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**DIGITAL ARCHIVING AND COPYRIGHT LAW:  
A COMPARATIVE ANALYSIS**

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## DIGITAL ARCHIVING AND COPYRIGHT LAW: A COMPARATIVE ANALYSIS

Hannelore Dekeyser<sup>†</sup> & Tomas A. Lipinski<sup>\*</sup>

*Existing precedent and commentator opinion reiterates that the purpose of copyright law is not to benefit authors or owners but to benefit the public. The limited monopoly right of copyright granted to authors or owners is a predicate to achieve that goal. The limited monopoly is a necessary and prerequisite incentive. Preservation of and access to the body of knowledge created through the limited monopoly incentive is the ultimate goal of the copyright system. Archives by nature and design play a critical role in the collation and preservation of the creative societal record; its cultural heritage. Applying present copyright law principles to digital collation and preservation processes often thwarts rather than forwards these efforts. Exceptions provided by the copyright law go may alleviate the problem, but do not solve it. Furthermore, the recent adoption of legislative protection for copyright management information and technical measures controlling access to and in some instances use of protected works exacerbates rather than ameliorates the problem. In the digital age, the copyright law becomes an inadequate tool for the preservation of the cultural record or access to that record. Present copyright exceptions may no longer be of any consequence. In the current article two approaches of copyright towards digital archiving and dissemination are examined and compared, namely that of U.S. law and of Belgian law, the latter being an example of implementation of the recent EU directives harmonizing copyright law. The authors demonstrate that copyright systems originating in the same basic policy proposition may result in different outcomes. Recent and pending changes in both U.S. and EU systems offer opportunity for policy-makers to enrich their own processes by understanding the success as well as shortcomings of these comparative outcomes.*

### I. INTRODUCTION

The advent of digital and Internet technologies and the adoption of those technologies to archival practice raise a variety of copyright issues. Storing a record in a box on a shelf does not typically implicate an exclusive right of the copyright owner, likewise is there concern when offering access to members of the public to that record in the reading room of the archive.<sup>1</sup> In the digital context, the line between exploitation (e.g., reproduction, distribution, etc.) and mere consumption (read “access”) of copyrighted works blurs. Digitalization requires reproduction and online access to the digitized record implies a communication and performance or display of the work to the public. As a result, the core concepts in copyright law must be revisited or a wider access to the digital societal record cannot progress. This article offers a brief comparison of copyright issues related to the creation of the archival record in digital format in Belgium and the United States, contrasting and evaluating the successes and failures within each system of

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<sup>1</sup> But see, *Hoteling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997). “When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.” Id. at 203. By logic this would apply to collections listed in the catalog of an archive.

copyright law towards a goal of informing various stakeholders of the opportunity to enrich their own respective processes.

A significant portion of the records entrusted to archives likely consist of unpublished content that is nonetheless subject to protection as original works of authorship under the copyright law. If the owner has not also transferred ownership to the archive or otherwise allowed for uses consistent with archival practice through a nonexclusive license for example, the archivist as well as patrons served by the archivist must heed the limitations on use imposed by copyright law. Ownership rights in published works, likely residing in the publisher, of course raise copyright issues in the preservation and access activities of archives. The duration of copyright protection far outweighs the life expectancy of any digital technology.<sup>2</sup> As a result, throughout the “lifetime” of the copyright in a particular work the archivist will migrate the content of that copyright from one generation of technology to the next. This migration entails reproduction and likely distribution, moreover the potential for communication or performance and display of the protected content. A strategy of “waiting it out” is counterproductive to the purpose of copyright, to benefit the public.<sup>3</sup> Copyright issues abound. This would be so even if

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<sup>2</sup> Under Belgian law, the term of copyright protection generally lasts 70 years after the death of the creator of a work. There are minor variations to this rule in the case of co-authorship, audiovisual works and anonymous or pseudonymous works. Art. 2 Belgian Copyright Act (hereinafter BCA) of June 30, 1994, (*Moniteur* July 27, 1994). See also, FERNAND DE VISSCHER AND BENOÎT MICHAUX, PRÉCIS DU DROIT D’AUTEUR ET DES DROITS VOISINS 206 (2000). Under United States (hereinafter U.S.) law the duration of copyright depends on the legislation which was in place at the time of publication. Works published under the 1976 Copyright Act – works created after 12/31/1977, the effective date of the act – are protected for author’s life plus 70 years, or if corporate, anonymous, pseudonymous: lesser of 95 years from publication or 120 from creation, but through March 1, 1989, registration was required within five years of publication. For unpublished works created after 12/31/1977, the duration is the life of the author plus 70, or 120 from creation for corporate, anonymous, pseudonymous. When the death date of an author is unknown: 120 years from creation. See, 17 U.S.C. §§ 302 and 304 (2000). U.S. Copyright law contains a significant exception for qualifying (those meeting the conditions of 17 U.S.C. §108(a) archives for published works to the additional twenty-year term extension enacted by the Sony Bono Copyright Term Extension Act. Pub. L. No. 105-298; 112 Stat. 2827, Title I (1998). Under section 108(h), a qualifying library or archives (“including a nonprofit educational institution that functions as such”) may ignore the 20 year extension. This exception applies to the reproduction, distribution, display or performance, but not to the creation of derivative works. The use must also be for the purpose of “preservation, scholarship, or research.” Whether personal uses are assumed within this list is unclear. The use not allowed if, after a “reasonable investigation” any of the following exist: the work is subject to “normal commercial exploitation,” “a copy or phonorecord of the work can be obtained at a reasonable price,” or the copyright owner or agent provides notice that either of the conditions set forth above exist.” Whether this provision benefits a qualifying archive in practice is difficult to say. See, e.g., “What database proprietor can rely on so limited an exemption—particularly when the phrase ‘reasonable investigation’ is so open-ended and particularly if the database has commercial, as well as non-commercial, aspects?” *Eldred v. Ashcroft*, 537 U.S. 186, 252 (2003) (Breyer, J., dissenting). See also, U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 46 (2006) observing that the section 108(h)(2)(C) “provides a formal way for a copyright owner to opt out of the exception. However, the ‘opt-out’ registry established by section 108(h)(2)(C) has never been used in the eight years since section 108(h) became law.” (footnote to effective date of the legislation, October 27, 1998, omitted).

<sup>3</sup> Under U.S. law and before enactment of the 1976 Copyright Act, the requirements of registration and renewal then in effect meant that many works once protected may now be in the public domain. However, determining the protected or unprotected (in the public domain) status of the work is difficult. Worse, identifying an owner of a protected may be likewise difficult. Use of an archived work based on an incorrect determination may incur the wrath (through litigation) of the copyright owner should an undetermined owner later appear. “Many users of copyrighted works who have limited resources or are particularly risk-averse have indicated that the risk of liability for copyright infringement, however remote, is enough to prompt them simply to not make use the work. *Such an outcome is not in the public interest*, particularly where the copyright owner is not locatable because he no longer exists or otherwise does not care to restrain the use of his work.” U.S. COPYRIGHT OFFICE, REPORT ON

the migration entails no new reproduction but access alone as the statute of limitations for the initial reproduction may lapse, infringement based upon continued distribution, communication and performance or display will continue to toll anew each day the work is made available is such new technology.<sup>4</sup>

This comparative analysis between Belgian and United States (hereinafter U.S.) copyright law surrounding the practices of archival work raises and answers several questions. First, what possible array of ownership and use provisions and iterations of those provisions is possible based upon common or shared premises? Second and more important, whether preservation of and access to the archived cultural record enhanced or undermined by the present copyright law and its emerging trends? Most important, is the current and developing copyright law adequate to progress the preservation of this record into the digital environment? While the authors have explored similar issues in the institutional context of educational entities<sup>5</sup> and legislative reform is under way in associated issues,<sup>6</sup> no concrete review is available in the specific context of the archive.

## II. EXCLUSIVE ECONOMIC RIGHTS APPLIED TO THE ACTIVITIES OF ARCHIVES

Copyright law grants an author or other owner a limited monopoly on protected works as an incentive to encourage future creativity. The incentive encourages the creation of more works to which members of society are exposed and thus be in turn inspired to create in their own right and by which the information commons is enlarged upon the expiration of copyright. It is the role of the archive to preserve and make available protected content for present access until such events occur. This monopoly takes form in a number of exclusive rights, most of which are of an economic nature, intended to protect the property (read economic) interest in the work. In addition, Belgian and to a limited extent U.S. law grants authors a number of rights of a moral nature, intended to protect the “intimate bond” that exists between the creator and his creation.

The exclusive economic rights as defined in the Belgian Copyright Act (hereinafter BCA) comprise of the right of reproduction, distribution and communication to the public.<sup>7</sup> Each of these terms is interpreted by jurisprudence and doctrine to cover a broad range of activities. Originally, reproduction meant the manufacture of physical copies of a work, while communication to the public meant performance of a work to an audience. The creation of derivatives, translations or adaptations is traditionally considered a form of intellectual copying, thus falls within the scope of the reproduction right. In the copyright context, the term distribution is still reserved for the transfer of physical copies, as are the terms rental and

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ORPHAN WORKS 15 (2006) (emphasis added). Legislation was introduced to cure the problem of so-called “orphan works” during the “waiting out” period. H.R. 5439, The Orphan Works Act of 2006. H.R. 5439, 109th Cong., was combined with other amendments to title 17, United States Code and re-introduced as title 2 of H.R. 6052, Copyright Modernization Act of 2006 on September 18, 2006. Neither bill passed before the end of the 109th Congress.

<sup>4</sup> See, *Hotelling v. Church of Latter Day Saints*, 118 F.3d 199 (4th Cir. 1997).

<sup>5</sup> See, e.g., TOMAS A. LIPINSKI, THE COMPLETE COPYRIGHT LIABILITY HANDBOOK FOR LIBRARIANS AND EDUCATORS (2006); and TOMAS A. LIPINSKI, COPYRIGHT LAW AND THE DISTANCE EDUCATION CLASSROOM (2005). See also, Alicia Ryan, *Contract, Copyright, and the Future of Digital Preservation*, 10 BOSTON UNIVERSITY JOURNAL OF SCIENCE AND TECHNOLOGY LAW 152 (2004).

<sup>6</sup> See, e.g., U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 15 (2006); and the work of the Section 108 Study Group, available at <http://www.loc.gov/section108/>.

<sup>7</sup> Art. 1 BCA.

lending.<sup>8</sup> With works in digital form, the exact same digital object or file may be reproduced and/or communicated to the public, thus both exclusive rights are implicated.

Under U.S. law copyright owners have the following rights under section 106: (1) to reproduce the copyrighted work in copies or phonorecords, (2) to prepare derivative works<sup>9</sup> based upon the copyrighted work, (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending, (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform<sup>10</sup> the copyrighted work publicly, (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display<sup>11</sup> the copyrighted work publicly,<sup>12</sup> and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.<sup>13</sup>

Though there are obvious variances in formulation, both Belgian and U.S. law afford authors the same types of exclusive rights (creation of physical copies and derivatives, sale, rental, lending and public performance or display). The most notable difference appears to be the description of the subject matter, where the Belgian system simply refers to 'works', the U.S. system takes a more analytical approach. This synthetic versus analytic approach will prove to be a recurring theme. The right of reproduction and adaptation/derivation is of particular interest to archives in the acquisition and preservation stage and to a lesser extent in the dissemination stage. The right of distribution and rights of communication or performance and display as they are known in Belgium and the U.S. respectively are paramount in the dissemination of archived content.

#### *A. Acquisition and Preservation of Records as Derivative?*

Eventually, some records will require migration to a more suitable file format to ensure continued access in the new platform. Does migration equal adaptation, impinging on the derivative right? The migration process is designed to preserve the original work in its essential features, though in practice its appearance and functionality may be substantially affected.

In Belgian law, a derivative work implies an independent contribution of the maker, thereby transforming the original work into something new. The only example the law gives of adaptation is translation. This contribution may in turn be original, thus the maker becomes a (partial) copyright holder of the derivative work in his own right.<sup>14</sup> Migration operations

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<sup>8</sup> See, Fabienne Brison and Benoît Michaux, *De Nieuwe Auteurswet*, 1995 R.W. 483 (1995); and FERNAND DE VISSCHER AND BENOÎT MICHAUX, *PRÉCIS DU DROIT D'AUTEUR ET DES DROITS VOISINS* 104 (2000). 104. The regime applicable to the preservation and dissemination of physical works will not be treated in this paper.

<sup>9</sup> 17 U.S.C. § 101 (2000).

<sup>10</sup> 17 U.S.C. § 101 (2000) ("To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.").

<sup>11</sup> 17 U.S.C. § 101 (2000) ("To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."). Some categories of works can be performed, although others can only be displayed; you cannot perform a piece of sculpture, nor can you display a song.

<sup>12</sup> See 17 U.S.C. § 101 (2000), for a definition of "public" display or performance.

<sup>13</sup> 17 U.S.C. § 106 (2000).

<sup>14</sup> ALAIN BERENBOOM, *LE NOUVEAU DROIT D'AUTEUR ET LES DROITS VOISINS* 77 (2005); and FERNAND DE VISSCHER AND BENOÎT MICHAUX, *PRÉCIS DU DROIT D'AUTEUR ET DES DROITS VOISINS* 84 (2000).

performed by the archivist on digital records to ensure their readability do not necessarily entail an act of adaptation.<sup>15</sup> The migrated version, although it is recast in a different format, is or should be essentially identical to the original version of the work, and will still be regarded as an ordinary copy. Since the right of adaptation is considered a part of the right of reproduction, distinguishing between the two is of limited practical importance. In this context, the moral right of integrity may be of greater significance (see discussion below).

U.S. law also grants the copyright owner the exclusive right to prepare derivative works, but the right is not a subset of the reproduction right. Under U.S. law a derivative work is one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'"<sup>16</sup> Migration from one format to another does not result in a new work as U.S. courts have commented.<sup>17</sup>

Here too, the parallels between both legal systems far outweigh the minor differences, notably the fact that U.S. law sees reproduction and adaptation as two independent rights, whereas Belgian law considers adaptation to be a special kind of reproduction. This nuance is of importance in particular where the scope of copyright exceptions is concerned.

### B. Dissemination of Records

In the past common practice entailed the archive providing access to its records on-site, where the physical copy of the record was consulted by patrons. Today as the archival record is migrated to digital from access from off-site users becomes the logical extension of the physical archive, offering new potential for access to the cultural record by a broader segment of the population. It is unfortunate that to an extent in both Belgian and U.S. the copyright law is unprepared to accommodate these possibilities.

The BCA grants copyright holders an exclusive right of communication, meaning any exploitation in intangible form of a work regardless of the means used. Examples are the performance of a play or music broadcast on the radio. Unlike U.S. law the notion 'to the public' remains undefined in either statute or case law. There is little discussion when the communication is aimed at a more or less predefined audience, e.g. viewers of a television program or concertgoers. Whether putting a work on the internet constituted a communication to the public was the subject of controversy, until the European Union (hereinafter EU) directive explicitly settled this point in favor of the copyright holders. Making works available in such a way that members of the public may access them from a place and at a time of their choosing, i.e., off-site and online, now falls within the scope of communication to the public.<sup>18</sup> As a result,

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<sup>15</sup> FRANK GOTZEN, AUTEURSRECHT, TEKENINGEN EN MODELLEN, 67-68 (1998) (K.U.Leuven Faculteit Rechtsgeleerdheid).

<sup>16</sup> 17 U.S.C. § 101 (2000).

<sup>17</sup> *UMG Recordings v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000); *Greenberg v. National Geographic Soc.*, 244 F.3d 1267 (11th Cir. 2001); See also, *O'Well Novelty Co. v. Offenbacher, Inc.*, 2000 WL 1055108 (225 F.3d 655), \*\*5, n. 1 (4th Cir. 2000) (unpublished) (per curiam) WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 112 (2003).

<sup>18</sup> Art. 3 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *Official Journal* L 167 June, 22nd 2001, p. 10-19, (hereinafter EU Copyright Directive). This provision was transposed more or less

such access requires permission from the copyright owner to make works available online or to organize an on-site but still computer-assisted viewing by an audience. However the issue of individual access digital records in the reading room of the archive remains an unsettled question. Where the digital records exist on a physical medium (CD, DVD, memory stick), consultation by an individual patron could be treated akin to the review of books and other physical objects on-site, a use which falls outside the scope of copyright.<sup>19</sup> If the individual consults the records by way of a network, even an internal one, the right of communication comes into play.<sup>20</sup> Treating consultation of digital records in this fashion, as a form of communication to the public, requires that prior consent from the copyright holders would be required, were it not for the archives exemption (see discussion below).

Under U.S. the concept of “to the public” (performance, display, and distribution) is defined at least for performance and display: “To perform or display a work ‘publicly’ means to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”<sup>21</sup> The definition refers to “a place open to the public” and encompasses a wide range of archive locations. It may not matter if a group of people know each other or not, if researchers are working on a genealogy project, or if members of the same household wish to see an archive-owned video or view a digitized set of photographs in its reading room. The trigger is that the performance or display is made at a place open to the public or where people beyond the family or social acquaintances might gather. The definition also has an “action (transmission or communication) clause.” If the performance or display is transmitted or communicated to a place specified by the “location clause” or “to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times,” the library may be infringing copyright.<sup>22</sup> If an archive allows patrons to view videos (performance) on its premises, it would trigger the location clause but not the action clause.<sup>23</sup> However, if the archive placed an elevated large screen monitor in each corner of the main reading room, and played a video related to various archive-themes (The Name of the Rose, The De Vinci Code, etc.) this would trigger the action (transmission or communication) clause as well. Patron or public access to digital content through the web site of the archive would involve the public display of protected content.<sup>24</sup>

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literally in art. 1 §1al. 3 BCA. Fabienne Brison and Benoît Michaux, *De Nieuwe Auteurswet*, 1995 R.W. 483 (1995).

