

6.2. BE – Belgium – National legal summary³⁸⁷

6.2.1. General legal framework

6.2.1.1. National legislation on copyright³⁸⁸

Since 1 January 2015, Belgian copyright law has been incorporated into Book XI of the Code of Economic Law (ELC). Copyright is mainly governed by Title 5 “Copyright and Neighbouring Rights” of Book XI.³⁸⁹

Other books of the ELC are also relevant to copyright: Book 1, Title 2, Chapter 9 (definitions); Book XV (criminal sanctions and provisions relating to administrative enforcement); and Book XVII (court proceedings).³⁹⁰

In Belgium, copyright infringement can be considered both as a civil law violation and a criminal offence. Under civil law, any violation of the author’s economic rights, including the right of reproduction, of distribution and of communication to the public (Article XI.165 (1) ELC) and/or the author’s moral rights (Article XI.165(2) ELC), is considered a civil law violation. From a criminal law perspective, if a civil law violation (i.e. the “material aspect”) is carried out with malicious or fraudulent intent, it is considered a criminal offence under Article XI.293(1) ELC. For this purpose, “fraud” is defined as “the intention to procure for oneself or for others an undue advantage, even of a non-financial and indirect nature”. On the other hand, “malice” is defined as “the intention to harm the interests, material or otherwise, of the rightsholder”.³⁹¹

³⁸⁷ The country report on Belgium incorporates the feedback received from Benoît Kosłowski (Ministry of Economy) during the checking round with the national competent institutions.

³⁸⁸ The information contained in this country report is based on the data collected through a survey conducted by the European Audiovisual Observatory before the legal deadline for transposition of the DSM Directive of 7 June 2021.

³⁸⁹ Book XI of the ELC was adopted by the laws of 10 and 19 April 2014 whose provisions came into effect on January 1, 2015, Official Journal, 12 June 2014:

http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=nl&cn=2013022819&caller=list&fromtab=wet#LNK0404.

³⁹⁰ Belgium is also a member of several international conventions on enforcement of copyright, namely: the Universal Convention of Geneva of 6 September 1952; the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; the Berne Convention of 24 July 1971; the WIPO Copyright Treaty of 20 December 1996; the WIPO Performances and Phonograms Treaty of Geneva of 20 December 1996; the TRIPS Agreement.

³⁹¹ The definitions of fraud and malice are provided by the preparatory works of Parliament, 51-2852/001, p. 36 (<https://www.dekamer.be/FLWB/PDF/51/2852/51K2852001.pdf>).



Belgian law does not differentiate crimes on the basis of acting for profit. If, for instance, a copyright infringement is carried out with the intention to harm the rightsholder's (moral) interest, though without acting for profit, such a criminal offence is punishable by the same "level 6" penalty as fraudulent intent (Article XI.293 ELC, Article XV.104 ELC and Article XV.70 ELC). In practice, the pursuit of a for-profit motive on the part of the infringer will help to obtain criminal sanctions. Furthermore, no administrative fines are applicable in the aforementioned cases.

6.2.1.2. Transposition of EU directives

This section aims at highlighting the transposition of EU directives related to the enforcement of copyright and related rights into national law, as reported in the table below.

Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (the DSM Directive)³⁹² has not been transposed in Belgium (as at October 2021). In this regard, the Intellectual Property Council (*Conseil de la propriété intellectuelle*) issued an Opinion on the transposition of the Directive on 19 June 2020.³⁹³ A preliminary draft law transposing the DSM Directive was notified to the European Commission on 21 June 2021. The draft contains a section relating to the fight against infringement of copyright, related rights and *sui generis* database rights on the internet (provisions 81 to 86). A new judicial procedure is being created. In this context, a "Service to combat online infringements of copyright and neighbouring rights" has also been set up, which may further implement the decision of the court if the service is authorised. The court's decision can be directed not only against the primary counterfeiter, but also against intermediaries, such as ISPs. They may be required to block access to the infringing acts.³⁹⁴

³⁹² Directive EU 2019/790 on copyright and related rights in the Digital Single Market, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN>.

³⁹³ <https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf>.

³⁹⁴ For further details on the draft law, please see at: <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2021&num=360&mLang=en&CFID=1584535&CFTOKEN=2904e4694d391aaf-D253C241-9989-33B4-8EF5D5C01503DACD>.

