen van de vermogensrechten en van de morele rechten van de auteur volgens de Wet van 30 juni 1994", in Belgisch auteursrecht — Van oud naar nieuw (Ed. F., Gotzen), Brussels, Bruylant, 1996, p. 74. and F., BRISON, "Het bestemmingsrecht van auteurs en houders van naburige rechten", note under Brussels, 9 september 2002, AM 2004, p. 332.

[90]The proof that third parties know the destination is a question of facts, no particular formal evidence is needed (F., GOTZEN, "De algemene beginselen van de vermogensrechten en van de morele rechten van de auteur volgens de Wet van 30 juni 1994", in Belgisch auteursrecht — Van oud naar nieuw (Ed. F., Gotzen), Brussels, Bruylant, 1996, p. 74).

[91]P., LAURENT, "Les licenses de type open source ou open content ne se fondent pas sur un «droit de destination»", 2007, p. 369.

[92]Handboek licentieovereenkomsten, Bibliotheek Handelsrecht Larcier, Ghent, 2008, p. 92.

touches the exclusive rights of the author[93]. The right of destination has its use in explaining the extent of the economical copyrights of the author. The right of destination is not a new right, but is part of the economical copyrights set out in article 1 of the Copyright Act[94].

All rights are subject to abuse, including the copyright. An author can therefore not randomly exercise his economic and moral rights. A lawful tangible or moral interest needs to be proven. However, exercising his copyrights cannot be considered as an abuse of rights as such. Only in exceptional cases will an author who invokes his copyrights be guilty of an abuse of rights[95]. Licensing a work under a copyleft restriction will in principle not constitute an abuse of right, considering that the author, in general, will be able to prove a legitimate moral or tangible interest. A legitimate moral interest could be wanting to keep his work within the FOSS community, also in a derivative format. Companies which have constructed a business model around distributing software under copyleft restrictions will usually be able to prove a legitimate interest.

However, if an author were to define the license conditions by saying that the copyleft principle is not only reflected in what is considered a derivative work in copyright terms, but also in other works, this could be considered as an abuse of rights in certain cases[96]. This could be the case for instance if a license were to lay down that work which has been stored on the same carrier as the licensed work needs to be distributed under a FOSS license[97].

The Software Act specifies: *The first sale in the European Union of a copy of a program by the copyright owner or with his consent results in the exhaustion of the right to control the distribution of that copy in the European Union, with the exception of the right to control the further leasing and lending out of the program or a copy thereof.*[98] The right of the author to further control the transfer of a specific tangible copy which has been lawfully released in the European market is therefore exhausted. Nevertheless this does not affect the right of the author to lay down certain conditions regarding the use of the copy, or a certain destination regarding that copy[99]. After all, the free transfer and further distribution also needs to transfer the conditions of the license. The copyleft principle is therefore not, in principle, in contrary to this principle.

[93] Y., VAN DEN BRANDE and J., KEUSTERMANS, noot bij Rb. Amsterdam, 9 maart 2006, AM 2006, afl. 3, p. 277 and Y., VAN DEN BRANDE and J.KEUSTERMANS, "Open source software: een analyse naar Belgisch recht", I.R.D.I. 2007, p. 378.

[94] M.-C. Janssens, "De beschermingsomvang in het auteursrecht: een balans na tien jaar toepassing van de Wet van 1994", AM 2004, p. 444.

[95] A., BERENBOOM, Le nouveau droit d'auteur et les droits voisins, Larcier, Brussels, 2005, p. 48.

[96] S., VAN CAMP, "Open Source Software: de ondraaglijke lichtheid van een concept", T.B.H. 2006, p. 497. See also M., DOLMANS, "Main Provisions of EC Competition Law", in (Eds. E. J., LOUWERS and C., PRINS), M., Bender, 2005, § 4.02 (D) (3).

[97] GPL v. 3 stipulates otherwise. The Open Source Definition prohibits this under clause 9.

[98] Sofware Act, art. 5. See also Software Directive, art. 4, c.

[99] F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 88.

Damages

Damage caused by copyright violations are compensated under Belgian law in accordance with the general applicable principles of the unlawful act[100]. This implies that the injured party of a copyright breach needs to be compensated *en manière telle que la personne lésée se retrouve dans la situation qui aurait été la sienne si la faute dont elle se plaint n'avait pas été commise*[101] Dual damages, triple damages or other forms of punitive damages are not awarded under Belgian law. Nor are costs reimbursed which the author spent on tracing and prosecuting infringements[102].

Infringements of software copyrights follow the same regime as infringements of every other copyright[103]. The aforementioned principle is therefore applicable in case of copyright infringements of software.

Infringements of software distributed under a FOSS license, do not need to be sanctioned any differently than infringements of proprietary software. After all, FOSS does not belong to the public domain. In no way whatsoever has the author given up his rights.

Certain legal theory[104] and case law[105] assume that the damage to the copyright owner will be limited, as the author has made his work freely available via the internet. This argument does not always apply.

Besides establishing a reputation and recognition with the related value creation, an author can have other reasons to make his work 'freely' available[106]. The author may also have a direct monetary advantage from the free distribution of his work. The simplest way is circulating the free works with advertising. Another way is granting specific services relating to the work. The free circulation of the work ensures the work has many users. The author generates his income from the provision of support and consulting services, or licensing "proprietary add-

[100]Article 1382 Belgian Civil Code.

[101]Free translation: "in such a way that the harmed person finds himself in the position wherein he would have been if the fault whereof he complains hadn't been committed" Court of Cassation, 13 May 2009, available on http://www.cass.be.

[102]J., KEUSTERMANS and T., DE MAERE, "Foutbegrip en schadevergoeding in het auteursrecht: "double damage"?", comment on Ghent, 19 January 2009, 2009, p. 388.

[103]F., DE VISSCHER and B., MICHAUX, Précis du droit d'auteur et des droits voisins, Bruylant, Brussels, 2000, p. 229.

[104]J., TRIAILLE e.g. states that the author of FOSS in case of infringement can't claim royaliteis, as he gave up his right to royalties by distributing his work under a FOSS license on the internet. See J., TRIAILLE, "Licences "Open Source" et contrats avec les auteurs et les distributeurs", 2005, p. 58-59.

[105]In like manner with pictures published on the internet under a Creative Commons license: the author of this contribution criticizes a ruling of a Dutch Court wherein it states that the commercial value of the pictures concerned must be limited as they are accessible to all via the internet (Y., VAN DEN BRANDE and J., KEUSTERMANS, comment on Court of first instance Amsterdam, 9 March 2006, 2006, p. 277).

[106]See e.g. C., DIBONA, D., COOPER and M., STONE, "Introduction", in Open Sources 2.0: The Continuing Evolution (Ed. C., DiBona, D., Cooper and M., Stone), O'Reilly, 2006, p. XXX.

ons[107]". Another business model is the so-called dual licensing model[108]. This model uses — as the name allows us to deduce- two different licenses. The first license is often a copyleft license. This first — free — license ensures the work is circulated quickly and has a wide range of users. A second license without the copyleft system can then be obtained against payment by interested parties who want to use the work without their own additions being affected by the copyleft principle.

FOSS cases in Belgium

No cases have been reported yet (October 2013).

[107] Add-ons are additions to the free work to which the author reserves all rights, and which can only be used against payment.

[108] See e.g. M., OLSON, "Dual Licensing", in Open Sources 2.0: The Continuing Evolution (Ed. C., DiBona, D., Cooper and M., Stone), O'Reilly, 2006, p. 35.