<sup>19</sup> Marie-Christine Janssens, *De uitzonderingen op het auteursrecht anno 2005 - Een eerste analyse*, 6 AUTEURS & MEDIA A&M 503 (2005). The fact that temporary copies are necessary to allow access to the records does not invalidate this analogy, as such copies are covered by a blanket exemption (see further). Similarly, rental and lending rights are applied to works in physical form (e.g. music CDs, movie DVDs, books), but no to online alternatives (e.g. software downloads).

<sup>20</sup> This view is supported by the fact that the EU directive contains an express exemption for precisely this situation, as does the BCA. See further in the section “Exceptions in Favor of Archives.”

<sup>21</sup> 17 U.S.C. § 101 (2000).

<sup>22</sup> 17 U.S.C. § 101 (2000).

<sup>23</sup> See, *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 282 (9th Cir. 1989).

<sup>24</sup> *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1557 (M.D. Fla. 1993) (display of photographs); *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 192 F.Supp.2d 321,331 (D.N.J. 2002) (display of video clips).

It is obvious that an archive that allows web access to its collection is engaging in a display of that content.<sup>25</sup> However, an archive that allows access to digital content in an on-site mode alone because it desires to comply with the requirements of section 108 (see discussion below), may also implicate the display right if patrons make simultaneous access of the work.<sup>26</sup> Thus, it may be best to think of “display” under U.S. law as either 1) transmission<sup>27</sup> from one place to another or 2) multiple images of a work at one place and time.<sup>28</sup>

### *C. The Right to Read Subsumed by Exclusive Rights in the Digital-Online Environment?*

The act of reading does not implicate the performance or display of content as it cannot be said that one “performs” a book when reading it or “displays” the physical object of a book when reading it. Moreover under U.S. law section 109(c) allows for the display of a single lawfully made copy to the public.<sup>29</sup> Recall the definition of display aligns more with the concept of transmission to another location or multiple “displays” in the vernacular sense of a single work in the same location. However, when the work being read is in digital form as in a virtual archive or the virtual space of a physical archive, i.e., online access that is also off-site, then copyright issues of performance and display arise. Under both Belgian and U.S. perspectives distribution is less problematic as transfer of a physical copy does not occur. The Ninth Circuit recently reiterated this result.<sup>30</sup> Digitalization (reproduction) may be required to access the work yet the reproduction may be beyond that allowed by section 108 or fair use (section 107). As a result the public display and distribution of this unlawfully made copy is not privileged under section 109. Moreover, even if the reproduction and distribution is allowed under section 108, the display of text or the performance of other works, the transmission or simultaneous access by patrons is a display or performance not privileged under section 108.<sup>31</sup>

As the definition of display intimates, display includes the presentation of the work by device or process, though it could also be made by film, slide, or television image. This is why exemptions were created in U.S. law for uses of material by qualifying nonprofit educational institutions, for example where every student in a computer lab receives the same image at the same time, or where a distance student views the image from the course website. Without the privilege to perform or display materials in the context of a classroom (physical or virtual) such uses would implicate the exclusive rights of the copyright owner. According to the 1976 legislative history, “[a]s long as there is no transmission beyond the place where the copy is located, both section 109(b) [now section 109(c)] and section 110(1) would permit the classroom

<sup>25</sup> H.R. REP. NO. 94-1476, at 80 (1976), as reprinted in 5 U.S.C.C.A.N. 5659, 5694 (1976).

<sup>26</sup> H.R. REP. NO. 94-1476, at 80 (1976), as reprinted in 5 U.S.C.C.A.N. 5659, 5694 (1976).

<sup>27</sup> 17 U.S.C. § 101 (2000) (“To ‘transmit’ a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”).

<sup>28</sup> H.R. REP. NO. 94-1476, at 80 (1976), as reprinted in 5 U.S.C.C.A.N. 5659, 5694 (1976).

<sup>29</sup> 17 U.S.C. § 109(c) (2000).

<sup>30</sup> *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (“The district court reasoned that distribution requires an ‘actual dissemination’ of a copy. Because Google did not communicate the full-size images to the user’s computer, Google did not distribute these images. Again, the district court’s conclusion on this point is consistent with the language of the Copyright Act.” (citation to district court omitted)).

<sup>31</sup> See, JESSICA LITMAN, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL 29, 40 (protesting result in which all acts of reading or viewing a digitalized work with the use of computer involves “actionable reproduction”).



display of a work by means of any sort of projection device or process.”<sup>32</sup> The display right that section 110(1) grants and that section 109(c) does not—is for the right to display multiple images or to use “new communications media, notably television, cable and optical transmission devices, and information storage and retrieval devices”<sup>33</sup> to display copyrighted materials. As a result an on-site rendering of text-based content seldom results in a public display (unless by “simultaneous projection of multiple images”), but an off-site, online rendering is a public display as the case law holds. Posting the content on the archive website would be a display<sup>34</sup> not otherwise privileged by the law other than fair use.

The concept of public distribution applies in the archive setting as well. In *Hotaling v. Church of Latter Day Saints*<sup>35</sup> the plaintiff claimed that the distribution was ongoing, as the unlawfully copied work was made available to members of the public through the holdings of the church library. The court observed: “When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”<sup>36</sup> Because the library had unlawfully made a complete cover-to-cover copy of one of the plaintiff’s books, the distribution of that material was also unlawful. Even the *Hotaling* dissent agreed that an off-site circulation of an actual physical copy of a protected work would be a distribution. Of course if the content is lawfully made, first sale rights under 17 U.S.C. § 109(a) allow for this distribution. The problem in *Hotaling* was that the copies distributed to the public were not lawful copies, thus the necessity of ensuring that any reproduction that is made by the archives is a lawfully made copy, i.e., authorized under the copyright law or by license or permission from the copyright owner. Application of this holding to distance environments suggests that once material is posted unlawfully to an archive web site it would continue to violate the right of performance or display for every day it remains on that site and accessible by patrons. While section 108 dealing with additional privileges for archives addresses reproduction and distribution it does not address display or performance, which in the digital archive environment may also arise.

Likewise the Belgian judge would not analyze the online dissemination in light of the right of distribution, as this only pertains to the transfer of ownership of physical copies of a work, by sale or otherwise. Distribution does not cover rental, lending, consultation on site of works in the archives’ collection, nor does it cover access through a network. As described above, the question before the judge would be first whether the archives is engaging in a communication to the public and second whether this is lawful. The crux of the matter would be the applicability and scope of the archives exemption (see further).

In the U.S. copyright system, most dissemination activity (all performances and displays of multiple images) at the archive is at least in theory touched by copyright, be it performance, display or off-site distribution. The reverse was true in Belgium, as on-site consultation of works

<sup>32</sup> H.R. REP. NO. 94-1476, at 82 (1976), as reprinted in 5 U.S.C.C.A.N. 5659, 5696 (1976).

<sup>33</sup> H.R. REP. NO. 94-1476, at 80 (1976), as reprinted in 5 U.S.C.C.A.N. 5659, 5694 (1976) (Commenting on the limits of section 109(c): “In other words, the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.” Id.).

<sup>34</sup> See, e.g., *Playboy Enterprises, Inc. v. Webworld, Inc.*, 991 F.Supp. 543, 552 (N.D. Tex. 1997); *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F.Supp. 503 (N.D. Ohio 1997) ; *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 844 (C.D. Cal. 2006).

<sup>35</sup> *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

<sup>36</sup> *Hotaling v. Church of Latter Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

by individuals traditionally fell outside the scope of copyright. This remains true today for works embodied in a physical medium. The advent of digital formats, a file stored on the network server of the archive for example allows copyright to creep into the reading room. As a result, in both Belgian and U.S. law the array of ownership rights impacts at least some aspects of access to the archival record, perhaps far less in Belgian law than in the U.S. The preservation of the archival record through reproduction, whether or not in migration of format implicates the right of copyright owner. Migration to digital format as part of migration raises additional issues with respect to exclusive rights. Exceptions, discussed below are necessary otherwise the copyright is an inadequate vehicle for the preservation and transfer of the cultural record to successive generations. However, whether the exceptions alleviate the problems that ownership rights pose in this respect remains for further discussion and conclusion to develop below.

### III. THE IMPACT OF MORAL RIGHTS ON THE ACTIVITIES OF ARCHIVES

Belgian copyright in addition to the economic link between the copyright owner and the work attempts also to honor the 'intimate bond' between the creator and the creation. Thus creator is granted a number of so-called "moral" rights. The justification for these rights is the predicate that the copyrighted work is an expression of the author's personality.<sup>37</sup> Viewing creative expression in works as an extension of the person, a moral right is tied to the creator and is inalienable, unlike the economic interest of the owner (whether the author or another) in the work which like property is transferable. The BCA defines three moral rights: divulgation, paternity and integrity.

The first moral right granted to the creator of a work is that of divulgation: only the author decides when his work is ready to be made public.<sup>38</sup> Divulgation is not tied to formality, therefore the creator's decision may become obvious action, displaying a work in a public place or uploading it to a website for example. It is akin to the economic right of first publication, but again is owed to the creator regardless of ultimate copyright ownership. In Belgium, the author does not have the possibility to repent.<sup>39</sup> In theory, works not divulged by their author will rarely find their way into an archive. The act of depositing a work in an archive, by the author or by his heirs, is of itself a form of divulgation. Issues arise when works are taken from the creator then divulged against the wishes of the creator. However, it is not clear whether an author could demand the destruction of any and all copies in an archive's collection in such instance, especially where the archive acts in good faith, is not aware or has no reason to believe that such divulgation is against the wishes of the creator or is induced to divulge based upon the false assurance of another in the presence of reasonable reliance on those assurances. Since the copyright exceptions provided by law pose limits on both the moral and economic rights of the

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<sup>37</sup> ALAIN BERENBOOM, *LE NOUVEAU DROIT D'AUTEUR ET LES DROITS VOISINS* 100 (2005); and FERNAND DE VISSCHER AND BENOÎT MICHAUX, *PRÉCIS DU DROIT D'AUTEUR ET DES DROITS VOISINS* 181 (2000).

<sup>38</sup> The divulgation right is not granted to the creator of a computer program. See, ALAIN BERENBOOM, *LE NOUVEAU DROIT D'AUTEUR ET LES DROITS VOISINS* 181; and FERNAND DE VISSCHER AND BENOÎT MICHAUX, *PRÉCIS DU DROIT D'AUTEUR ET DES DROITS VOISINS* 26984 (2000).

<sup>39</sup> ALAIN BERENBOOM, *LE NOUVEAU DROIT D'AUTEUR ET LES DROITS VOISINS* 103 AND 110 (2005); Fabienne Brison and Benoît Michaux, *De Nieuwe Auteurswet*, 1995 R.W. 484 (1995); and FERNAND DE VISSCHER AND BENOÎT MICHAUX, *PRÉCIS DU DROIT D'AUTEUR ET DES DROITS VOISINS* 182 and 190 (2000).

author,<sup>40</sup> archives are in all likelihood shielded from liability by the archives exemption (see discussion below).

A second moral right of the creator is a right of paternity, i.e., the right to claim or disclaim the work as his or her own. This entails the right to control attribution related to the work, to decide under which name the work shall be published: under his own name, a pseudonym or anonymously. In the two latter cases, the creator may change his mind at a later date and demand that the work is published under a different name from that point forward. An archive would not be required to alter records already in its possession, though it may need to update accompanying metadata to ensure correct attribution.

Finally, the creator may demand respect for his work, specifically regarding its integrity. In archive or museum practice this takes the form of a presentation right. The creator may object to modification of the work or object to placement of the work in a damaging context.<sup>41</sup> In cases where the creator has waived the right of integrity, the creator may always protest against any manipulation of the work that may taint his reputation or honor. It is open to debate whether any of the operations performed by the archivist to preserve digital works infringes on the works integrity of the work. To an extent, this depends on the factual circumstances of each case. It is typical for the archivist to direct preservation of works in the original context. For example digitization of images may require manipulation of color or lighting to achieve the “look” of the original photograph. As a result, digital archives aim to preserve the essential characteristics of the digital records in their care. Non-essential characteristics may be sacrificed in the course of conservation efforts. While the creator and the archivist may differ on what constitutes an essential characteristic of the work the archivist likely promotes the right of integrity of the creator rather than interferes with that right. In cases where the creator has waived his moral right to integrity, discussion is limited to cases of manifest infringement. Again, archives could in all likelihood invoke the archives exemption to justify modifications that are strictly necessarily for preservation.

In stark contrast, while an author can claim rights of paternity (“to claim authorship of that work, and to prevent the use of his or her name as the author”) and integrity (prevent certain uses that are “prejudicial to his or her honor or reputation”) in the United States this protection applies with respect to works of “visual art” alone. A work of visual art is defined rather narrowly in section 101.<sup>42</sup> For example, the work must exist only in a single copy or limited edition of “200 copies or fewer that are signed or consecutively numbered by the author.”<sup>43</sup> According to Nimmer, “[t]his concept contains a number of very obvious definitional problems that have not been explored by the courts.”<sup>44</sup> In the United States, similar concepts of a “moral right” are also

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<sup>40</sup> FERNAND DE VISSCHER AND BENOÎT MICHAUX, PRÉCIS DU DROIT D’AUTEUR ET DES DROITS VOISINS 182 (2000).

<sup>41</sup> ALAIN BERENBOOM, LE NOUVEAU DROIT D’AUTEUR ET LES DROITS VOISINS 106 (2005); Fabienne Brison and Benoît Michaux, *De Nieuwe Auteurswet*, 1995 R.W. 484 (1995); and FERNAND DE VISSCHER AND BENOÎT MICHAUX, PRÉCIS DU DROIT D’AUTEUR ET DES DROITS VOISINS 199 (2000).

<sup>42</sup> 17 U.S.C. § 106A (2000).

<sup>43</sup> 17 U.S.C. § 101 (2000) (defining a “work of visual art”). In addition the definition excludes the following: “any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication, any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container, any portion or part of any item described in clause (i) or (ii), any work made for hire, and any work not subject to copyright protection under this title.”

<sup>44</sup> RAYMOND T. NIMMER, *Information Law*, ¶ 6.03[3][A], at 6-10 (1999).

at work in commercial settings apart from the pure statutory moral rights articulation, e.g., as an unfair trade practice.<sup>45</sup> What the concept of moral rights does establish is a way to think about ownership rights that are not based either upon physical possession of the work or economic rights linked to that work.<sup>46</sup> Rather it appeals to higher, “moral,” aspects of authorship/ownership. Strangely enough the implementation of these rights in United States Law has been criticized on both First Amendment and civil liberties grounds.<sup>47</sup>

Moral rights demarcate the line between *droit d'auteur* and copyright systems. For example, moral rights rest with the copyright creator, not the copyright owner. Such rights may be waived, but not transferred. Perhaps surprisingly, in the context of archives the supposed deep divide between both systems is virtually non-existent. Belgian creators of digital works have moral rights unlike their U.S. counterparts. However, in the face of archives such rights appear ineffective due to the exemption regime (see discussion below).

#### IV. EXCEPTIONS IN FAVOR OF ARCHIVES

Without further adjustment to the rights of copyright owners and the reach of those right by owners digital archiving and dissemination practices of much of the archival record would be constricted or prohibitively expensive, i.e., in the cost of permission seeking and permission execution. Legislators recognize that in selected environments and circumstances the public interests of access and use overrides ownership rights in the copyright law. In these cases, exceptions have been carved out of the owner’s monopoly rights or in the alternative compulsory licensing schemes are developed. In Belgium, many exemptions are accompanied by a compensation scheme.<sup>48</sup> While compulsory (statutory) licensing mechanisms exist in U.S. law,<sup>49</sup>

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<sup>45</sup> See, e.g., *Gilliam v. American Broadcasting Companies, Inc.*, 538 F.2d 14 (2nd Cir. 1976) (Cause of action under Section 43(a) of the Lanham Act (15 U.S.C. 1125(a) (2000)) allowed to proceed. Extensive editing (shortening) of *Monty Python’s Flying Circus* television originally airing on the BBC undermined the integrity of the original work when shortened for American audiences).

<sup>46</sup> DAVID R. DOWNES, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 253 259 (2000).

<sup>47</sup> See, Katherine M. Thompson, *The Visual Artist’s Rights Act*, in THE VISUAL ARTIST’S BUSINESS AND LEGAL GUIDE 27, 30-31 (Gregory T. Victoroff ed., 1994), (27) 30-31; Kathryn A. Kelly, *Moral Rights And The First Amendment: Putting Honor Before Free Speech?*, 11 UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW 211, 250 (1994).

<sup>48</sup> Articles 59-61quater BCA. The compensation scheme was modified extensively in the wake of the transposition of the EU Copyright Directive. This complex piece of regulation lies outside the scope of this paper. For an analysis see Katrien Van der Perre, *Reprografie, digitale onderwijsuitzending, privé-kopie en leenrecht na de Wet van 22 mei 2005: standpunt van de auteur*, 6 AUTEURS & MEDIA 520-531 (2005).

<sup>49</sup> See, 17 U.S.C. § 111 (2000) (Limitations on exclusive rights: Secondary transmissions); 17 U.S.C. § 115 (2000) (Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords); 17 U.S.C. § 116 (Negotiated licenses for public performances by means of coin-operated phonorecord players); 17 U.S.C. § 119 (2000) (Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing); and 17 U.S.C. § 122 (2000) (Limitations on exclusive rights: Secondary transmissions by satellite carriers within local markets).

such legislative “solutions” are not favored by content owners.<sup>50</sup> Further, courts do not view the compelled license as a solution to issues of access.<sup>51</sup>

In 2005 the exceptions in the Belgian Copyright Act were amended in light of the EU Copyright Directive.<sup>52</sup> The EU Copyright Directive was issued with the goal of harmonizing the various exceptions to ownership right within the EU. As a proscriptive document, only the exceptions listed in the Copyright Directive were allowed to remain within the laws of member states. As a result the exceptions listed must be taken “as is” otherwise the harmonizing effect would be frustrated.