Table 18. Regulatory framework

| EU directive | National law |
|---|--|
| DSM Directive | N/A |
| Intellectual Property Rights Enforcement Directive (IPRED) | Act of 9 May 2007 on the civil aspects of the protection of intellectual property law – replaced by the Code of Economic Law (ELC) Act of 10 May 2007 on the judicial law aspects of the protection of intellectual property law |
| Information Society (InfoSoc) Directive | Act of 22 May 2005 – replaced by the ELC |
| E-Commerce Directive | Act of 11 March 2003 on certain legal aspects of information society services – replaced by different books of the ELC |
| Conditional Access Directive | Act of 12 May 2003 on the legal protection of information society services At federal level: the ELC which deals with intellectual property (Book XI); the law of 5 May 2017 on Audiovisual Media Services in the Bilingual Region of Brussels Capital For the Flemish community: Decree of 27 March 2009 regarding radio broadcasting and television (the Decree) |

Source: Belgian response to European Audiovisual Observatory standardised survey

6.2.2. National rules applicable to audiovisual sports content

6.2.2.1. Legal definitions of “broadcaster” and “sports event organiser”

At federal level, the notion of “broadcaster” is not defined in Belgian legislation regarding “neighbouring” (or related) rights, but the definition of a broadcast, as provided by the 1961 Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations (Article 3(f)), is applicable.

At the community level, the Flemish Community Decree of 27 March 2009 defines a “broadcaster” (*omroeporganisatie*) as the natural or legal person who assumes editorial responsibility for the choice of content of the broadcasting service and who determines how the service is organised (Article 2, 27°). The Decree also defines a “broadcasting service” as: (i) a service as referred to in Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU), for which the provider of the service has editorial responsibility, with the principal aim of providing the general public with audiovisual or auditory programmes for purposes of information, leisure, education or cultural enjoyment, by means of electronic communications networks; and/or (ii) commercial communication (Article 2, 26°).



The Decree of the French Community of 26 March 2009 defines a “service distributor” as any legal entity that makes one or more audiovisual media services available to the public in any manner whatsoever and in particular by terrestrial broadcast, satellite or cable distribution networks. The offer of services may include services published by the person himself/herself and services published by third parties with which he/she establishes a contractual relationship (Article 1, 15°). The decree also contains a definition of an audiovisual media service and of a linear service (broadcasters), transposing the Audiovisual Media Services (AVMS) Directive. Thus, an audiovisual media service is defined as a service under the editorial responsibility of a service publisher, the principal purpose of which is the communication to the public of television or radio programmes by electronic communications networks, with the aim of informing, entertaining and educating or with the aim of providing commercial communication (Article 1, 48°). In addition, a linear service provider (broadcaster) is defined as an audiovisual media service provider whose programmes are intended to be received simultaneously by all or part of the public at a time decided by the publisher of the audiovisual media service on the basis of a programme schedule drawn up by the publisher (Article 1, 49°).

The term “sports events organiser” is not defined in the Code of Economic Law (ELC) or in various community decrees relating to media law. However, the notion of event “organiser” is defined in the Flemish Community Decree of 27 March 2009, as “a) the person or association that organises an event or b) the holder of the exploitation rights of the event” (Article 2, 29°). In addition, a definition is provided by Article 2, 26° of the Ordinance of the Brussels-Capital Region of 21 June 2012 relating to the promotion of health in the practice of sport, the prohibition of doping and its prevention, which states that

*an organiser of a sports event designates “any person, natural or legal, who organises a competition or a sports event alone or in association with other organisers, whether free of charge or in return for payment”.*³⁹⁵

6.2.2.2. Legal protection related to sports events

Under Belgian law, there is no specific legislation which protects sports event organisers against online piracy of audiovisual sports content. In accordance with the Court of Justice of the European Union (CJEU) judgment in *Football Association Premier League*,³⁹⁶ Belgian law does not recognise sports events as works benefitting from copyright protection. Although in the same judgment the court offered member states the possibility of granting some type of protection to sports events with a “unique and original character” and the possibility of adopting legislation to protect sports events, Belgium has not adopted specific protection measures for such events.

³⁹⁵ Official Journal, 5 July 2012.

³⁹⁶ Court of Justice of the European Union (CJEU), 4 October 2011, *Football Association Premier League Ltd v. Others*, C-429/08.



However, recordings of sports events can be protected. Although the sports event does not in itself qualify as work of authorship, this is usually not the case for the audiovisual recording of such event, which can fairly easily achieve the (modest) levels of originality required to qualify for copyright protection.³⁹⁷ The resulting audiovisual product could therefore be considered an original creation and the author is granted a wide variety of exclusive rights in it (Article XI.165 ELC).

