

# Breach of copyright licence: Precisions of the Belgian Supreme Court on cease and desist actions

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Philippe Laurent (Marx, Van Ranst, Vermeersch & Partners)

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In this post, I would like to come back to an interesting decision of the Belgian Cour de Cassation of 7 October 2010, which confirmed that a cease and desist action could be successfully sought against a copyright licensee. As usual, the Supreme Court's decision is quite concise and does not extensively detail the facts. In short, the decision's background is a litigation between a television company and a collecting society, where the former refused to pay some royalties to the latter. The collecting society therefore sought a cease and desist injunction against the TV company.

Some relevant paragraphs of the decision can be translated and summarized as follows:

- A cease and desist action grounded on article 87, §1 of the Belgian Copyright Act can be lodged against whoever commits a breach of contract if that breach constitutes as such an infringement to copyrights or neighbouring rights.

- Whoever fails to observe the limitations of an exploitation authorization granted by the copyrights or neighbouring rights owner commits an act of counterfeiting, independently of any contractual breach. The competent judge can therefore establish the existence of the infringement and issue a cease and desist order if the licensee does not discharge the obligations imposed by the owner in exchange for his consent.

- The appealed decision establishes that the TV company did not pay the minimum fee as set forth in the licence contract and considers that the TV company diffused without authorization the works of the collecting society's repertoire as the payment of this minimum fee was one of the essential conditions to its authorization. It could validly infer from this enunciation that the TV company infringed the collecting society's copyrights despite the fact that the contract binding the party had never been declared void and that the collecting society never raised any exception of non-performance.

This decision puts an end to some controversies as to whether the existence of an IP contract would impede the resort to a cease and desist action when the agreement is not respected. The answer is clear: the contract does not hamper any of the "exclusive" and prohibiting aspects of the IP rights involved, and the specific IP remedies are still applicable in a contractual context.

The decision is however less clear when it comes to understand in which specific situations an injunctive relief can be obtained.

On the one hand, the Court refers to any failure to observe the "limitation to the exploitation authorization" (so, if I receive a licence to make and distribute 100 copies of a book, the making of a 101st copy is an infringement which could trigger a cease and desist action).

The Court further confirms that the non-performance of the obligations imposed to the licensee in exchange of the owner's consent is also a copyright infringement (if I accepted to pay royalties to make my 100 copies of the book, the non-payment of these royalties renders my copying of the book illegal, and I could be enjoined from making and/or distributing the copies of the book).

On the other hand, the Supreme Court explains further in its decision that a judge adjudicating a cease and desist action based on article 87, §1 of the C.A. is not competent to order the ceasing of breaches of contracts which do not constitute copyrights or neighbouring rights infringements. He can however examine the substance and the scope of a contract in order to assess whether the act incriminated as counterfeiting was actually authorized or not.

The picturing of an example illustrating this last situation is less obvious. If in our licence contract, the copyrights owner added some sort of non-competition clause forbidding the licensee to distribute works from another author, breaching that clause could be "the non-performance of an obligation imposed in exchange of the authorization" but would also be a "breach that does not constitute a copyright infringement". In our opinion, the Court's teaching in that case is that a judge could not impede the distribution of copies of the other author's works on basis of article 87 of the C.A., as this act is not an infringement to the copyrights of the licensor. However the judge could enjoin the licensee from copying and distributing the book if he deems that the non-competition clause is part of the conditions of the licence... which would mean that the way the licence is drafted is likely to influence the judge's decision.