The exceptions provided in the BCA are mandatory and contractual waivers are inoperable. However this general rule does not apply to works made available online on demand, where the user can access them from a place and at a time of their choosing.<sup>53</sup> Where the archive obtains a work for its collection directly from a content provider, it must verify whether the contract provides for a waiver of any or all compulsory licenses. The archive must indicate the extent to which use is subject to additional terms and conditions of the provider or other contract. As a rule, the terms and conditions of a database license do not bind third parties, i.e., the patrons of the archive. License terms and conditions may impose an obligation on the archive to ensure that its patrons abide by the terms and conditions, though remedy for a failure to abide by the terms and conditions would be against the archive as a party to the agreement, not the archive patron.

In the U.S. the content providers continue to emphasize contract (license) as the preferred vehicle to deliver online or digital copyrighted content to consumers. The emerging rule is that the terms and conditions of a contract override any use privilege or exception granted by the copyright law to general users<sup>54</sup> that could include an archive (under section 107, fair use for example) or specific users such as an archive under section 108.<sup>55</sup> As a result, the provisions of use governing licensed content in an archive can override the privileges (so-called “limitations

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<sup>50</sup> See, e.g. Darlene A. Cote, Note, *Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on the Compulsory License*, 2 JOURNAL OF INTELLECTUAL PROPERTY 219, 243 (1994); Midge M. Hyman, Note, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS AND ENTERTAINMENT LAW JOURNAL 104, 138 (1985).

<sup>51</sup> See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 569 (1985) (“Congress has not designed, and we see no warrant for judicially imposing, a ‘compulsory license’ permitting unfettered access to the unpublished copyrighted expression of public figures.”).

<sup>52</sup> The EU Copyright Directive does not apply to software and databases, which were the subject of previous EU Directives, art. 1 § 2 EU Copyright Directive.

<sup>53</sup> This modification has received heavy criticism, both in parliament and in doctrine. Doc. Parl., Senate, 3-1073/3. p. 1; and Marie-Christine Janssens, *De uitzonderingen op het auteursrecht anno 2005 - Een eerste analyse*, 6 AUTEURS & MEDIA A&M 509 (2005); Séverine Dusollier, *Les nouvelles dispositions belges en matière de protection technique du droit d'auteur et des droits voisins*, 6 AUTEURS & MEDIA 543 (2005); and SÉVERINE DUSOLLIER, DROIT D'AUTEUR ET PROTECTION DES OEUVRES DANS L'UNIVERS NUMÉRIQUE 547 AND 652 (2005).

<sup>54</sup> In *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the Seventh Circuit upheld the validity of shrink-wrap and click-on or Web-wrap CD-ROM licenses. The most startling statement from the *ProCD vs. Zeidenberg* court concerned its discussion of contract versus copyright. The defendant, Zeidenberg, attempted to use the fair-use concept as a defense in his development of a database of telephone names and addresses extracted from the plaintiff's product. Furthermore, the underlying content of the database was unprotected by copyright, consisting of basic names, addresses, phone numbers, i.e., factual information. Because he signed a valid license or contract, he was bound by the terms of the contract. “A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create ‘exclusive rights.’” *Id.* at 1454.

<sup>55</sup> 17 U.S.C. § 108(f)(4) (“Nothing in this section ...in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections” (emphasis added)).

on exclusive rights”) or in a litigation-sense, the affirmative defenses to infringement granted by various provisions of the U.S. copyright law, i.e., sections 107-122.

#### *A. Temporary Reproduction*

A new exemption was introduced into the BCA for temporary acts of reproduction necessary for the transmission of the work in a network by an intermediary or for other lawful use. The exemption is subject to strict conditions: the copy must be transient or incidental in nature, may not have any independent economic significance, and must be made as an integral and essential part of a technological process.<sup>56</sup> This exemption does not allow archives to incorporate works into their collection or to disseminate them to the public, but may be relevant with regard to the internal management and conservation of the collection (e.g. migration and back-up operations).

Under the U.S. copyright law several provisions address transient, ephemeral and incidental reproduction of protected content. While none of the provisions target the archive in specific, depending on circumstances the archive may nonetheless take advantage of these exemptions. Early case law concluded that a RAM copy is a copy for purposes of the copyright law and thus could constitute an infringing reproduction.<sup>57</sup> Section 117(c) offers a RAM copy exception for purposes of maintenance or repair.<sup>58</sup> This provision applies to all copyright users. However, in contexts other than maintenance and repair, RAM copying can still constitute infringement, e.g. in the case of web browsing.<sup>59</sup>

Two provisions relating to distance education allow for copying of content, one provision in specific allows for limited duration archiving. Both provisions fall under the so-called “ephemeral” recording provision. This may be useful for archives associated with educational institutions. Section 112(b) allows a qualifying section 110(2) entity (“a governmental body or other nonprofit education organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a)”) to make “no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display,” provided that 1) “no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause [i.e., ephemeral recordings under section 112(b)],” and 2) all copies or phonorecords are “destroyed within seven years from the date the transmission program was first transmitted to the public.”<sup>60</sup> Beyond the thirty copy-seven year rule an educational institution may retain one copy “preserved exclusively for archival purposes.”<sup>61</sup>

A second provision, also related to distance education allows for digitalization of content in limited context and for storage (“archive”) on institutional servers for as long as the material is used in subsequent online classroom environments. Under section 112(f) “it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a display or performance.” In addition and again in support of distance education, “transient or temporary” copies in support of qualifying

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<sup>56</sup> Art. 21 §3 BCA, in compliance with art. 5 EU Copyright Directive.

<sup>57</sup> *MAI Systems, Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) cert. dismissed 114 S. Ct. 671 (1994).

<sup>58</sup> 17 U.S.C. § 117(c) (2000).

<sup>59</sup> *Intellectual Reserve, Inc. vs. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. at 1294 (D. Utah 1999) (citing *Marobie-F vs. National Association of Firefighter Equipment Distributor* among others).

<sup>60</sup> 17 U.S.C. § 112(b) (2000).

<sup>61</sup> 17 U.S.C. § 112(b)(2) (2000).

transmissions (performance and display) under section 110(2) are exempt.<sup>62</sup> Transient copies on the network of a “service provider” that might otherwise be infringing are covered by section 512(a), however, the provision does not offer exemption per se rather limits the monetary and injunctive remedy available to copyright owners.<sup>63</sup>

The Belgian legislator as required by the EU exempts transient copying in support of otherwise legitimate use, foreclosing the possibility of copyright infringement claims for temporary copies in the digital environment. This proactive approach offers a stark contrast to the often reactive approach of U.S. legislators when drafting exceptions. For example, the section 117 exemption was enacted in part as a response to the decision in *MAI Systems, Corp. v. Peak Computer, Inc.*, and the section 512 exemption is response to other developing case law.<sup>64</sup> This approach results in a patchwork of often over-drafted yet under-crafted exemptions. While this is significant for the development of the information society overall, the impact on archives is less severe in light of the specific archives exemption (see discussion below).

### B. Official Documents and Public Speeches

In Belgium, the record of speeches delivered in parliamentary proceedings, public judicial sessions or political meetings may be reproduced and communicated to the public without restriction. The creator (author or speaker) retains the right to distribute the record as an independent work.<sup>65</sup> Official government documents are not protected by copyright in the first instance. Legal doctrine considers that this exclusion covers at least documents published in the *Moniteur Belge*, official EU documents, court verdicts and administrative decisions and proceedings of parliamentary bodies.<sup>66</sup> Archives are in principle free to preserve, reproduce and otherwise offer, through various means including digital off-site (online), access to speeches and official documents. Collections of such official documents created by private publishers may be protected by sui generis database protection rights (see discussion below). As a result it is seem

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<sup>62</sup> 17 U.S.C. § 110 (2000). (“For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.”).

<sup>63</sup> 17 U.S.C. § 512(a) (2000) (“A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the *intermediate and transient storage* of that material in the course of such transmitting, routing, or providing connections, if...” (both emphasis added)).

<sup>64</sup> See, H.R. REP. NO. 105-551 (Part 1), at 11 (1998) (“As to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another. Thus, the bill essentially codifies the result in the leading and most thoughtful judicial decision to date: *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, 907 F.Supp. 1361 (N.D. Cal. 1995). In doing so, it overrules those aspects of *Playboy Enterprises, Inc. v. Frena*, 839 F.Supp. (M.D. Fla 1993), insofar as that case suggests that such acts by service providers could constitute direct infringement, and provides certainty that *Netcom* and its progeny, so far only a few district court cases, will be the law of the land.”).

<sup>65</sup> Art. 8 §1 BCA. Compare art. 5 par. 3, e) and f) EU Copyright Directive.

<sup>66</sup> Art. 8 §2 BCA. Compare art. 5 par. 3, e) EU Copyright Directive. ALAIN BERENBOOM, LE NOUVEAU DROIT D'AUTEUR ET LES DROITS VOISINS 55 (2005).

advisable that an archive building a collection of these documents obtain record of the document from the official “public domain” source.

Under section 105, works of the U.S. government are not protected by copyright and exist in the public domain. A federal government publication is a “work of the United States Government” when it is prepared by an officer or employee of the United States Government as part of that person’s official duties.”<sup>67</sup> This applies to all branches of the government including the executive branch and its agencies, judicial and administrative courts and legislative processes at the federal level. For example, the National Archives and Records Administration (NARA) and any of its subunits, are a part of the federal government. As a result, NARA publications are not protected by copyright (unless the copyright is explicitly reserved), so such items may be reproduced and distributed, and in the present context digitized and made a part of an electronic vertical file or web site of an archive. However, works of state and local government are not covered by Section 105 but may be protected by copyright.<sup>68</sup> Likewise works of federal government that are thus in the public domain may be distributed by a third party content provider through a license agreement, thus use of the record in that context would then be governed by the terms and conditions of the license and not section 105.

While the Belgian and U.S. copyright system agree on the basic idea, the boundaries of the exemption for official publications, public speeches, etc. are quite different. The U.S. is more generous in exempting all works created by agents of all three branches of the federal government, as opposed to just administrative decisions and regulations in Belgium. Yet, Belgium is more generous by applying the exemption to all three levels of government, i.e., federal, regional and local level. In practice, many states do not choose to copyright its public documents or choose to enforce its proprietary right in cases of commercial use alone.

### *C. Archives Exemption*

Before the expression of the EU Copyright directive through the BCA, the Belgian Royal Film Archive (hereinafter BRFA) alone benefited from a specific copyright exemption, allowing the BRFA to copy and restore films for preservation purposes. The exemption did not allow for commercial use of the films by the BRFA or any other use that might hinder the normal exploitation of the work by the copyright holders or unreasonably harm their legitimate interests. Interestingly, the copyright holder was granted a right of access to his work, under the condition that this did not endanger preservation of the work and upon fair compensation for the conservation effort of the Film Archive.<sup>69</sup> The most obvious reason for privileging the BRFA in this way, is the fact that film is the first medium for which restoration efforts were commonly required, film being more unstable a medium than say paper for example, and at time long before the expiration of the copyright.

In the wake of the EU copyright directive, the BRFA exemption was replaced by a general exception for archives, museums, and libraries. As before strict conditions exist. Nowhere are the terms “archive,” “museum” or “library” defined, though the new law indicates that all qualifying

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<sup>67</sup> 17 U.S.C. § 101 (2000).

<sup>68</sup> *National Conference of Bar Examiners v Multistate Legal Studies, Inc.*, 495 F. Supp. 34 (N.D. Ill. 1980), aff'd 692 F.2d 478 (7th Cir. 1982), cert den. 464 U.S. 814 (1983). See also, 14 Op. Atty. Gen. Okla. 317 (1982) (No. 82-167) (copyright may be claimed in works of the Oklahoma Historical Society); 1983 La. AG LEXIS 387, at 2 (July 27, 1983) (available in the LEXIS\*NEXIS LA Library) (Louisiana state agencies “may own the copyright in its capacity as a private person”).

<sup>69</sup> Art. 22, §1, 8° BCA (version in force until May 27<sup>th</sup>, 2005).



entities must operate on a non-profit basis and that the latter two (museums and archives) must be open to the public. The law does not quantify how many archival copies may be made, but states that no more than the strictly required number of copies may be made in light of the aim of preserving our cultural and scientific heritage. Further the work must be lawfully published, a notion which fails to address the issue of the “legitimacy” of a copy that finds its way into the archive sourced from a third party. This suggests only that the author must have exercised his moral right of divulgation.<sup>70</sup> As a result, the “lawfully” requirement does not prohibit an archive from including such illicit copies in its collection, nor from making them available to the public in the circumstances allowed by other archive exemptions. At first sight, this interpretation may appear outrageous, though upon closer inspection it is clear that requiring non-profit archives, libraries and museums to filter out any questionable material would defeat the purpose of collection, preservation and access.<sup>71</sup> The law provides safeguards against abuse assuring that the normal exploitation of the work by the copyright owner may not be hindered nor the owner’s legitimate interests be harmed unreasonably. Copies created under this exemption remain the property of the institution but may not be used for any commercial purpose. Copyright holders have a right of access to copies of their work under the same modalities as before.<sup>72</sup>

Not only has the number of users or beneficiaries of this exemption been increased, the scope of uses are expanded as well. Where the RBFA included compulsory license for acts of reproduction, the new exemption covers some narrowly defined acts of communication to the public, specifically acts that mirror consultation of physical copies in the reading room of an archive.<sup>73</sup> Again, the scope is limited to lawfully published works. Access may be given to individual members of the public, for the purpose of research or private study, via dedicated terminals on the premises of the institution. Making works freely available via the internet is clearly not covered by this exemption. It might be possible for institutions to pool their collections through a dedicated network with each archive offering access to the entire pooled collection on its respective premises. However, under a similar “premises” provision in U.S. law the legislative history makes clear that such remote, though pooled access is not acceptable as it would still be a transmission from the holding archive to the patron at the pooled archive (see discussion below).

Finally a rather puzzling condition is imposed: only material “not offered for sale or not subject to licensing terms” is covered.<sup>74</sup> This implies that an archive may not disseminate a work under this exemption as long as the work is still available on the market. This condition is highly remarkable and without parallel in the physical world, where works may be consulted on

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<sup>70</sup> See, Marie-Christine Janssens, *De uitzonderingen op het auteursrecht anno 2005 - Een eerste analyse*, 6 AUTEURS & MEDIA 503 (2005), on the difference in scope between the notion “lawfully published work” used here and the notion “legitimate user” required in some other exemptions. See also, SÉVERINE DUSOLLIER, *DROIT D’AUTEUR ET PROTECTION DES OEUVRES DANS L’UNIVERS NUMÉRIQUE* 587 (2005).

<sup>71</sup> To some extent this parallels the “lawfully made” requirement in U.S. law contained in section 109(a) relating to public distributions. However the extension of a public distribution right even with the imposition of a “lawfully made” requirement to online distributions was rejected by the U.S. Copyright Office in its report on reform of section 109. U.S. COPYRIGHT OFFICE, *DMCA: SECTION 104 REPORT* (2001).

<sup>72</sup> Art. 22, §1 first sentence and §1, 8° BCA (version in force since May 27, 2005). Compare art. 5, par. 2, c). EU Copyright Directive.

<sup>73</sup> Art. 22, §1, 9° BCA. Compare. art. 5, par. 3, n). EU Copyright Directive.

<sup>74</sup> In French the wording reads 'ne sont pas offertes à la vente ni soumises à des conditions en matière de licence'.

location without any restriction. (See discussion below for review of a similar “market” provisions in U.S. law where it does apply to the physical world.) Upon closer inspection, it appears that this clause bears the mark of a flawed Dutch translation of the EU Copyright Directive. The English, French and German versions of the directive contain wording to the effect that the exemption applies in the absence of contrary provisions contained in purchase or license agreements.<sup>75</sup> This interpretation leaves archives and their patrons much worse off, as it allows rights holders to contract away on site access to archival records. Either interpretation of this condition results in a provision that is far reaching, especially considering that the purpose is to further research. The argument can be made that the EU, and in its wake the member states, have overstepped the bounds in this instance. Freedom of expression, which comprises a conditional right of access to information, as guaranteed by the European Convention on Human Rights and many other fundamental texts comes to mind.<sup>76</sup> As stated earlier copyright is generally justified on the premise that it is merely an incentive for the creation of more works, which ultimately benefits society as a whole. Preservation of and access to knowledge and cultural heritage is a prerequisite for any such benefits to materialize.

By contrast in the United States section 108 grants qualifying libraries and archives additional use rights beyond a general right of fair use (discussed below) under Section 107. Changes were made to section 108 as part of the Digital Millennium Copyright Act<sup>77</sup> (hereinafter DMCA) to update the law for the digital age. With these changes, the section 108 allows the qualifying library or archive (under Section 108(b) and 108(c), the so-called preservation and replacement provisions), to make up to three copies, including digital copies of library or archive materials in limited circumstances. “Limited” because the resulting digital copy may not be accessed outside the physical premises of the library (see discussion below). However, a comprehensive review is under way to consider relaxation of these limitations.<sup>78</sup>

Section 108 of the U.S. copyright law offers reproduction and distribution rights to qualifying archives. The term “public archive” is not defined in U.S. law, though as a concept it is embodied in section 108(a)(2). A more accurate label would be a “qualifying” archive, i.e., an archive that meets the initial three-part section 108(a) test thus qualifying for the privileges granted in section 108 to archives. It does not include educational entities or museums as a whole, but is broad enough to include a qualifying archive within such institution. (See discussion below, regarding possible reform of section 108 to include museums.) For example, a nonprofit archive open to the public such as a local historical society qualifies for the privilege the section offers. When an archive engages in reproductions or distributions under the provisions of section 108 it must meet three requirements contained in section 108(a): “(1) the reproduction or distribution is made without any purpose of direct or indirect commercial

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<sup>75</sup> Dirk Visser, *De beperkingen in de auteursrichtlijn*, 2001 AMI 15 (2001).