Moreover, pursuant to Article XI.209 ELC, the producer holds related rights in the first fixation of the film. Thus, the producer has the exclusive right to authorise or prohibit the direct or indirect, temporary or permanent, reproduction by any means and in any form, in whole or in part, of the film, including the rental right and lending right, as well as the exclusive distribution right. Furthermore, the producer is granted the exclusive right to authorise or prohibit the communication to the public of the film by any process, including by making it available in such a way that members of the public may access it from a place and at a time individually chosen by them (Article XI.209(1)(4) ELC).

If the recording of the sports event is broadcast, such broadcast can be protected by the related rights of the broadcaster under Article XI.215 ELC. Pursuant to this article, broadcasters are granted the following exclusive rights:

- to broadcast directly or rebroadcast their broadcasts, including by cable retransmission³⁹⁸ and communication to the public by satellite;
- to reproduce their broadcasts by any process, direct or indirect, temporary or permanent, in whole or in part, including distribution of fixations of their broadcasts;
- to communicate their broadcasts to the public if such communication is made in places accessible to the public against payment of an entrance fee;
- to make available to the public the fixations of their broadcasts in such a way that members of the public may access them from a place and at a time individually chosen by them.

Similar exceptions to those for copyright are applicable to the broadcasters' related rights, which are provided in Articles XI.217 and XI.218 ELC.

In the event that sports event organisers are not themselves the producers of the first fixation of the film, neither authors or broadcasters, they can still be protected under general contract law. Organisers can indeed control the physical access to their events (in a stadium, etc.), as well as who is entitled to record and broadcast the event.

³⁹⁷ The audiovisual recording of a sports event commonly features a large number of cameras aiming to capture not only the most important aspects of the event, but also the smallest details. In some cases, cameras can be located on helicopters, drones, or, as in the case of Formula 1, on competing cars. Added content, such as 3D animations indicating whether a football player is offside, can also be blended with the recording.

³⁹⁸ Retransmission will also be covered with the transposition of Directive (EU) 2019/789.

The rights to broadcast sports events are often sold collectively and on the basis of territorial exclusivity.³⁹⁹ For example, in professional football, each football club does not sell the broadcasting rights to their matches individually but transfers those rights to a mutual organisation – such as the Pro League – which will then sell the broadcasting rights of all the football clubs to one or more television broadcasting organisations, mostly on an exclusive basis.⁴⁰⁰

Concerning the question of who holds the rights to the audiovisual recording and to the broadcast of sports events, there are no specific rules. As mentioned above, there is no specific framework for the exploitation of audiovisual sports rights. However, a trend shows that in professional team sports, national audiovisual rights are generally held by the relevant league. In contrast, in individual competitions, the event organisers are usually the ones who exploit the audiovisual rights.⁴⁰¹

In the case of sports events, the broadcasting organisations can be the club or a federation and alternately it can be an entity that operates as a professional broadcaster and has acquired the exclusive right to broadcast the sports event.

Provided that the sports content is protected by producers' rights, copyright and/or broadcasters' rights, not only the holders of such rights, but any interested party is entitled to take legal action, based on Article XVII.14(3) ELC and Article XVII.19 ELC. This may include the sports events organisers and sports league organisers. In fact, even if sports event organisers are not the broadcaster or the producer, they can still be considered as an interested party (for injunctions relief at least).⁴⁰²

6.2.2.3. Other specific rules applicable to sports events

Under Belgian law, there is no other specific legislation which protects sports event organisers against online piracy of audiovisual sports content.

Belgian law does not provide any specific rules about the use of sports events in social media. However, a decision of the Belgian Supreme Court of 24 June 2015⁴⁰³ contains interesting elements regarding the publication of protected content on social media. In its decision, the court ruled that sharing a protected work on Facebook can constitute a communication to the public. The defendant had posted a message on his Facebook profile in which he called the public not to buy a certain book, but to download it for free on a website – whose hyperlink was mentioned in the post. First, the court ruled that the actions of the defendant were not limited to a private communication to a

³⁹⁹ Maeschalk J, Vermeersch A, and De Saedeleer K, "Sport en media", in Maeschalk J, Vermeersch A, and De Saedeleer K, *Sportrecht*, Brugge, eds. Die Keure, 2019, pp. 315-331.

⁴⁰⁰ Demeulemeester S., op. cit., p. 21.

⁴⁰¹ Ibid, p. 4.

