Kluwer Copyright Blog

Copyright in the new Belgian Code of Economic Law: codification and new regulation

Sari Depreeuw (De Wolf and Partners) · Wednesday, May 13th, 2015

The Belgian legal order has recently welcomed a new legal code: the Code of Economic Law (CEL). Laws are not systematically arranged in codes in Belgium: there are some codes (such as the judicial code, the criminal code, codes of various types of taxes etc.) as well as countless separate laws, acts and regulations for its many levels of governance. Now we have a Code of Economic Law (here in Dutch and in French), which is meant to gather in one volume various regulations pertaining to the field of "economic law", such as competition law, consumer protection, product and service safety, e-commerce, banking and finance, specific enforcement proceedings, etc.

The Code of Economic Law also contains a book on intellectual property rights, which entered into force on 1 January 2015 (with some exceptions – here). Book XI regulates patents (Title I), supplementary protection certificates (Title 2), plant variety property rights (Title 3), trade marks and designs (Title 4, though only a brief reference since the Benelux and EU trade mark regulations are not included in the CEL), copyright and neighbouring rights (Title 5), computer programs (Title 6), Databases (Title 7), topographies and semi-conductors (Title 8) and enforcement matters (Titles 9 and 10).

The Belgian legislature has taken the opportunity not only to codify existing copyright law (copyright act of 30 June 1994) but also to introduce some novelties. Some of these are intended to implement European directives (e.g. the term of protection for phonograms), others increase legal certainty on contentious points (e.g. the obligation to pay equitable remuneration) and yet others tweak the existing rules to achieve a precise result (e.g. mandatory collective management of the resale right and several remuneration rights, which cannot be transferred or waived) or even introduce an entirely new copyright infrastructure (with a "single platform" for the resale right, a "single office" for cable retransmission remunerations and a "single platform" of collecting societies for certain public communication rights).

The most striking novelty is probably the creation of a "Regulation Service" ("Dienst Regulering" or "Service de Régulation" – art. XI.274 et s. CEL), embedded in the competent federal administration (FPS Economy or office for economic affairs). While the Office for economic affairs was already competent for controlling the governance of collecting societies, it will have more invasive powers through its Regulation Service (starting from January 2016). The Regulation Service will have three specific functions: control, advice and mediation.

The Regulation Service will verify whether the rules that collecting societies adopt for determining, collecting and distributing the copyright fees to the members (authors or others) are "fair" and "non-discriminatory" at the request of any interested party, a collecting society or other associations (such as

professional associations). The Regulation Service has several options: (i) it will decide on the basis of Belgian and European copyright law whether the collecting society's rules are fair and non-discriminatory; (ii) it may address a formal warning to the collecting society, where the rules are not deemed fair and non-discriminatory; and (iii) it may seize the Court of appeal of Brussels to obtain a decision on the fair and non-discriminatory nature of the rules (after having sent a warning). It cannot however replace the rules of the collecting society. The Regulator will hear the parties, it can order any "useful inquiry" and rely on experts or witnesses. Its decision can be appealed before the Court of appeal of Brussels (art. XI.341 CEL).

The Regulation Service also has an advisory role and will issue its opinion (either on its own initiative or at the request of the competent minister or of other services of the Office for economic affairs) on the exploitation of copyright and neighbouring rights. It can initiate research on the "value" of copyrights and neighbouring rights (including market analyses), and it can share "all useful information" for preparing executive regulations.

Finally, the Regulation Service can mediate in conflicts on copyright and, in this context, it can provide guidance, hear or advise the parties to achieve an amicable settlement, it can issue recommendations to the parties (in case no settlement is reached) and it can issue "advice in the framework of its task on its own initiative or at the request of the minister".

It remains to be seen whether the Regulation Service will function as an actual "regulator". On the one hand, it has far-reaching competences to gather economic information and to assess whether or not a collecting society's rules on collecting and distributing copyright fees are fair and non-discriminatory and to issue notices to amend the rules, should this not be the case. On the other hand, it cannot intervene to impose a regulation that it deems fair and non-discriminatory and overrule the collecting society, it cannot impose sanctions (it should seize the Court of appeal of Brussels to address the issue) and its "regulatory" competence is limited to collecting societies (i.e. it cannot take a formal stance on the financial or other licence conditions other powerful right holders may impose). Many questions remain open, not least the relationship between the Regulator and the service within the FPS Economy responsible for controlling CMOs. Another question is how this new Regulation is positioned in relation to dispute resolution systems of other Member States (see the Impact Assessment preceding the CMO Directive, p. 119) and whether the objective is to evolve to some sort of Copyright Tribunal, as known in other Member States. However, these important issues are unlikely to be clarified by the time the regulator is supposed to be operational.

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