<sup>76</sup> The intricacies of applying the European Convention on Human Rights to EU legislation, as well as the debate concerning the relationship between freedom of expression and copyright law escape the bounds of this contribution. For a recent analysis on this debate from a Belgian perspective, see DROIT D’AUTEUR ET LIBERTÉ D’EXPRESSION REGARDS FRANCOPHONES, D’EUROPE ET D’AILLEURS 160 (Alain Strowel and François Tulkens eds. 2006).

<sup>77</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>78</sup> Section 108 Study Group, information available at [www.loc.gov/section108/](http://www.loc.gov/section108/). Also the U.S. co-author participated in both sequences of Roundtable and Comment relating to this review, i.e., as a panelist and in the submission of written comments. Submission of written comments can be found at <http://www.loc.gov/section108/docs/Lipinski-UnivofWiscMilwaukee.pdf> and [http://www.loc.gov/section108/docs/Lipinski\\_U-WiscMilwaukee.pdf](http://www.loc.gov/section108/docs/Lipinski_U-WiscMilwaukee.pdf).

advantage, (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field, and (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.”<sup>79</sup> Reproduction and distribution includes copies or phonorecords for the collection under section 108(b) for preservation and security of unpublished materials or under section 108(c) of published materials in cases of damage, deterioration, loss, or theft, or if the existing format in which the work is stored has become obsolete, or copies made for patrons, respectively.

In cases of reproduction and distribution for purposes of preservation and security under section 108(b), those purposes most consistent with an archive, the copy or copies, phonorecord or phonorecords made (up to three copies or phonorecords may be made) must be from a work in the current collections of the library or archive and if a digital copy is made, the digital copy (whether tangible or intangible) must not be made available to the public in that format outside the premises of the library or archives, i.e., circulation of a physical diskette or CD-Rom or remote access (Internet) to the material is not allowed.<sup>80</sup> A copy made under subsection (b) for deposit in another library or archive may be transferred to that library or archive in digital format but the receiving library or archive must not distribute the material in that format or likewise if this institution is the receiving library or archive, i.e., staff cannot make the reproduced material available to patrons in digital form in any capacity, whether through in-house or access.

An archive may also possess published items in its collection that require replacement. In cases of damage, deterioration, loss, or theft, or if the existing format in which the work is stored has become obsolete under section 108(c), the copy or copies made (up to three copies may be made) are subject to the same limitation on digital distribution, i.e., off-site distribution of the material is not allowed. In addition, however, archive (or library) must first make a reasonable effort to obtain an unused replacement at a fair price. Under this so-called market search requirement the “reasonable effort” “will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.”<sup>81</sup> There is no requirement that the archive maintain possession of the original.<sup>82</sup> This is the practical result as most archives would not divest items once the decision to accession is made.

The DMCA Senate Report was unwilling to embrace the concept of the digital library and drew a distinction between the physical premises of the library and virtual spaces: “Although online interactive digital networks have since given birth to online digital ‘libraries’ and ‘archives’ that exist only in the virtual (rather than physical) sense on Web sites, bulletin boards and home pages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information...The extension of the application of Section 108 to all

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<sup>79</sup> 17 U.S.C. § 108(a) (2000).

<sup>80</sup> 17 U.S.C. § 108(b) (2000).

<sup>81</sup> H.R. REP. NO. 94-1476, at 75-76 (1976), as reprinted in 5 U.S.C.C.A.N. 5659, 5689 (1976).

<sup>82</sup> Compare 17 U.S.C. § 117(a) requiring that an archive copy of a computer program be destroyed upon cessation of ownership of that copy.

such sites is tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online Web site, bulletin boards, or a home page to freely reproduce and distribute copyrighted works. Such an exemption would swallow the general rule and severely impair the copyright owner's right and ability to commercially exploit their copyrighted works."<sup>83</sup> Unlike circumstances under the BCA, the DMCA through its text and interpreting document settles for the present the issue of digital access that requires transmission and arguably would prohibit circulation (distribution) of a physical digital copy (CD-ROM, DVD, diskette, etc.) as well.

The immediate discussion answers the second question the authors pose and to some extent begins exposition of the third: is preservation of and access to the archived cultural record enhanced or undermined by the present copyright law and its emerging trends, and is the current and developing copyright law adequate to progress the preservation of this record into the digital environment? The treatment of temporary or transient copies contrasts the alternative approaches of Belgian and U.S. copyright law and shortcomings each may present. The former being broader in principle, proactive, yet less certain in specific example raising questions in application, the offering detail in execution but applying to a reactive, narrower range of specific aspects, the latter due in part perhaps to the influence of legal positivism in U.S. law-making. Likewise preservation of the public record (government documents) reveals a similar template with Belgian law placing into the public domain works of all government tiers and the U.S. arguably a broader range of works (all branches) but at the federal level alone, this circumstance due perhaps to the sensitive constitutional-historical demarcation between federal and state spheres.

Without giving *carte blanche*, the Belgian "archive" exemption affords archives, libraries and museums wide berth in building their collections. Once divulged by its creator any work may be included and may be reproduced in hard copy or digital form as necessary, a freedom their U.S. counterparts can only dream of. Unfortunately, access to the preserved record appears to be at the mercy of the copyright owner, more or less so depending on the interpretation of the Belgian law one follows. This problem does not affect the records that U.S. archives manage to collect, though disappointingly all hopes of pooling digital collections are dashed by the law. In Belgium, one can still hope at least! However upcoming reform in the U.S. may ameliorate these contrasting shortcomings. Overall, the archives exemption in both systems is a mix of positive and negative in terms of preservation and access, leaving these authors to wonder at what point the copyright law will satisfy the overall societal interest of increased access to culture and knowledge, especially as more and more of the preserved record becomes digital and access to that record is sought ever more by patrons online. Be turning in specific to the third and final question the authors pose a review of general abuse of right and fair use, and two specific applications (software and databases) is necessary.

#### *D. Abuse of Right Versus Fair Use*

A fair use doctrine does not exist as such in Belgian Copyright Law. However there is a doctrine stemming from tort law, abuse of right that applies throughout the law, including copyright. Abuse of right is a tort, where the enforcement of a right in court is a wrongful act. This doctrine is applied sparingly in cases where there is little debate possible as to the abusive character of the enforcement. One of three criteria must be met, either the right is being enforced

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<sup>83</sup> S. REP. 105-190, at 62 (1998).

with the sole aim of causing harm, or the most harmful mode of enforcement is chosen above other options or the interest of the right holder is manifestly disproportionate in comparison with the harm suffered by third parties.

A copyright owner may not abuse the exclusive right, whether economic or moral in nature. In light of the justification of the limited monopoly (to benefit society) exercise of rights in such a manner that stifles preservation of protected should be frowned upon. Thus, an archive could use the abuse of right theory as a defense against an author invoking his moral rights to prevent any modification of his work, specifically in cases where this is required to ensure long-term preservation and access to the work. Likewise, enforcement by the copyright holder of contractual clauses prohibiting archives from giving access to preserved digital records could be deemed abuse of right in a court of law, notably if there are aggravating circumstances, for instance lack of alternatives available to patrons.<sup>84</sup> (A similar concept of copyright misuse may apply in U.S. law, see discussion below.)

In order to draft a privilege provision that could apply to any use of copyrighted material Congress made the language of section 107, the fair use provision purposefully vague, leaving interpretation and application of the principle to be developed by the courts on a case-by-case basis. Fair use is an equitable concept and as such courts refuse to establish bright line tests. Thus determining the limits of fair use is less about identifying “too much” or “too little” or “this side” or “that side” of the line. Rather focus is placed on understanding how the factors are applied in analogous cases and if any patterns or trends are signaled by those cases. There are four nonexclusive fair use factors that need to be considered in any fair use assessment: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”<sup>85</sup> Recent case law focuses on “commercial exploitation” as opposed to the mere commercial nature of the use. It is likely that this factor favors the archive, unless of course the entity is selling the copies or otherwise profiting from use of the work. However, “commercial use” need not encompass profit seeking. In the much publicized *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit concluded that the purpose of individuals who participated in the sharing of music through Napster technology was indeed commercial because it saved them the expense of purchasing authorized copies.<sup>86</sup> Courts also view transformative uses more favorably<sup>87</sup> than those that unnecessarily substitute the copy for the original or transpose the document to another medium or environment. As noted earlier, digitization is likely not transformative.<sup>88</sup> The most significant and relevant

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<sup>84</sup> On the applicability of abuse of right doctrine to the enforcement of contractual obligations, see LUDO CORNELIS, *ALGEMENE THEORIE VAN DE VERBINTENIS*, INTERSENTIA 247 (2000).

<sup>85</sup> 17 U.S.C. § 107 (2000).

<sup>86</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001).

<sup>87</sup> *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Calif. 1999), aff'd 280 F.3d 934 (9th Cir. 2002), prior opinion withdrawn, aff'd in part, rev'd in part, 336 F.3d 811 (9th Cir. 2003) (framing issue not discussed) (“Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.” *Id.* at 819, footnote to *Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (radio broadcast over telephone line); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (CD audio into computer MP3); *Los Angeles News Service v. Reuters Television International Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998) (news footage without editing).

<sup>88</sup> The issue of transformation relates to a different function, not mere reproduction. First factor favored fair use where images of posters were reproduced in an illustrated history: “We conclude that the first fair use factor weighs in favor of DK because DK’s use of BGA’s images is transformatively different from the images’ original

case involved discussion of the web-archiving practices of a commercial entity, Google, Inc.<sup>89</sup> The Ninth Circuit commented favorable on the value of efforts to preserve the record of web culture: “We conclude that the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case.”<sup>90</sup>

The second factor assesses where the work falls on the creativity continuum, with scientific works receiving less protection than works of pure fiction. Also, unpublished works are given more protection than published works. This factor may work against the archive and much of its historical holding may consist of unpublished materials such as letters, photographs, etc. On the other hand, such material may be uncreative or subject to thin copyright, e.g., a photograph of some ancestor’s house, basic letters, etc. When an archive circulates or offers other access to its collection it is making a public distribution of those works, i.e., one can distribute unpublished works to the public.<sup>91</sup> The third factor asks how much is taken. However, courts have realized that at times a “100%” taking is necessary, as the First Circuit concluded in *Bill Graham Archives v. Dorling Kindersley Ltd.*,<sup>92</sup> where a publisher reproduced several posters offering a record of the music group Grateful Dead in an illustrated history of the group and its concert culture: “[W]e hold that even though BGA’s images are creative works, which are a core concern of copyright protection, the second factor has *limited weight* in our analysis because the purpose of DK’s use was to emphasize the images’ historical rather than creative value.”<sup>93</sup> The third factor also looks at the substantiality of the portion used in relation to the copyrighted work as a whole. In other words, if the taking is of a small proportion of the work (measured quantitatively) but is nonetheless “substantial” to the work, this will weigh against a fair use. The seminal case in the area is the Supreme Court case, *Harper & Row Publishers, Inc. v. Nation*

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expressive purpose and DK does not seek to exploit the images’ expressive value for commercial gain.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

<sup>89</sup> *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) (concluding that “Google’s use of thumbnails is highly transformative.” *Id.* at 721.).

<sup>90</sup> *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701, 723 (9th Cir. 2007). See also, *Field v. Google, Inc.*, 412 F.Supp.2d 1106, 1119 (D. Nev. 2006) (“The fact that the owners of billions of Web pages choose to permit these links to remain is further evidence that they do *not* view Google’s cache as a *substitute* for their own pages. Because Google serves *different and socially important purposes* in offering access to copyrighted works through ‘Cached’ links and does *not* merely *supersede* the objectives of the original creations, the Court concludes that Google’s alleged copying and distribution of Field’s Web pages containing copyrighted works was *transformative*.” *Id.* at 1119.

<sup>91</sup> Two famous copyright cases involved distribution of unpublished or pre-publication works. See, *Salinger v. Random House, Inc.*, 881 F.2d 90 (2d Cir.), cert. denied 493 U.S. 1094 (1987) (unpublished letters of author J.D.Salinger); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (prepublication excerpt of President Ford’s memoirs); *Estate of Martin Luther King, Jr. v. CBS, Inc.*, 194 F.3d 1121 (11th 1999) (“I Have a Dream” speech of Dr. Martin Luther King heard by thousands and broadcast to thousands more was not a publication.) Moreover, “[t]here must be multiple copies available for distribution, transfer, rent, lease, or lending. Thus, publication occurs only if the single item is one of many copies available for distribution.” JOHN W. HAZARD, JR. COPYRIGHT LAW IN BUSINESS AND PRACTICE § 1:5, at 1-10 (20004). “An offering must also be to a ‘group of persons,’ not just to a single individual, and the offering must be for the purpose of further distribution. If the manufacturer of the greetings cards in the example above offered to distribute the cards for private display only, no publication would occur, because the offer must be made for further distribution, public performance, or public display.” *Id.*, at § 1:7, pp. 1-11—1-12.

<sup>92</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (transformative timeline use of seven artistic concert posters of famous music group Grateful Dead reproduced, reduced in size and distributed with others throughout biographical book (Grateful Dead: The Illustrated Trip) was fair use).

<sup>93</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612-613 (2d Cir. 2006) (emphasis added).

*Enterprises*,<sup>94</sup> in which an excerpt from the President Ford's memoirs was published in *The Nation* magazine. The excerpt was only a small proportion of the book. However, it was "the heart" of the book: the discussion of President Ford's pardon of President Nixon. Depending on the circumstances this factor may favor or disfavor the use by the archive. The fourth fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, in practice is often considered the most important factor. The Supreme Court has stated: "A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated."<sup>95</sup> However, the recent *Napster* decision considers the future or potential secondary market and a copyright owner's plan to "monetize" a resource in the future.<sup>96</sup> The court recognized harm "related to Napster's deleterious effect on the present and future digital download market."<sup>97</sup> In addition, *Napster* suggests that a copying or "reproduction" to forgo the purchase of a bona fide copy does in fact impact the economic rights of the copyright owner.<sup>98</sup> Likewise uses that destroy the ability to use the work in the future, the works' value to the copyright owner also favor fair use.<sup>99</sup> This factor may favor the archive, especially if the item is old and likely of little commercial value. Moreover, this reality may make it unlikely that the owner may surface and pursue legal remedy against the archive. However, this remains a possibility and this threat discourages many archives from pursuing digitalization projects. Often the identity of the owner cannot be ascertained, thus raising the issue of orphan works.

Unlike fair use, the concept of misuse (abuse) of copyright in U.S. law is far less developed than is the doctrine in the patent area from which it derives. "The hesitancy of courts to apply the doctrine may have been accentuated by the fact that, until recently, it has been assumed that a finding of misuse renders a copyright unenforceable, at least until the misuse has ceased and its effects have been purged. As the resultant limitation on enforceability could be excessively punitive relative to a minor transgression, courts may have resisted deeming such transgressions misuse."<sup>100</sup> The doctrine may prove a fruitful one in the archive arena. "Thus, the misuse defense applies only if a copyright is leveraged to undermine the Constitution's goal of promoting invention and creative expression. There has to be a sufficient nexus between the alleged anti-competitive leveraging and the policy of the copyright laws."<sup>101</sup> As recent case law demonstrates, at least one appellate court would be receptive to considering the doctrine as a defense when the alleged abusive enforcement of a copyright through contract involved public domain information, often the trade of the archive.

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<sup>94</sup> *Harper & Row, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

<sup>95</sup> *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>96</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d. 1004, (9th Cir. 2001).

<sup>97</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d. 1004, (9th Cir. 2001).

<sup>98</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F. 3d. 1004 (9th Cir. 2001).

<sup>99</sup> *Chicago Board of Education v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003), cert. denied 125 S.Ct. 54 (2004) (reprinting of tests in professional education newsletter not a fair use).

<sup>100</sup> Kathryn Judge, *Rethinking Copyright Misuse*, 57 STANFORD LAW REVIEW 901, 904 (2004). See also, Neal Hartzog, *Gaining Momentum: A Review of Recent Developments Surrounding the Expansion of the Copyright Misuse Doctrine and Analysis of the Doctrine in its Current Form*, 10 MICHIGAN TELECOMMUNICATIONS TECHNOLOGY REVIEW 373-406 (2004).

<sup>101</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 995 (C.D. Cal. 2006).

In, *Assessment Technologies of WI, LLC. v. Wiredata, Inc.*,<sup>102</sup> the Seventh Circuit first commented that copying as an intermediate step before extracting public domain data would be allowed under the copyright law.<sup>103</sup> Second the court commented unfavorably on attempts to circumvent lawful uses of the unprotected content. The vendor-plaintiff did not create the database rather, “it created only an empty database... To try by *contract* or otherwise to prevent the municipalities from revealing their own data, especially when, as we have seen, the complete data are unavailable anywhere else, *might constitute copyright misuse.*”<sup>104</sup> The example of contract is particularly well taken in the access-use paradigm of archiving, as the terms and conditions in a license might prohibit the licensee from providing access to the work such as an online database to a designated category of users such as remote users or from making certain uses of the content. Contract might then be used to create a parallel set of restrictions on copyright content, yet as the Seventh Circuit pointed, if done to control the use of the public domain material might constitute copyright misuse. However the doctrine could not be invoked where the archive desires to preserve and offer access to works protected by copyright, i.e., an owner who prevents preservation and access beyond that exempted by section 107, 108, 109 as discussed above for example, could not be said to be engaging in misuse of the copyright.