⁴⁰² Pursuant to Article XCII.19(2) ELC, an interested party is entitled to start cease and desist proceedings against an infringer of (a third party's) copyright or related rights.

⁴⁰³ Court of Cassation, 24 June 2015, AM 2015, pp. 277-278.

small circle of intimate relations and that he should have been aware that his message would reach a wider audience than his family or Facebook “friends”. In addition, the Court ruled that posting a link that allows the downloading of a copyright protected work constitutes a communication to the public that should be authorised by the rightsholder, unless that work is freely accessible on another website. Finally, according to the court, posting protected content on a social networks or hyperlinking to content that is freely available elsewhere but posted without the consent of the rightsholder can constitute communication to the public.⁴⁰⁴

Table 19. Definitions of the main concepts relating to audiovisual sports events

| Concept | Existence of a definition | Relevant rights |
|------------------------|---------------------------|---|
| Broadcaster | Yes | Related rights |
| Sports event organiser | No | Rights as defined by contract law – access to the events (entitlement to take legal action) |

Source: Belgian response to European Audiovisual Observatory standardised survey

6.2.3. Remedies and sanctions applicable in the event of infringement

6.2.3.1. National remedies

This section aims to list the national remedies applicable specifically to cases concerning online piracy of audiovisual sports content.

The enforcement measures, procedures and remedies applicable to copyright infringement, as provided in Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED), are provided by the Act of 9 May 2007 on the civil aspects of the protection of intellectual property law and the Act of 10 May 2007 on the judicial law aspects of the protection of intellectual property law. After the introduction of the ELC in 2014, Belgian intellectual property (IP) legislation was codified in Book XI of the ELC. Procedural aspects of IP enforcement are now mainly included in Book XVII of the ELC and the Belgian Judicial Code.

⁴⁰⁴ Fierens A, and Schoefs R, “Klassieke en nieuwe vormen van mededeling aan het publiek”, IDRI 2015/4, p. 351.



All sanctions, remedies and injunctions applicable to breaches of the rights set out in the InfoSoc Directive may be invoked in cases of online piracy of audiovisual sports content – provided such content is protected by copyright or subject to protection under related rights belonging to producers or broadcasters. For example, rightsholders are entitled to seek injunctive relief, request a preliminary injunction, initiate descriptive seizure proceedings (measures for preserving evidence), request a blocking injunction against intermediaries (e.g. internet service providers), and seek damages and corrective measures (recall from the channels of commerce, definitive removal from the channels of commerce, destruction of the goods).

Concerning the protection of technological measures and rights management information (Article 6-7 of the InfoSoc Directive), Article XI.291 ELC defines as criminal offences: (i) the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he/she is pursuing that objective; (ii) the manufacture, importation, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (1) are promoted, advertised or marketed for the purpose of circumvention of, or (2) have only a limited commercially significant purpose or use other than to circumvent, or (3) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures (Article XI.291(1) (2) ELC); also, in the case of removal or alteration of any electronic rights management information and the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other protected subject-matter from which electronic rights management information has been removed or altered without authority, if such a person knows, or has reasonable grounds to know, that by so doing he/she is inducing, enabling, facilitating or concealing an infringement of any copyright protected work (Article XI.292(1) ELC). These criminal offences are punishable with a “level 6” penalty (Article XV.104 ELC).

Moreover, rightsholders can seek injunctive relief against infringers of Article XI.291 ELC, based on Article XVII.14(3) ELC. Such an injunction can also be targeted at intermediaries (Article XI.334(2) ELC). Additional sanctions such as confiscation (Article XV.130 ELC), posting of judgments (Article XV.131 ELC) or closure of the establishment of the infringer (Article XV.131/1 ELC) may also apply. Article XV.72 ELC provides that in the event of a repeat offence within five years from the date of a final judgment for the same offence, the maximum fines and prison sentences are doubled. As infringements of Article XI.291 ELC are also civil faults, rightsholders may seek damages based on Article 1382 of the (old) Civil Code.

Furthermore, regarding the legal protection of conditional access services, it is worth mentioning that a difference has to be made between broadcasts (governed by the laws of the Communities) and information society services providers (governed by federal law). In cases concerning online piracy of audiovisual sports content, both providers of

information society services and broadcasters can invoke legal measures and remedies, provided that illicit devices are concerned, including an injunctive relief remedy against the infringing activities⁴⁰⁵ and even against commercial communication aimed at promoting illicit devices if such communication has not yet been made public but its publication is imminent. In such a case, the provider of information society services or broadcaster may also seek damages based on Article 1382 of the Civil Code and file a criminal complaint.⁴⁰⁶

6.2.3.2. National bodies with competences on copyright enforcement

In Belgium, there is no national body with specific competences on infringements of copyright other than judicial courts that have the power to impose remedies in case of piracy or infringement of copyright or related rights.