Considering the abuse/misuse of right doctrine function as a possible fair use exemption is tenuous at best as the logic behind the concept is different. All concepts are based on equity. In the first instance, the copyright owner is punished with suspension of the right in response to improper conduct regarding exercise of the right. Likewise in the presence of copyright misuse, the owner is foreclosed from enforcing the copyright during the duration of the misuse, once misuse ceases, the owner is free to pursue remedy.<sup>105</sup> In the second case, the owner commits no offense, rather the user engages in infringing conduct. However as a result of the fair use privilege, operating as an affirmative defense to a claim of infringement, the owner is forced to tolerate a certain level of interfering use in the superseding interests of society and of equity. Since, the abuse of right requires a finding of fault with the owner, logic suggests the concept apply is amore limited number of circumstances. It stands to reason that a Belgian court would accept abuse of right doctrine where an archive is defending its right to preserve material, though this is less clear when applied to acts of dissemination. U.S. case law reveals deference for the transformative use of protected content, and the developing law views the concept of archiving and documentation of the historical record as beneficial purposes. This bodes well for fair use, and answers the second question (is preservation of and access to the archived cultural record enhanced or undermined by the present copyright law and its emerging trends) in the affirmative.

## V. COPYRIGHT PROTECTION FOR SPECIAL KINDS OF COPYRIGHTED WORKS

In Belgium, two types of works are given specific protection: software and databases. These regimes parallel to the general copyright regime in most respects, but with some variation.

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<sup>102</sup> *Assessment Technologies of WI, LLC. v. Wiredata, Inc.*, 350 F.3d 640 (7th Cir. 2003).

<sup>103</sup> *Assessment Technologies of WI, LLC. v. Wiredata, Inc.*, 350 F.3d 640, 645 (7th Cir. 2003).

<sup>104</sup> *Assessment Technologies of WI, LLC. v. Wiredata, Inc.*, 350 F.3d 640, 646-647 (7th Cir. 2003) (emphasis added).

<sup>105</sup> *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 972 (4th Cir. 1990). (“A successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement of the misused copyright.”).



Application of these regimes and variation can further be applied in the archive setting. These rules are explained briefly and compared to U.S. approaches.

### A. Preservation of Software Programs

The Belgian Software Copyright Act (hereinafter BSCA) does not define “software” because the legislator feared obsolescence would defeat any functional benefit of the definitional text. The preparatory works of the EU Software Copyright Directive define a computer program as “the expression in any form, language, notation or code a set of instructions, the purpose of which is to cause a computer to execute a particular task or function.”<sup>106</sup> Computer programs are declared equivalent to literary works and as such the general copyright regime applies, unless by express deviation in the BSCA. The scope of protection expressly includes preparatory design material.<sup>107</sup> As a rule, the copyright owner is the creator of the program, though in most cases the creator’s employer is presumed to be the owner of the economical rights.<sup>108</sup> (A similar result occurs in the U.S. due to application of the work made for hire doctrine.<sup>109</sup>) The moral rights remain with the actual creator of the program, though they include only a right of paternity and a limited right of integrity.<sup>110</sup>

The BSCA contains a number of exemptions for users of computer programs. For example, the lawful user need not seek permission to use the computer program in accordance with its intended purpose, including for error correction, in the absence of express contractual provisions to the contrary.<sup>111</sup> (Similar exemption exists in U.S. law for routine use and for maintenance.<sup>112</sup>) An archive would likely rely on this exemption when running computer programs in its collection. The lawful user is entitled to create a back-up copy, in so far as this is necessary for the continuity of his use of the program.<sup>113</sup> This exemption is too narrow to allow the entity to make a true preservation copy of a computer program, as by definition many archived programs will no longer be in operational use, e.g., the equipment may be obsolete or operating system incompatible to run the program. The lawful user may attempt to determine the ideas and principles which underlie any element of the program by observing, studying or testing what

<sup>106</sup> COM (88) 816 final, Official Journal C. April 12<sup>h</sup>, 1989, vol. 91, p. 9.

<sup>107</sup> Art. 1 Belgian Software Copyright Act (hereinafter BSCA) of June 30, 1994 (*Moniteur* July 27<sup>th</sup>, 1994), compare art. 1 par. 1 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *Official Journal* L 122, May 17, 1991, p. 42-46, EU Software Copyright Directive.

<sup>108</sup> Art. 2 BSCA, compare art. 2 par. 3 EU Software Copyright Directive.

<sup>109</sup> 17 U.S.C. § 101 (2000) (“A ‘work made for hire’ is—(1) a work prepared by an employee within the scope of his or her employment...”). 17 U.S.C. § 201(b) (2000) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”). See e.g., *Miller v. CP Chemical, Inc.*, 808 F. Supp. 1238, 1244 (D.S.C. 1992) (“The ultimate purpose of the development of the computer programs was to benefit CP by maximizing the efficiency of the operation of the quality control lab.”). Compare *Avtec Systems, Inc. v. Pfeiffer*, 805 F. Supp. 1312 (E.D. Va. 1992), *aff’d in part, rev’d in part and remanded*, 21 F.3d 568 (4th Cir. 1994) (software developer owns program created outside of normal course of employment).

<sup>110</sup> Art. 4 BSCA (referring to art. 6bis, 1 of the Berne Convention and not the BCA).

<sup>111</sup> Art. 6 §1 BSCA, compare art. 5 par. 1 EU Software Copyright Directive.

<sup>112</sup> 17 U.S.C. § 117(a)(1) (2000) (“new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine”) and (c)(1) (“for purposes only of maintenance or repair of that machine, if ... such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed”).

<sup>113</sup> Art. 6 §2 BSCA, compare art. 5 par. 2 EU Software Copyright Directive.

happens when he uses the programs in a way that he is entitled to.<sup>114</sup> This exception is sometimes disparagingly characterized as the right to see what is in plain view. In U.S. law this might be characterized as the “look and feel” of the program and does not implicate its actual text, the series of zeros and ones that make up the text of its code. Obviously, this right to observe will not always provide the information required to allow an archive to migrate computer programs or dependant files where necessary.

A narrow exemption exists for decompilation, i.e., translation of the text (machine code) back into human-readable code, but only to achieve interoperability with an independently created computer program. By definition a migrated computer program is a derivative intended as a substitute. Only when the aim is to independently create a new program to load files created with the old program could an archive invoke this exemption. In addition, decompilation must be indispensable to obtain the information necessary to achieve the interoperability, thus it does not apply when the producer provides the necessary specifications. Only a licensee or other lawful user may benefit from this exemption. Decompilation is limited to the parts of the program which are necessary to achieve interoperability. The information obtained may not be passed on to others, except if they too are trying to create an interoperable program. Obviously, the decompiled code may not be reused in other computer programs, in so far as this is an unlawful reproduction of the original program. Regardless, decompilation may not conflict with the normal exploitation of that program or unreasonably prejudice the rightholder's legitimate interests.<sup>115</sup>

Since the BSCA is a graft on the BCA and does not expressly discard the general exemption regime, it seems reasonable to assume that it remains applicable where the BSCA does not deviate.<sup>116</sup> This would allow the application of the exemptions for archives, education and research to computer programs (see above). Thus, while the specific exceptions of the BSCA might not allow for migration of computer programs it could be argued that this is a reproduction albeit derivative in nature, covered by the archives exemption as it makes little sense to preserve identical copies of software if these can no longer be accessed or used.

In U.S. copyright law computer programs are treated as a form of literary works.<sup>117</sup> Section 101 defines a computer program as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”<sup>118</sup> Section 117, in addition to transient RAM copying discussed earlier contains one other significant exception available to all lawful owners of a copy of the software program but may be of particular relevance in the archive setting. Section 117 allows lawful owners to make a backup or archival copy of a computer program: “it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be

<sup>114</sup> Art. 6 §3 BSCA, compare art. 5 par. 3 EU Software Copyright Directive.

<sup>115</sup> Art. 7 BSCA, compare art. 5 par. 3 EU Software Copyright Directive.

<sup>116</sup> ALAIN BERENBOOM, *LE NOUVEAU DROIT D'AUTEUR ET LES DROITS VOISINS* 179 (2005); FERNAND DE VISSCHER AND BENOÎT MICHAUX, *PRÉCIS DU DROIT D'AUTEUR ET DES DROITS VOISINS* 262 (2000); and ALAIN STROWEL AND ESTELLE DERCLAYE, *DROIT D'AUTEUR ET NUMÉRIQUE: LOGICIELS, BASES DE DONNÉES, MULTIMÉDIA* 280 (2001).

<sup>117</sup> See, *Whelan Assoc. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1234 (3d Cir.1986).

<sup>118</sup> 17 U.S.C. § 101 (2000).

rightful.”<sup>119</sup> While there is no statutory authority for the reverse engineering or de-compilation of software code, case law has established the conditions under which such practice may constitute a fair use.<sup>120</sup> However, since possession of a lawfully made copy of a computer program is often accomplished through license instead through a “sale” it is likely that the savvy licensor would forbid such fair uses by the terms and conditions of the license agreement. As a result, this precedent or any other provision of the copyright law such as section 117 reproduction rights or section 109 distribution rights may not offer much solace to the archive or any other user desiring to back-up, decompile or distribute software in its possession if the terms and conditions of the license prevent such activity. Furthermore, the computer program may now also be subject to technological measures (discussed below) that prevent such archiving, migration, etc., if circumvention of an access control is required before reproduction can occur.

Assessing the operable (read legal and practical) reach of license terms and conditions is beyond the scope of this article, but since software like databases (discussed next) is content in digital form the third question posed by the authors is implicated here (is the current and developing copyright law adequate to progress the preservation of this record into the digital environment) in addition to the second question (whether preservation of and access to the archived cultural record enhanced or undermined by the present copyright law and its emerging trends). Both legal systems offer exempt through statute and in the U.S. through case law. Again, the Belgian archive appears to occupy a more advantageous position in comparison with its U.S. counterparts. The broad archives exemption applies to computer programs, allowing archives to make preservation copies as necessary and arguably allowing the archive to migrate computer programs to ensure long term access outside the bounds of the decompilation exemption. Except for software delivered online on demand, downloaded from a web site for example contractual waivers of these rights are inoperable, whereas U.S. archives may be bound licensing terms and conditions hostile to preservation, migration and distribution and where none exist must nonetheless stay within the boundaries imposed by fair use or narrow copyright exemption.

### B. Archiving Database Content

A database is a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.<sup>121</sup> A distinction must be made between intellectual property in the database as a whole and the nature of the contents of the database, the individual elements. If the individual elements are also protected, the general rules of copyright law as discussed above apply as well. In the EU, the database as a whole may be afforded protection by two distinct regimes: a copyright afforded to the owner and a *sui generis* right afforded to the producer. In the U.S no such protection scheme exists, leaving producers to seek legal remedies elsewhere in the law, often, as introduced above, through contract, i.e., a license agreement.

The BCA recognizes copyrights on databases provided they are original works. The general rules apply, except where the law provides otherwise. As with software, the employer of the creator-employee may be presumed to own the economic rights.<sup>122</sup> The scope and term of

<sup>119</sup> 17 U.S.C. § 117(a) (2000).

<sup>120</sup> See, e.g., *Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832, 843 (9th Cir. 1992).

<sup>121</sup> Art. 20bis par. 3 BCA and art. 2, 1° Database Act of August 31<sup>st</sup>, 1998 (*Moniteur* November 14<sup>th</sup>, 1998), compare art. 1 par. 2 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *Official Journal* L 077, March 27<sup>th</sup>, 1996, p. 20-28 (EU Database Directive).

<sup>122</sup> Art. 20ter BCA, compare art. 4 par. 1 EU Database Directive.

protection are determined according to the general rules with specific exemption regime in place.<sup>123</sup> For example, the lawful user of a database is not required to obtain the authorization of the author to perform acts necessary to make normal use of the database.<sup>124</sup> While a good number of the general exemptions have a counterpart applicable to databases, this is not the case for the archives exemptions. This distinction is unfortunate, since a database (and access to its content) is just as vulnerable to technological obsolescence as other electronic works. It could be argued that such exemption is more necessary respecting a database, as software is a work of function, loose access through obsolescence or inoperability to the program as a tool and another program that can accomplish the same task may exist. However, a database is a work of content, loose access to its content through obsolescence or inoperability and the content may be lost forever. Such result is not in the public interest.

It can be argued that the archive may be able to rely on the exemption for education or research.<sup>125</sup> Supporting this argument is the fact that preservation of information is a prerequisite for education and research. Also, the Belgian State Archives, for instance, have the status of a federal scientific institute.<sup>126</sup> This exemption covers non-commercial use for the sole purpose of illustration for education or scientific research, as long as the source is indicated and in so far as it is not detrimental to the normal exploitation of the work. Communication to the public of works archived under this exemption is further limited to institutions founded or recognized by the government, where the communication occurs through internal networks and happens in the course of their normal activities.

An entirely different protection regime is granted to the producer of certain databases by the Belgian Database Act, namely databases which are the result of a substantial investment in either the obtaining, verification or presentation of the contents.<sup>127</sup> (U.S. law rejects protection for the so-called “sweat of the brow” efforts in the construction of databases or other collections of content.<sup>128</sup>) The producer is the person or organization taking the risk for the investment.<sup>129</sup> Producers based outside the EU cannot invoke the *sui generis* right, unless this right is extended to them by the Council of the European Union through trade agreements concluded with countries that offer comparable protection.<sup>130</sup>

The *sui generis* right grants producers two monopolies which are similar in scope to the right of reproduction and communication to the public, though these terms are not used. A first monopoly is the right of extraction, meaning transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.<sup>131</sup> The second monopoly is the right of re-utilization, meaning any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission.<sup>132</sup> The term “substantial” refers either to the quantity of information or to its quality, and is a measure of the potential damage to the investment made by the producer. Additionally, repeated and systematic extraction or re-utilization of insubstantial parts is

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<sup>123</sup> Art. 22bis BCA.

<sup>124</sup> Art. 20quater BCA, compare art. 6 par. 1 EU Database Directive.

<sup>125</sup> Art. 22bis BCA, compare art. 6 par. 2 EU Database Directive.

<sup>126</sup> Royal Decree of May 4, 2004 on the recognition of scientific institutions (*Moniteur* May 24, 2004).

<sup>127</sup> Art. 3 Database Act, compare art. 7 par. 1 EU Database Directive.

<sup>128</sup> *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).

<sup>129</sup> Art. 2, 5° Database Act.

<sup>130</sup> Art. 12 Database Act, compare art. 11 par. 3 and consideration 56 EU Database Directive.

<sup>131</sup> Art. 2, 2° Database Act, compare art. 7 par. 2 (a) EU Database Directive.

<sup>132</sup> Art. 2, 3° Database Act, compare art. 7 par. 2 (b) EU Database Directive.

prohibited when it conflicts with the normal exploitation of that database or unreasonably prejudices the producer's legitimate interests.<sup>133</sup>

Like the web archive of a website, an archive will be interested in preserving the complete database, which is by definition also an extraction of a substantial part of it. In principle, the archive would need the producer's permission to make an archival copy of the entire database, an activity related to acquisition and preservation. Providing access to the archived database may in some cases imply re-use, though allowing consultation on the premises does not arguably fall within this scope. The Database Act echoes the exemption regime for databases provided in the BCA.

Determining the term of protection for a particular database is somewhat complicated. In the life-cycle of a database, three occurrences are of importance: completion, release and update. The initial fifteen year term of protection runs from the date of completion. If the database is publicly released within this term, a new fifteen year term of protection commences. An update, which entails a new substantial investment in the database, results in a new version of the database which is in turn protected for fifteen years, though this does not influence the protection of the previous version(s). The expiration date of all the terms mentioned here must be calculated from the first of January of the year following the date of the occurrence in question.

As a rule of thumb, the archives can be certain that a specific version of a database is protected no longer than the thirtieth year (two successive fifteen year periods) after its first release on the EU market. Databases completed after December 31, 1982, which fulfilled all the requirements for protection on January 1, 1998, are protected from this date for a term of fifteen years.<sup>134</sup>

To date, U.S. Congress has not deemed a specific protection for databases necessary. Ever since the Supreme Court decision in *Feist Publications v. Rural Telephone Service Co.*,<sup>135</sup> content providers have sought to legislate protection of the underlying and unprotected (in terms of the copyright law) content in factual databases. Not satisfied with reliance on the terms and conditions of license agreements nor the remaining copyright protection offered under the compilation copyright in the database as a whole, reformers desire to prevent extraction of part of the database or allow extraction under very limited circumstances.<sup>136</sup> This can impact archiving practices when the underlying information is factual or otherwise in the public domain. If the content is sought, unless protected by contract unprotected content can be extracted in theory, though this extraction may need to occur piecemeal as reproduction of the complete contents in the same shape and form as the database may result in the capture of original expression, i.e., copyright in the compilation.

While a database is not defined in the copyright statute, a compilation, a form of copyrighted work of which a database is an example is defined in section 101: "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works" Commentators have made this connection: "data bases are simply automated compilations-collections of information capable of being retrieved in various forms by an appropriate search program... it is often

<sup>133</sup> Art. 4 al. 2 Database Act, compare art. 7 par. 5 EU Database Directive.

<sup>134</sup> Art. 18 Database Act, compare art. 14 par. 3 EU Database Directive.

<sup>135</sup> *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

<sup>136</sup> U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES (1997).

senseless to seek in them a specific fixed arrangement of data.”<sup>137</sup> And the courts have likewise accepted this construct.<sup>138</sup> In practice, database content an archive might obtain for institutional or third party (public patron) use would be governed by the terms and conditions of a license agreement. However, such terms and conditions bind the archive and its employees, not third party patrons though as mentioned above terms and conditions may require the archive to enforce such rights against the patrons.

In disputes concerning databases, claims are often based on “misappropriation.” Misappropriation is not an intellectual property right per se but appears within the construct of tort law. In fact, it is often invoked as a legal remedy when other intellectual property regimes such as patent, trademark, copyright, and trade secret, have failed. This can occur because the technical requirements for those categories of property to be considered within a particular protection rubric have not been met. In other words, the information as it exists is not within the patent, copyright, trademark, or trade secret laws. If the information is in an intangible form such as a mere business idea<sup>139</sup> or exhibits some unique character such that its value is decreased by age, such as “hot” news,<sup>140</sup> the law works to create a legal remedy for its unauthorized taking. Because misappropriation may be used to protect an idea or underlying information, courts are hesitant to recognize it often. There is a danger, through excessive protection, in assigning property rights to basic, essential or public-domain-type information in such specious form.<sup>141</sup> Recent case law suggests the narrow application of this concept to web sites and other online compilations of data.<sup>142</sup> Archives may be interested in preserving various websites.<sup>143</sup> As long as the archive is not in competition with original website purveyor the misappropriation doctrine should not be invoked if the source of the content consisted of unprotected factual material. Short of other legal concepts such as license and misappropriation, there is no specific or comprehensive legislative protection granted to databases under U.S. law. Efforts to adopt a protection scheme parallel to the EU Directive have not succeeded. As a result, databases are governed by same protections (and privileges of use) of the statute applicable to compilations and as applied by the courts.

The generous archives exemption that exists in all other areas of Belgian copyright is missing where databases are concerned, an omission which can be traced back to the various EU copyright directives. However the education and research exemption might used to rectify this

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<sup>137</sup> Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUMBIA LAW REVIEW 516, 531 (1981).

<sup>138</sup> *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 600 F.Supp. 933, 941-942 (D.C. Ill., 1984) (quoting the same language from the Denicola article); and *West Publishing Co. v. Mead Data Central, Inc.*, 616 F.Supp. 1571, 1580 (D.C. Minn., 1985) (quoting the same language but only citing the *Rand McNally* decision).

<sup>139</sup> See, David M. McGovern, *What Is Your Pitch?: Idea Protection Is Nothing But Curveballs*, 15 LOYOLA OF LOS ANGELES ENTERTAINMENT LAW JOURNAL 475, 508 (1995); Donna Domagala, *Employee Suggestion Plans: Building a Better Mousetrap or the Misappropriation of Ideas?*, 31 SUFFOLK UNIVERSITY LAW REVIEW 392, 421 (1997).

<sup>140</sup> See, *National Basketball Association v. Motorola, Inc.*, 195 F.3d 841 (2d Cir. 1997).

<sup>141</sup> See, *International News Service v. Associated Press*, 248 U.S. 215, 363 (1918).” (Brandeis, J., dissenting).

<sup>142</sup> *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044 (E. D. Mo. 1999) (movie listings not “hot news” under *Motorola* standard (high cost, time sensitive, commercial free-riding, parties in direct competition, reduce incentive to collect, i.e., missing the incentive element), see, *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997)). See also, *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) (court “declines to decide this issue at the present time” but observes that the “claim was pled with sufficiency as a “hot news” claim”).

<sup>143</sup> Alicia Ryan, *Contract, Copyright, and the Future of Digital Preservation*, 10 BOSTON UNIVERSITY JOURNAL OF SCIENCE AND TECHNOLOGY LAW 152, 176 (2004).

omission. While U.S. law does not offer sui generis protection for databases the impact of licensing schemes may nonetheless create a landscape of limited archive rights in preservation and dissemination of database content database. Through application of existing provision and the potential, at least in the U.S., for legislative reform archive can begin to bring preservation of the cultural record and access to that record into the digital environment. In the authors' opinion the greatest threat to this progress is posed by the increased use of technological protection measures and copyright management information.

## VI. LEGAL PROTECTION FOR TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Producers of digital material increasingly turn to technical means to control the use that is made of protected content. These technical means take one of two forms: technological measures and rights management information. It is typical for a technological measure (TM) to include the presence of rights-management information (RMI), identifying the particulars of ownership and indicating permitted uses. Experience has shown that many TMs can be circumvented or RMI can be manipulated or removed. The publishing and media sectors lobbied successfully for legal protection against interference with the use of TM and RMI. The legal infrastructure can be said to support and encourage the use of TM and RMI mechanisms.

The WIPO Copyright Treaty of 1996 includes provisions relating to circumvention of technological measures for protected works and unauthorized modification of rights management information associated with protected works.<sup>144</sup> The EU Copyright directive echoes these provisions in its chapter III on protection of technological measures and rights-management information.<sup>145</sup> In turn, similar provisions were inserted into the Belgian Copyright Act.<sup>146</sup> In the United States implementation of the WIPO protocols regarding the use of technological controls resulted in an elaborate and convoluted statutory scheme of protection and exception enacted in 1998 as part of the DMCA. The statute makes a critical distinction between "access" and "use" control measures and between circumvention and trafficking of a device of circumvention.

### *A. Definitions: Rights Management Information*

According to the BCA, RMI is any information provided by right holders which identifies the work, the author or any other right holder or information about the terms and conditions of use of the work. RMI may be added in clear text or in encoded form. RMI must be attached to the work in order to be protected.

In the U.S. the statutory phrase "copyright management information" (hereinafter CMI) is used to encompass information conveyed in connection with a copyrighted work, including in digital form, i.e. the title of the work, the name of the author, the name of the copyright owner, the name of a performer of a non-audiovisual work, (the latter two are not protected for public performances of works by radio and television broadcast stations), for audiovisual works the name of a writer, performer, or director credited in the audiovisual work, terms and conditions for use of the work, as well as any other relevant identifying information and information included in the copyright notice. This information may be included in full or referenced by way of identifying numbers, symbols or via a link. The Register of Copyrights may prescribe

<sup>144</sup> Art. 11 and 12 of the WIPO Copyright Treaty, Geneva, December 12, 1996.

<sup>145</sup> Art. 6 and 7 of the EU Copyright Directive.

<sup>146</sup> Art. 79bis and 79ter BCA.

additional information by regulation, with the exception of any information concerning the user of a copyrighted work. By law, the following is not included: "any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work."<sup>147</sup> The definition though quite broad is not without limit. In a recent case, *IQ Group, Ltd. v. Wiesner Pub., LLC*, the federal district court rejected the idea that a logo, functioning as a service mark, accompanied by link information is copyright management information, thus removal of either did not violate the section 1202 prohibition.<sup>148</sup>

While an archive, or any other user for that matter, is not required to add CMI, if the archive reproduces copies or phonorecords of works that contain such information then such information must be included on any reproductions made.<sup>149</sup> In contrast to section 1201 where the work must be in digital form before the prohibitions on circumvention and trafficking apply,<sup>150</sup> there is no such requirement for the CMI prohibitions.<sup>151</sup> In other words it applies not only to digital reproductions but to analog reproductions and to conversions from one form to another. However, unlike liability for unauthorized reproduction and public distribution, performance or display, liability is not strict but is based on concepts of facilitation of infringement.

True to their respective styles, the Belgian law defines RMI with broad brush strokes while the U.S. statute describes a very detailed array of information which it protects as CMI. Court interpretation alone will indicate whether protection regimes in both countries align regarding what content constitutes protected copyright/rights management information in practice.

### B. Definitions: Technical Measures

The BCA defines a technological measure as any technology, device or component that is applied to a protected work in the normal course of its operation, and is designed to prevent or restrict acts that are not authorized by the right holder. It is important to note that 'acts not authorized' includes not only activities that infringe the exclusive rights granted by law such as reproduction and communication to the public but activities that were traditionally unregulated such as control of access to a protected work. The extension of a protection regime to devices that control mere access to a work is not without controversy in the EU<sup>152</sup> or the U.S.<sup>153</sup> The TM

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<sup>147</sup> 17 U.S.C. § 1202(c) (2000).

<sup>148</sup> *IQ Group, Ltd. v. Wiesner Pub., LLC*, 409 F.Supp.2d 587, 598 (D.N.J. 2006).

<sup>149</sup> H.R. REP. NO. 105-551 (Part 1), at 22 (1998).

<sup>150</sup> While the requirement is not explicit in the statute the two definitions of circumvention of technical measures, to which the prohibitions apply, suggest such an interpretation, see 17 U.S.C. § 1201(a)(3)(A) (2000) and 17 U.S.C. § 1201(b)(2)(A) (2000).

<sup>151</sup> S. REP.105-190, at 16 (1998).

<sup>152</sup> Legal protection for access control measures was and remains a highly debated issue in the EU and its Member States. The Commission held that only TMs enforcing copyright, neighboring rights of sui generis database rights benefit from the legal protection of art. 6 EU Copyright Directive. See COM(97) 628 final, December 10, 1997, *Official Journal* C 108, April 7th, 1998 p. 6, recital 30. The Council takes a more expansive view by considering that anti-circumvention rules apply independently from any copyright infringement, thus offering legal backing to any activities right holders choose to restrict by use of TMs (i.e access and copy control). See Council Common Position (EC) No. 48/2000 of September 28<sup>th</sup>, 2000, *Official Journal* C 344, December 1<sup>st</sup>, 2000, p. (1-22) 19. See also, Markus Fallenböck, *On the Technical Protection of Copyright: The Digital Millennium Copyright Act, The European Community Copyright Directive and their Anticircumvention Provisions*, 7 INTERNATIONAL JOURNAL OF COMMUNICATIONS LAW AND POLICY at 41 (2002-2003), available at [http://www.ijclp.org/7\\_2003/pdf/fallenboeck-artikel-ijclp-15-01-03.pdf](http://www.ijclp.org/7_2003/pdf/fallenboeck-artikel-ijclp-15-01-03.pdf).



must be effective to be protected, thus obliging right holders to select a quality TM. Technological measures shall be deemed “effective” when they are shown to achieve their goal in practice, namely enforcing a use (copy, communication, etc.) or access control. This does not mean that the technical measures must be infallible but that circumvention may not be trivial.<sup>154</sup>

A technical measure might be something as simple as technology that prohibits viewers from fast-forwarding past advertisements on a DVD,<sup>155</sup> from playing the DVD on a PC or platform other than a DVD player,<sup>156</sup> so-called technological handshake protocols<sup>157</sup> and geographic use restriction codes,<sup>158</sup> and even the authentication sequence that occurs between a printer and microchip contained on a toner cartridge.<sup>159</sup> These examples demonstrate the reach of the anti-circumvention and anti-trafficking rules, the controversy inherent in section 1201 and extent to which content owners will seek to use the law to counter perceived threats. “The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”<sup>160</sup> The definition of an act of “circumventing a technological measure” encompasses activity that attempts “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.”<sup>161</sup> Of course the danger of section 1201 to use the analogy of the House Report is that while breaking and entering a house to steal a rare manuscript is of course illegal, reading that manuscript is not yet considered an illegal activity in the United States! As a result, the preservation-for-future-access role of the archive is threatened by the use of TMs.

Similar to the BCA, the access control must be effective before the for the section 1201(a)(1) rule applies to prevent unauthorized access although it is not thought to require perfect control.<sup>162</sup> Some examples of effective access control measures are “those based on encryption, scrambling, authentication, or some other measure which requires the use of a ‘key’ provided by a copyright owner to gain access to a work.”<sup>163</sup> If the control somehow “requires the application of information, or a process or a treatment”<sup>164</sup> it qualifies as effective, regardless whether circumvention is possible or even easy (i.e., circumvention by running a black magic marker across a disk’s surface). Such a TM remains protected by the anti-circumvention rule of

<sup>153</sup> Kathrine A. Henderson, Richard A. Spinello and Tomas A. Lipinski (forthcoming), *Prudent Policy? Reassessing the Digital Millennium Copyright Act*, 37 COMPUTERS AND SOCIETY (2007), to be available at <http://sigcas.acm.org/sigcas/index.cfm>.

<sup>154</sup> Séverine Dusollier, *Les nouvelles dispositions belges en matière de protection technique du droit d’auteur et des droits voisins*, 6 AUTEURS & MEDIA 537 (2005).

<sup>155</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62011, 62015-62016 (October 31, 2003) (proposed class 9).

<sup>156</sup> *Universal Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (motion picture studios place CSS encryption technology on DVDs to prevent the unauthorized viewing and copying of motion pictures).

<sup>157</sup> *Real Networks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000) (preliminary injunction).

<sup>158</sup> *Sony Computer Entertainment America Inc. v. Gamemasters, Inc.*, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999).

<sup>159</sup> *Lexmark International, Inc. v. Static ControlComponents, Inc.*, 253 F. Supp. 2d 943 (E.D. Ky. 2003) (preliminary injunction), vacated and remanded, 387 F. 3d 522 (6th Cir. 2004).

<sup>160</sup> H.R. REP. NO. 551 (Part 1), at 17 (1998).

<sup>161</sup> 17 U.S.C. § 1201(a)(3)(A) (2000).

<sup>162</sup> 17 U.S.C. § 1201(a)(1)(A) (2000) (“effectively controls access”).

<sup>163</sup> H.R. REP. NO. 551 (Part 2), at 40 (1998).

<sup>164</sup> 17 U.S.C. § 1201(a)(3)(A) (2000)..

section 1201(a)(1)(A). By the same token, Congress did not anticipate that attempts to remedy so-called “playability” problems should be viewed as an attempt at circumvention.<sup>165</sup>

Second and similar to the BCA, the access control must be put in place by the copyright owner or with his or her authorization.<sup>166</sup> In other words, an archive that purchased an item from a distributor or retailer who had placed such protection on the work without the approval of the copyright owner could circumvent the retailer’s access control and not violate section 1201. Similarly, the BCA definition of technological measures implies that such TMs would have been added with the copyright holder’s permission and thus would be covered by the provision.

In addition, the technological access control must not degrade, corrupt, or distort the work otherwise it does not qualify as an “effective” control.<sup>167</sup> Section 1201 does not prohibit attempts by “a retailer or individual consumer to modify a product or device solely to the extent necessary to mitigate a noticeable adverse effect on the authorized performance or display of a work ... if that adverse effect is caused by a technological protection measure on the ordinary course of its design and operation.”<sup>168</sup> However, if degradation occurred because a consumer tried to anti-circumvent an access control, then there is no right to make a further circumventing “clean up” of the copy, a sort of legal equivalent of the ‘you broke it, you bought it’ adage. The copyright owner authorization requirement and degradation conditions apply to both the anti-circumvention and anti-trafficking rules on access. By contrast, the BCA does not deny legal protection to TMs causing playability issues rather the BCA grants courts injunctive power to order the owner to adapt measures so that protected works can be used in normal circumstances.<sup>169</sup> Both statutes take a similar approach to technological measures, though issues of playability are dealt with differently. While the U.S. statute allows for self-help, the Belgian act only offers relief through the courts. There also seems to be a slight difference in view on the exact meaning of the term “effective” with U.S. law including a broader range of TMs as being deemed “effective” though it remains for future cases to achieve consistency in application.

### *C. Scope of Protection: Copyright Management Information*

Intentionally and illegitimately altering or removing rights-management information is a criminal offence under the BCA. The same holds for any form of trafficking or making available works that have been subjected to this treatment. Criminal liability applies only insofar as the perpetrator knew, or had reasonable grounds to know, that he was facilitating or concealing copyright infringement.<sup>170</sup>

Subsection 1202(a) of the U.S. Copyright Act states that “[n]o person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement (1) provide copyright management information that is false, or (2) distribute or import for distribution copyright management information that is false.”<sup>171</sup> The House Report indicates a dual volitional element to the offense: the person providing, distributing or importing the false CMI must first know the

<sup>165</sup> H.R. REP. NO. 105-796, at 65 (1998) (Conf. Rep.).

<sup>166</sup> 17 U.S.C. § 1201(a)(3)(B) (2000).

<sup>167</sup> H.R. REP. NO. 551 (Part 2), at 40 (1998).

<sup>168</sup> H.R. REP. NO. 551 (Part 2), at 41 (1998).

<sup>169</sup> Art. 79bis §5 (“use of works in accordance with their intended purpose”) and art. 87bis BCA.

<sup>170</sup> Art. 79ter BCA and art. 12ter Database Act, compare art. 7 EU Copyright Directive.

<sup>171</sup> 17 U.S.C. § 1202(a) (2000).

CMI is false, and second must do so with the intent to induce, enable, facilitate or conceal an infringement of any right under Title 17.<sup>172</sup>

Subsection 1202(b) prohibits three direct acts related to the integrity of CMI. The first is removal or alteration of CMI. There is an element of intent here as well.<sup>173</sup> “A section 1202(b)(1) violation occurs when a person (i) without authority of the copyright owner or the law (ii) intentionally removes or alters any copyright management information (iii) knowing or having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of the federal copyright laws.”<sup>174</sup> Likewise section 1202(b)(2) prohibits the distribution or importation of false information also with an element of knowledge, i.e., “knowing that the copyright management information has been removed or altered.”<sup>175</sup>

The third prohibition includes alteration and removal as well (“knowing that copyright management information has been removed or altered”). However, to paraphrase the words of section 1202(b)(3), no person shall without the authority of the copyright owner or the law distribute or import for distribution or make public performance of works with knowledge that CMI has been removed or altered and with the knowledge or in cases of section 1203 reasonable grounds to know that the distribution or importation for distribution or public performance will induce, enable, facilitate, or conceal copyright infringement.<sup>176</sup>

As in all three section 1202(b) prohibitions a second knowledge requirement (actual or constructive for civil penalties alone) is included relating to inducement: “knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.” Early case law suggests this is a high standard to meet. As there is no requirement that a person verify CMI information, it is the atypical scenario where CMI is false and the person knows it to be so. Moreover, proving this state of knowledge would appear an evidentiary challenge. The distributor, importer or performer need not have undertaken the removal or alteration, but liability arises for the conduct in the chain of infringement so to speak.<sup>177</sup>

Courts have emphasized the dual knowledge requirement of actual (regarding the CMI itself) and constructive (regarding the potential for infringing use of the work by others) knowledge.<sup>178</sup> In an unreported opinion relying on the Sixth Circuit opinion in *Gordon v. Nextel Communications and Mullen Advertising, Inc.*, a district court observed: “The statute requires that Defendant have knowledge that CMI was removed or altered without the permission of the copyright owner. Once CMI is removed, Defendant is only required to have ‘reasonable grounds to know’ that his actions would ‘induce, enable, facilitate, or conceal an infringement of any right under’ the DMCA. 17 U.S.C. § 1202(b)(3). Notwithstanding these separate knowledge standards—actual knowledge for removal of CMI and constructive knowledge for the effect of removal of CMI—Plaintiff attempts to argue that constructive knowledge of the removal of CMI is sufficient to satisfy § 1202(b)(3). The plain language of the statute, as confirmed by the Sixth Circuit in *Gordon* makes clear that constructive knowledge is not enough, there must be actual

<sup>172</sup> H.R. REP. NO. 551 (Part 1), at 20 (1998).

<sup>173</sup> 17 U.S.C. § 1202(a)(1) (2000).

<sup>174</sup> *Gordon v. Nextel Communications and Mullen Advertising, Inc.*, 345 F.3d 922, 927 (6th Cir. 2003).

<sup>175</sup> 17 U.S.C. § 1202(a)(1) (2000).

<sup>176</sup> 17 U.S.C. § 1202(b)(3) (2000). See also H.R. REP. NO. 551 (Part 1), at 21 and 46 (1998).

<sup>177</sup> S. REP. NO. 105-190, at 17 (1998).

<sup>178</sup> See, e.g., *Gordon v. Nextel Communications and Mullen Advertising, Inc.*, 345 F.3d 922, 926 (6th Cir. 2003); *Monotype Imaging, Inc. v. Bitstream, Inc.* 2005 WL 936882, at \*8 (N.D. Ill. 2005) (unpublished); *Schiffer Pub., Ltd. v. Chronicle Books, LLC*, 2004 WL 2583817, at \*14 (E.D. Pa. 2004) (unpublished).

knowledge. [citation omitted] As there is none here, Plaintiffs claim fails.”<sup>179</sup> Since there is no requirement to verify the integrity of such information, i.e., that the CMI remains intact, it is unlikely that users would become aware (actual knowledge) that the CMI was removed or altered. As a result plaintiffs will have a difficult time succeeding in facilitation cases under section 1202.

Consistent with general statutory approaches, but even more so with provisions enacted as part of the DMCA, the convoluted over-drafting of the U.S. provision is striking when compared with its concise Belgian counterpart. The focus of both statutes is similar, protection of CMI/RMI information tied to a work. Both systems penalize the same actions except one: mere importation of false information, section 1202(b)(2), is not targeted by the BCA. With regard to mere distribution of works tampered with by others, Belgian courts could find inspiration in the U.S. jurisprudence.

#### *D. Scope of Protection: Technical Measures*

Anyone who circumvents an effective TM runs the risk of criminal prosecution, though only if one knew or should reasonably have known that the conduct was circumventing, and second that such conduct would facilitate criminal infractions of copyright. This last condition precludes prosecution in cases where the circumvention does not pose an unreasonable threat to legitimate interests of the right holder. This condition was added to allow for private copying<sup>180</sup> but may benefit the archive as well, for example when it circumvents a TM upon acquisition to migrate to a more portable technological platform in order to ensure long-term preservation. In contrast, parallel provision in the Database Act is more stringent than the BCA, since it does not consider relevant knowledge of facilitation of infringement. This difference between the *sui generis* right and copyright appears to be the consequence of an accidental omission by the legislator.<sup>181</sup> One can only speculate whether a judiciary challenge against this provision for discrimination would be successful.

In addition to actual circumvention, the provision of devices and products or services which are either promoted for the purpose of circumvention, or have only a limited commercially significant purpose or use other than to circumvent, or are primarily designed for the purpose of facilitating circumvention are prohibited as well. The manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of such devices, products or components is a criminal offence, as is the provision of such services.<sup>182</sup> These are so-called trafficking provisions, i.e., distribution of qualifying devices and circumstances that can be used by others to circumvent. The Belgian Software Protection Act already contained a provision prohibiting the commercialization of tools that are destined solely for the circumvention of technical measures protecting software.<sup>183</sup> Similarly, the law on conditional access prohibits commercialization in any form of illicit devices, meaning any equipment or software designed or adapted to give access to a protected service in an intelligible form without

<sup>179</sup> *Keogh v. Big Lots Corp.*, 2006 WL 1129375, at \*2 (M.D. Tenn. 2006) (unpublished) (emphasis original).

<sup>180</sup> Doc. Parl. Chambre, session 51, nr. 1137/013, at 85.

<sup>181</sup> The supplementary condition present in the BCA stems from amendment nr. 142, entered into the debate at the last minute (Doc. Parl. Chambre, Session 51, nr. 1137/012 p.7 ff.).

<sup>182</sup> Art. 79bis, §1, al. 2 BCA and art. 12bis, §1 al. 2 Database Act, compare art. 6 par. 2 EU Copyright Directive.

<sup>183</sup> Art. 10 al. 2 BSCA, compare art. 7 par. 1 c EU Software Copyright Directive 91/250/EC, O.J. L 122 May 17, 1991.

the authorization of the service provider.<sup>184</sup> The conditional access provisions reach any information society services which are provided on the basis of conditional access against remuneration.<sup>185</sup> While there is a significant overlap with the protection offered to TMs in the BCA, the law on conditional access still has a reason for existence.

The impact of these provisions upon efforts by the archive to preserve the public record is significant. For example, a TM that is applied to a collection of works containing at least one copyrighted work potentially protects all the content. By applying TMs to a mixed collection of public domain and protected works, the content owner-provider can enforce control mechanisms against public access. Suppose also the mixed work is also protected by copy controls. While circumvention may not be prohibited in every case the trafficking rules restrict availability or knowledge of such circumvention tools. Likewise, it would appear trivial to add a minor copyrighted addition to an otherwise public domain work, which would activate the anti-circumvention provisions in full.<sup>186</sup>

Under U.S. law circumventing an access control that a copyright owner places on his or her work violates section 1201(a)(1). As discussed below, trafficking in the anti-circumvention access or use “device” is also a violation. (Note that circumventing a use control is not prohibited, so hack away!) Explicit in U.S. law, circumvention and trafficking rules apply only to works subject to copyright protection. A work consisting of public domain content alone could be freely accessed through circumvention. Use of encryption technology to protect a reformatted version of a literary work (a novel) that is in the public domain and the act of circumventing its access control should not in theory be a violation of section 1201(a)(1)(A).<sup>187</sup> Thus if the underlying work is not subject to copyright protection, then circumventing access to it, or trafficking in an access or use control related to it cannot by the plain language of the statute violate the section 1201 rules. TMs controlling access to material that are in the public domain can be circumvented as such material is not subject to protection under the copyright law. This was the result in *Lexmark International, Inc. v. Static ControlComponents, Inc.*,<sup>188</sup> where the appellate court concluded that the patch of computer code limiting its printers to accepting only authorized toner cartridges was not protected by copyright.<sup>189</sup> As a result, the section 1201 rules did not prohibit the circumvention of the toner cartridge lock-out program.

In addition and similar to Belgian law, trafficking of a circumvention “device” is also prohibited under section 1201(a)(2). If a person writes a piece of code that when combined with certain hardware allows access to the information contained in a DVD or CD-ROM, and then the person shares that code with others, the person violates section 1201(a)(2).<sup>190</sup> Trafficking is defined broadly in the statute: “No person shall manufacture, import, offer to the public, provide,

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<sup>184</sup> Art. 2, 6° Belgian Conditional Access Act of May 12, 2003, (*Moniteur* May 26, 2003) compare art. 2 e) Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, *Official Journal* L 320, November 28<sup>th</sup>, 1998, p. 54-57 (EU Conditional access).

<sup>185</sup> Art. 2, 2° Belgian Conditional Access Act, compare art. 2 a) EU Conditional Access Directive.

<sup>186</sup> Markus Fallenböck, *On the Technical Protection of Copyright: The Digital Millennium Copyright Act, The European Community Copyright Directive and their Anticircumvention Provisions*, 7 INTERNATIONAL JOURNAL OF COMMUNICATIONS LAW AND POLICY at 58 (2002/2003), available at [http://www.ijclp.org/7\\_2003/pdf/fallenboeck-artikel-ijclp-15-01-03.pdf](http://www.ijclp.org/7_2003/pdf/fallenboeck-artikel-ijclp-15-01-03.pdf); KAMIEL KOELMAN, “Bescherming van technische voorzieningen”, *AMI* 2001, 18.

<sup>187</sup> *United States v. Elcom Ltd.*, 203 F.Supp. 2d 1111, 1131-1132 (N.D. Cal. 2002).

<sup>188</sup> *Lexmark International, Inc. v. Static ControlComponents, Inc.*, 387 F. 3d 522 (6th Cir. 2004).

<sup>189</sup> *Lexmark International, Inc. v. Static ControlComponents, Inc.*, 387 F. 3d 522, 542-543 (6th Cir. 2004).

<sup>190</sup> See, *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 436-437 (2d Cir. 2001).

or otherwise traffic in any technology, product, service, device, component, or part thereof.”<sup>191</sup> This violation is true even if the DVD or CD-ROM was purchased from a legitimate source, i.e., it is a lawfully made copy, or if the eventual use one desires to make of the accessed work is a fair use or authorized under any of the other provisions of the of copyright law. Thus liability is separate from copyright infringement.<sup>192</sup> The fact that this restriction limits the range of fair uses available to the archive does not matter. By the same token, the legislative history stresses that the trafficking provisions are “drafted carefully to target ‘black boxes,’ and to ensure that legitimate multipurpose devices can continue to be made and sold.”<sup>193</sup>

A second anti-trafficking rule prohibits the trafficking of technologies that circumvent use controls of protected works. Section 1201(b), makes illegal sale or distribution (trafficking) of a device that allows someone to use a copyrighted work in contravention of the protections placed by an owner.<sup>194</sup> Like the section 1201(a) anti-trafficking rule this provision targets the manufacturers of so-called black box technologies that systematically remove use restrictions.<sup>195</sup> According to the House Report: “This provision is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders, telecommunications switches, personal computers, and servers—used by business and consumers for perfectly legitimate purposes.”<sup>196</sup>

Both the section 1201(a)(2) and section 1201(b)(1) anti-trafficking provisions make it unlawful to manufacture, import, offer to the public, provide or otherwise traffic in a technology, product, service, device, component, or part thereof, that is “primarily designed or produced for the purpose of circumventing protection afforded by a technological measure” (a primary purpose test), or has only a “limited commercially significant purpose or use other than to circumvent protection afforded by a technological protection measure” (secondary purpose test), or is “marketed ...for use in circumventing protection afforded by a technological protection measure.”<sup>197</sup> Engaging in trafficking that falls under any of the three conditions violates the anti-trafficking rule. In addition the “limited commercially significant purpose” test is a higher standard than previously established by courts for contributory infringement technologies under traditional theories of secondary copyright liability. In *Sony Corporation of America v. Universal Studios, Inc.*, the United States Supreme Court concluded that the Betamax machine (then the rival of the VHS VCR) was not an infringing technology as it was capable of substantial non-infringing uses.<sup>198</sup> In other words the technology may not be a contributory infringing technology under *Sony* because it has substantial non-infringing uses, but may be foreclosed under section 1201 because it presents only a limited commercially significant purpose.

The Senate Report explains that the two anti-trafficking rules (access and use) target two distinct classes of devices. While section 1201(a)(2) is designed to protect access to a copyrighted work section 1201(b) is designed to protect the traditional copyrighted rights of the

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<sup>191</sup> 17 U.S.C. § 1201(a)(2) (2000).

<sup>192</sup> See 17 U.S.C. § 1203 (2000).

<sup>193</sup> H.R. REP. NO. 551 (Part 1), at 18 (1998). See also, H.R. REP. NO. 551 (Part 2), at 38 (1998).

<sup>194</sup> 17 U.S.C. § 1201(b)(1) (2000).

<sup>195</sup> H.R. REP. NO. 551 (Part 2), at 39 (1998) (emphasis added). See also, *Real Networks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. 2000) (preliminary injunction).

<sup>196</sup> H.R. REP. NO. 551 (Part 2), at 39-40 (1998).

<sup>197</sup> 17 U.S.C. § 1201(a)(2)(A)-(C) (2000) and 17 U.S.C. § 1201(b)(1)(A)-(C) (2000).

<sup>198</sup> *Sony Corp. of America, Inc. v. Universal City Studios*, 464 U.S. 417, 442 (1984).

copyright owner.”<sup>199</sup> Viewed in this light, prohibiting trafficking in devices that can impact these traditional rights appears logical. The most common use controls would be technological measures that control copying.<sup>200</sup> “Subsection (b) applies when a person has obtained authorized access to a copy of a phonorecord of a work, but the copyright owner has put in place technological measures that effectively protect his or her right under Title 17 to control of limit further use of the copyrighted work.”<sup>201</sup> The controversy is that section 1201(a), as discussed above, grants content owners access rights to protected content as well. These problems are compounded when the access control applies to a mixed work, of protected (no circumvention of access allowed) and unprotected elements (circumvention of access prohibited). Moreover there is the potential to prohibit distribution of a wide array of circumvention tools that could be used when circumvention is lawful.

Since trafficking is prohibited in all instances, i.e., trafficking of access and use controls, making a lawful circumvention of a use control or the case of an access control associated with an unprotected work is made more difficult. Distributors of unauthorized use codes will be sought out as traffickers. “By virtue of the fact that few consumers possess the necessary skills and willingness to write their own decryption software, fair use is an illusory right under the DMCA.”<sup>202</sup> Prospective fair users must turn into hackers, as a circumventing use device would in theory (assuming everyone obeyed the anti-trafficking rules) be un-obtainable as trafficking or marketing it would be prohibited. Notice, there is **no** parallel in section 1201(b) against circumventing use, only trafficking in a device that would allow that circumventing use.<sup>203</sup> The rationale being that such use might a fair one under the copyright law.<sup>204</sup> The legal rub is that copyright owners under section 1201(a)(1) can still control access, even if the work is lawfully acquired, i.e., your purchase of a book now comes with a lock and like the voice-over on the car commercial says: keys sold separately!

This problem occurs because TMs are typically content neutral, i.e., the TM can be used to control both protected and unprotected works. While it is not unlawful to circumvent the control placed upon an unprotected work, good luck getting your hands on a device of circumvention, as distribution of such dual circumvention devices may be prohibited in both instances of access and use through overly strict application of the trafficking rules. This result will logically occur when a work subject to a TM falls into the public domain. Suppose the work is an old film from Hollywood Golden Age. The film is on DVD protected by CSS. At some point the content of the DVD will fall into the public domain, however distribution of DeCSS and similar circumvention

<sup>199</sup> S. REP. NO. 105-190, at 12 (1998).

<sup>200</sup> S. REP. NO. 105-190, at 12 (1998).

<sup>201</sup> H.R. REP. NO. 551 (Part 1), at 19 (1998).

<sup>202</sup> Victor F. Calaba, *Quibbles ‘n Bits: Making a Digital First Sales Doctrine Feasible*, 9 MICHIGAN TELECOMMUNICATIONS AND TECHNOLOGY LAW REVIEW 1, 20 (2000).

<sup>203</sup> H.R. REP. NO. No 551 (Part 2), 105th Cong., 2d Sess. 39 (1998).

<sup>204</sup> Courts have admitted that the application of the section 1201 may make fair use more difficult. See, *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001). (“We know of *no authority for the proposition that fair use*, as protected by the Copyright Act, much less the Constitution, *guarantees copying by the optimum method* or in the identical format of the original...Fair use has *never been held* to be a guarantee of access to copyrighted material in order to *copy it by the fair user’s preferred technique or in the format of the original*. (footnote omitted and all emphasis added)); and *United States v. Elcom Ltd.*, 203 F.Supp. 2d 1111, 1131 (N.D. Cal. 2002) (“For example, nothing in the DMCA prevents anyone from *quoting from a work or comparing texts for the purpose of study or criticism*. It may be that from a technological perspective, the fair user may find it more difficult to do so—*quoting may have to occur the old fashioned way, by hand or by re-typing*, rather than by ‘cutting and pasting’ from existing digital media. Nevertheless, the fair use is still available.” (emphasis added)).

device is prohibited, so the public at that point may not be able to lawfully access (circumvent) the contents of the DVD if the “device” of circumvention may still not be distributed. Similar results may also occur because TMs are often dual purpose as well, controlling both access and use. As a result, the technologically un-savvy circumventer must rely on the kindness of unlawful traffickers or learn to become a proficient hacker in their own right!

Taken at face value, the U.S. statute is more generous towards users by not penalizing circumvention of use controls in the interest of allowing fair use, whereas the Belgian law indiscriminately criminalizes all circumvention. Further under U.S. law criminal penalties apply only when one violates section 1201 or section 1202 “willfully and for purposes of commercial advantage or private financial gain.” However, the arguably wide and strict application of the anti-trafficking rules produces often harsh results as the early cases demonstrate.

### *E. Exceptions for Archives*

In general, the existence of an exception does not justify the removal of RMI, circumventing a TM or facilitation (trafficking) thereof. Where TMs are concerned, the Belgian law urges right holders to take voluntary measures within a reasonable time span to ensure that beneficiaries of some selected exceptions can still enjoy them.<sup>205</sup> If the right holder fails to take voluntary measures, a judge can impose appropriate measures. A complaint may be filed by the competent minister, certain interest groups and any other interested party.<sup>206</sup> Proceedings may also be instigated when the applied TMs impede use of the work in accordance with its intended purpose.<sup>207</sup> The BCA includes the exception for reproductions made by archives, but not the corresponding exception for communication to the public. This omission is significant as these exceptions can be considered complementary. As indicated above, neither of these exceptions exists in the Database Act. Therefore it is significant that both the BCA and the Database Act include the exceptions for education and research purposes.<sup>208</sup> However no voluntary measures are required for works that are made available online and on demand.<sup>209</sup> The notion of “on demand online works” becomes increasingly problematic as the exception could be interpreted to include everything made available through the internet instead of certain interactive services alone. Furthermore there are no guarantees with respect to the price and conditions for use, nor requirement that the owner archive the work or deposit it to an archive unencumbered by TMs.

The U.S. statute provides no exceptions for archives with respect to CMI. However two exceptions exist that are of relevance to the archive regarding TMs. The first is specific in the statute, while the second is general under the rule making authority of the Librarian of Congress. In addition limitation on liability appears in section 1203 and is available for archives and other nonprofit entities. Finally, legislation is pending that impacts the preservation and dissemination

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<sup>205</sup> Art. 79bis, §2, al. 1 BCA and art. 12bis, §2 Database Act, compare art. 6 par. 2 EU Copyright Directive.

<sup>206</sup> Art. 87bis BCA and art. 2bis Database Civil Procedure Law of August 10, 1998, (*Moniteur* November 14<sup>th</sup>, 1998).

<sup>207</sup> Art. 79bis, §3, art. 87bis BCA and art. 2bis Database Civil Procedure Law.

<sup>208</sup> Art. 79bis, §2, al. 1 BCA and art. 12bis, §2 Database Act, compare art. 6 par. 4. EU Copyright Directive.

<sup>209</sup> Works “made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them”. Art. 79bis, §3 BCA and art. 12bis, §4 Database Act, compare art. 6 par. 4. EU Copyright Directive. ); Séverine Dusollier, *Les nouvelles dispositions belges en matière de protection technique du droit d'auteur et des droits voisins*, 6 AUTEURS & MEDIA 543 (2005); Kamiel Koelman, *Bescherming van technische voorzieningen*, 2001 AML 16, 22 (2001).



practices of archives, and relates in specific to public domain materials and uses exempt under section 108, among others.<sup>210</sup>

Section 1201(d) provides a specific exception for qualifying nonprofit libraries, archives, or educational institutions to circumvent an access control in order to make a bona fide determination of whether to purchase an item for its collection or curriculum.<sup>211</sup> This exception operates with respect to the section 1201(a)(1)(A) anti-circumvention of access control provision. It does not allow qualifying institutions to traffic in either an access or use control.<sup>212</sup> In order to qualify the: “the collections of that library or *archives* shall be open to the public or available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.”<sup>213</sup>

There are several other requirements. First, under section 1201(d)(1)(A) access to the work “circumvented” may not be “retained longer than necessary to make such good faith determination for purposes collection acquisition or curriculum adoption.”<sup>214</sup> Second, not only must the circumvention be made with the sole purpose of a section 1201(d) collection assessment or curriculum evaluation,<sup>215</sup> once accessed it “may not be used for any other purpose,”<sup>216</sup> even if it that subsequent use would otherwise qualify as a fair use under section 107 or be authorized by some other provision of copyright law, such as a classroom performance under section 110(1) or (2). In addition, the eventual use the institution will make of the acquired copy or copies (though purchase, loan, etc.) must also be in conformity with the copyright law. Not that any such entity would by design obtain copyrighted material with the intent to make an unlawful use of it beyond the bounds of the copyright law, the statute nonetheless establishes a prerequisite of behavior.

If the subsequent copy obtained by an archive is used unlawfully in terms of the copyright law, then the section 1201(d) circumvention privilege is denied as well.<sup>217</sup> The practical result is the that the section 1201(d) archive might be subject to copyright infringement as well as violation of the anti-circumvention rule and face penalties under section 1203. Finally, the section 1201(d) exemption operates “only [] with respect to a work when an identical copy of that work is not reasonably available in another form.”<sup>218</sup> It is unclear how strict a court would read the “identical copy” rule. Finally, the provision is operative only for purposes of collection development decision-making, not the preservation processes also granted in section 108 for example. As a result, the section 1201(d) exemption may be less useful or relevant. As noted

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<sup>210</sup> H.R. 1201, 110th Cong. (2007) (The Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007 (FAIR USE Act of 2007)) would add several exceptions to section 1201(a)(1), the prohibition on circumventing access to allow “an act of circumvention that is carried out solely for the purpose of gaining access to one or more works in the public domain that are included in a compilation consisting primarily of works in the public domain” and “an act of circumvention that is carried out solely for the purpose of enabling a library or archives meeting the requirements of section 108(a)(2), with respect to works included in its collection, to preserve or secure a copy or to replace a copy that is damaged, deteriorating, lost, or stolen.” Another provision would benefit the patron of the archive, exempting “an act of circumvention that is carried out to gain access to a work of substantial public interest solely for purposes of criticism, comment, news reporting, scholarship, or research.” *Id.*

<sup>211</sup> 17 U.S.C. § 1201(d)(1) (2000).

<sup>212</sup> See, 17 U.S.C. § 1201(d)(4) (2000).

<sup>213</sup> 17 U.S.C. § 1201(d)(5)(A) and (B) (2000) (emphasis added).

<sup>214</sup> 17 U.S.C. § 1201(d)(1)(A) (2000).

<sup>215</sup> 17 U.S.C. § 1201(d)(1) (2000).

<sup>216</sup> 17 U.S.C. § 1201(d)(1)(B) (2000).

<sup>217</sup> 17 U.S.C. § 1201(d)(1) (2000).

<sup>218</sup> 17 U.S.C. § 1201(d)(2) (2000).

above, legislation is pending to remedy the misalignment between the existing section 108 privileges and potential the reach of section 1201.

Under the general exceptions promulgated through the administrative rule-making process an exception was created that may hold a potential boom to digital archives such as the Internet Archive. "Without the ability to circumvent those 'original-only' access controls, the Internet Archive could not engage in its preservation and archival activities with respect to those works. Therefore, the Register recommends renewal of this exemption."<sup>219</sup> As a result the Register exempts for the next three year period, i.e., through October 27, 2009, "Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."<sup>220</sup>

Section 1203(5)(B) offers immunity from monetary damage for archives when that entity "was not aware and had no reason to believe that its acts constituted a violation." The burden of proof is on the archive.<sup>221</sup> However, section 1201(d)(3) pulls-back the immunity for a nonprofit library, archives, or educational institution that "willfully for the purpose of commercial advantage or financial gain violates" the qualification provisions of section 1201(d)(1). It is odd that the statutes uses the phrase "violates" since subsection (d) is an exception to the circumvention rule of 1201(a)(1) and paragraph (1) of subsection (d) merely list the qualification for that exception. If this violation is made then the archive "shall, for the first offense, be subject to the civil remedies under section 1203." Such violations pull back the general immunity offered by section 1203(c)(5)(B)(ii), i.e. mandatory remission of damages discussed above. A second offense (violation) is also met with loss of remission ("subject to the civil remedies") but in addition with loss of the section 1201(d) exception altogether ("forfeit the exemption").<sup>222</sup> This restoration of civil damages would be instead of criminal penalties normally attributable to willful violations. So too, in section 1201(d)(3) scenarios remission is foreclosed: "shall, for the first offense, be subject to the civil remedies under section 1203" and "shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203."

Section 1204 states that any person that violates section 1201 (circumvention or trafficking) "willfully and for purposes of commercial advantage or *private* financial gain" is subject to criminal sanctions.<sup>223</sup> However, section 1204(b) contains a blanket immunity provision for nonprofit libraries, *archives*, or educational institutions, precluding the criminal sanctions of section 1204(a) from applying in any circumstances. However, patrons and students and

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<sup>219</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68472, 68475 (November 27, 2006) (amending 37 C.F.R. § 201.40).

<sup>220</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68472, 68474 (November 27, 2006) (amending 37 C.F.R. § 201.40) (exempted class 2). This is not an access control: "The Internet Archive also sought an exemption for a second proposed class: 'Computer programs and video games distributed in formats that require obsolete operating systems or obsolete hardware as a condition of access.' The Register cannot recommend adoption of an exemption for this proposed class because it does not involve access controls and, therefore, no exemption is needed." 71 Fed. Reg. 68472-01, 68475 (November 27, 2006).

<sup>221</sup> 17 U.S.C. § 1203(c)(5)(B)(ii) (2000).

<sup>222</sup> 17 U.S.C. § 1201(d)(3)(B) (2000).

<sup>223</sup> 17 U.S.C. § 1204(a)(1) and (2) (2000).

employees of nonprofit libraries, archives and educational institutions remain subject criminal sanctions regardless.<sup>224</sup>

Though not explicit in the statute the use of a warning notice by the copyright owner that circumventing or trafficking is unlawful would likely preclude a defendant from claiming that it was “not aware and had no reason to believe that its acts constituted a violation.” For example if a password protected web site indicated on the home page: “Warning this site protected by technological measures. Authorized users only. This site contains copyrighted material. Unauthorized access through illicit means is a violation of section 1201(a)(1), title 17, United States Code” or words to that effect. Since most acts of circumvention or trafficking are willful, i.e., not by accident or mistake, copyright owners can secure an important advantage by the use of such awareness enhancing measures: rendering most acts subject to criminal penalties and foreclosing either species of damage remission.

Lack of a significant statutory exception for general purposes of preservation or fair use in U.S. law coupled with an exacting rule-making process for general exemption results in limited opportunity to engage in circumvention of access controls that is lawful. The withdrawal of immunity from archives where they are aware their acts constitute a violation prove that commercial interests are put squarely above societal interests in the preservation of heritage. Belgian archives and by consequence its patrons fare little better, as it remains to be seen how many right holders will take voluntary measures or how much assistance archives can expect from the courts, especially in light of the uncertainty surrounding the term “on demand on line works.” It can be concluded that any efforts to progress the copyright law to accommodate the preservation and dissemination of the public and cultural record in the digital and online environment is jeopardized by the increasing use of TM and RMI/CRI.

## VII. IMPACT ON DIGITAL ARCHIVING

By definition, TMs will impede the preservation of digital works, since their purpose is to enforce access and copy control. TMs are tied to a particular hardware and/or software platform and once this technology becomes obsolete the covered work perishes. Without the ability to circumvent now the cultural record will be lost to the future. Although archives enjoy a blanket copyright exemption in the BCA, this does not give them permission to circumvent TMs that stand in their way. Only if they can prove that downstream copyright infringements were unforeseeable can they escape criminal liability. Even if the archives were prepared to take this risk, it is unlikely that they would find the necessary tools to remove TMs, since these are outlawed as well.

At first glance, archives would appear to have no legitimate reason to alter or remove rights-management information. After all, they can just add their metadata on top of the existing information. However, in many cases any migration operation will entail an alteration or removal of RMI. A digital watermark with RMI may not survive migration to a new format. Under Belgian law the archive is liable for criminal prosecution, regardless whether the intention is to preserve the work as is permitted by a copyright exemption. Dissemination of this work, for instance to historic researchers, carries some risk of criminal liability as well unless the archive can positively prove that any resulting infringement was not reasonably foreseeable.

The shift is also apparent in U.S. law. To secure the privilege of reproduction and distribution section 108(a)(3) requires the archive to include a copyright notice, what would be

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<sup>224</sup> 17 U.S.C. § 1204(a) (2000).

CMI under section 1202. However, there is no requirement to do so; it is only a condition of the additional use rights section 108 offers. However, with CMI rules in place it is a separate offense under the copyright law, irrespective of infringing conduct, to reproduce such content even if otherwise authorized by the copyright law, sans the CMI. As a result, archives will need to incur the additional administrative cost of ensuring compliance with its archiving practices (read copying), to ensure that use rights are not lost not secure privileges under section 108 but to preclude separate liability under section 1202.

It is difficult to assess whether the use of technological controls by content providers will have a negative effect on the ability of archives and other public institutions to make available public domain material but the initial indication does not bode well. While it is true that in order for the section 1201 rules to apply, the object of the TM must be a work that is subject to copyright protection. Use of encryption technology to protect a reformatted version of a literary work (a novel) that is in the public domain and the act of circumventing the access control should not in theory be a violation of section 1201(a)(1)(A).<sup>225</sup> This problem is not so easily resolved when considering works of mixed composition. Again pending legislation in the U.S. would rectify the situation when circumvention is made of a work consisting “primarily” of public domain material.

During consideration of the DMCA legislation the House Report offered this telling comment: “Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, including the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it.”<sup>226</sup> While the threat to curtail preservation and access to public domain works by archives and others is apparent to some, courts have not been convinced the threat is real. The Elcom court admitted as much when it observed: “Publishing the public domain work in an electronic format [the court earlier used the example of a collection of Shakespeare’s plays] with *technologically imposed restrictions on how that particular copy of the work may be used* does not give the publishers any legally enforceable right to the expressive work, even if it allows the publisher to control that particular copy.”<sup>227</sup> The problem for future readers is that as more and works become accessing only in digital form subject to access controls, control of access through TMs will equate to control over the work itself. Exemption in both Belgian and U.S. regimes should be considered that would at least allow for preservation and access (though not necessarily use) until the time when the work is no longer protected otherwise the function of the archive to preserve if not also to disseminate the public and cultural record in the digital and online environment will be stifled.

## VIII. CONCLUSION

In assessing the array of ownership and use provisions and iterations of those provisions it can be concluded that the Belgian and U.S. legal systems agree on the basic idea of copyright,

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<sup>225</sup> See, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62011-01, 62015 (October 31, 2003).

<sup>226</sup> H.R. REP. NO. 551 (Part 2), at 36 (1998).

<sup>227</sup> *United States v. Elcom Ltd.*, 203 F.Supp. 2d 1111, 1134 (N.D. Cal. 2002).

but differ greatly in its implementation. Belgian copyright law takes a synthetic approach, referring to the subject matter simply as “works” and defining only three fundamental economic rights (reproduction, distribution, communication) that are to be interpreted broadly with broad exemptions. However, the specific regimes for software and databases mar this picture to some extent. The U.S. system takes a decidedly analytical and positivist approach, other than the nebulous four factor fair use test, a detailed statutory framework exists, of definitions (section 101 and elsewhere), exclusive rights (section 106) and specific exceptions (sections 108-121). While this framework on the surface may appear to offer definiteness further analysis in recent application reveals this may be less than optimal for several reasons. First, the more recent statutory text is often obtuse and convoluted. Second, operation of a particular provision can often be understood only with reference to the legislative history which is not technically a part of the law. Courts are often left to develop the true meaning, interpretation and application of a particular provision. In the area of archives this is particularly problematic as the specific archive provisions are seldom if ever litigated, while other provisions such as fair use are litigated often in the context of commercial exploitation, leaving a less than clear fit in application to eleemosynary character of the archive circumstance.

By comparing the array of exemptions with the Belgian and U.S. both successes and failures can be identified in terms of the preservation and dissemination of the public and cultural record by an archive. An archive in Belgium benefits from a broadly worded exemption that trumps both economic and moral rights, allowing it to build and disseminate its collection. Any work that has ever been divulged by its author may be included and may be reproduced in hard copy or digital form as necessary for preservation purposes without fee. Unfortunately, the true scope of this provision remains unclear, due for example to the “online on-demand” issue, i.e., all Internet-based content. Like the U.S. resolution must await interpretation by the courts. Dissemination of the collection is also an unclear matter. The intent is to carry the tradition of free access to works in the reading room into the virtual environment yet the intervention of contracts clouds what rights a court might frame for the archive. What is the point of having a broad dissemination exemption if copyright holders can frustrate its application with contrary contractual terms?

Limiting dissemination of digital works to the physical location of the archive hampers wide-scale dissemination and restricts the development of virtual collections. When last amending section 108 U.S. legislators were unwilling to embrace the concept of digital or virtual archive. Recent comment by the Section 108 Study Group suggest that virtual pooling or sharing arrangements are not consistent with the current law. Nothing in the Belgian law expressly prohibits archives from pooling their collections in a joint-venture entity, thus making access through several locations a possibility. Only for databases is their position somewhat tenuous, as there is no exemption for archives, but archives can attempt to seek the shelter of the exemption for education and research.

The current law is unprepared to support the full-scale application of preservation and dissemination in the digital and online environment by archives of the public and cultural record. Worse the expansion of TM and RMI/CMI pose a significant risk to any success legislative reform or court interpretation may bring the preservation and dissemination efforts of archives. The anti-circumvention rule prohibits an archive from accessing a protected work in order to backup or migrate obsolete works to new formats. The anti-trafficking rules compound this problem first and foremost by prohibiting archives from acquiring and sharing the necessary circumvention tools. Worse the exemptions that do exist are also threatened by the TM and

RMI?CMI protection rubric as there is little consistency between the beneficiaries of exemptions in the copyright law versus the circumvention or trafficking provisions. The BCA requests right holders to take voluntary measures and offers judiciary relief in case of failure. The unresolved meaning of the notion “online on demand” works that are exempt from voluntary measures, creates uncertainty and may discourage otherwise lawful conduct. The U.S. Copyright Act creates a statutory structure that allows for the circumvention of copy controls in the interest of allowing fair use, but not the trafficking of tools necessary to circumvent those controls. This is an odd structure as it may encourage each user to become a “hacker” in order to make a lawful circumvention otherwise fair use of controlled works becomes at least more difficult and for born-digital works perhaps impossible if access controls rules remain unaltered. Works covered by TMs are thus much less likely to be preserved long enough to make it to the public domain. These restrictions call into question the underlying policy of the copyright law, to bring more creative for the benefit of society as a whole.

One important caveat is that under Belgium law there is little precedent upon which the archive can rest secure. In the U.S. a future reform of the specific archive provision may result in articulated, specific privilege for the digitalization practices of qualifying archives. This may result in a broader set of use rights under U.S. law in the future again underscoring the difference between the two approaches: a broader set of use rights under Belgium law but less definition of the boundaries of those rights or an explicit articulation of rights in the circumstances chosen for codification. With these shortcomings of both Belgian and U.S. regimes articulated it is hoped that policy-makers faced upcoming and future reform can propose and execute provisions more consistent with premises upon which the copyright laws are based in both regimes and succeed in the goal of creating a legal infrastructure that supports the preservation and dissemination efforts of archives to make available the public and cultural record of their respective societies.