A specific service to combat online infringements of copyright and related rights will be set up in the context of the transposition of the DSM Directive. As mentioned above (1.1.1.2.), the service will be able to further implement a court's decision under the control of the judge.

6.2.3.3. Codes of conduct and Memorandums of Understanding

There is no code of conduct or Memorandum of Understanding relating to the enforcement of intellectual property rights and the fight against online piracy adopted either by public and/or private entities.

6.2.3.4. Notice and take-down procedures

Notice and take-down procedures can be applied whenever infringing content is uploaded to a website, including content-sharing platforms.

Belgian law does not expressly provide for notice and take-down procedures. Service providers are therefore free to organise such procedures as they see fit, as long as they stay within the boundaries of the liability exemption regime provided in Chapter 6 of Book XII ELC.

⁴⁰⁵ As provided in Article XII.21 ELC and Article 236 of the Flemish Community Decree of 27 March 2009, Article 156 of the French Community Decree of 26 March 2009 or Article 125 of the German-speaking Community Decree of 27 June 2005.

⁴⁰⁶ Based on Article XV.122 ELC or Article 236 of the Flemish Decree of 27 March 2009, Article 156 of the French Community Decree of 26 March 2009 or Article 125 of the German-speaking Community Decree of 27 June 2005.



Article XII.20(1)(1) ELC provides that there is no general obligation for providers, when providing the services covered by Articles XII.17 (“mere conduit” services), XII.18 (“caching” services) and XII.19 ELC (hosting services), to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating that some illegal activity is taking place. This does not preclude courts from imposing a temporary monitoring obligation (Article XII.20(1)(2) ELC).

However, these providers must promptly inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service (Article XII.20(2)(1) ELC). These providers must also communicate to the competent authorities, at their request, information enabling the investigation and identification of infringements committed through their services (Article XII.20(2)(2) ELC). In implementation of Article 19(1) of the E-Commerce Directive, Belgian law provides for a warning procedure (Article XV.31 ELC), a procedure for investigating and establishing the acts prohibited by Articles XII.17-XII.19 ELC (Article XV.2 ELC), as well as a settlement mechanism (Article XV.62 ELC). Criminal sanctions are provided for service providers, including a “level 3” sanction if they fail to communicate information to the competent authorities in accordance with Article XII.20 ELC (Article XV.118(3) ELC).

6.2.3.5. Removal and blocking orders

Two types of injunctions are relevant under Belgian law in the case of online piracy of audiovisual sports content: (i) permanent injunctions; and (ii) interim injunctions.

As far as permanent injunctions are concerned, these can be obtained through several types of proceedings. First, rightsholders can initiate regular proceedings on the merits against infringers and/or intermediaries based on tort (Article 1382 of the (old) Civil Code), as any violation of IP rights or other provisions of the ELC constitute a fault. In such a case, an injunction can be ordered by way of redress, besides other types of compensation (e.g. pecuniary damages requiring to prove the prejudice, etc.).

Secondly, provided that the audiovisual sports content is protected by copyright or related rights, rightsholders (or any interested party – Article XVII.19(2) ELC) may initiate injunction proceedings (*stakingsvordering*) against infringers based on Article XVII.14(3) ELC and against intermediaries whose services are used by a third party for infringements based on Article XVII.14(4) ELC. Such proceedings are accelerated proceedings on the merits, which means that they are conducted like summary proceedings (i.e. with procedural rules allowing them to move faster than regular proceedings on the merits), but they can result in a permanent injunction on the merits. Unlike summary proceedings, the claimant is not required to demonstrate urgency. However, no damages can be claimed via injunction proceedings. Only an injunction can be claimed, which includes corrective measures as provided in Article XI.334(2)(1) ELC.

With regard to interim injunctions, these can be obtained through several types of proceedings. First, the judge may, at any stage of the proceedings (proceedings on the merits), order interim measures to further examine the claim, to settle an interlocutory dispute or to provisionally determine the situation of the parties. Either party can request



such measures at any stage of the proceedings by means of a simple written request (Article 19(3) of the Judicial Code). There is no requirement to demonstrate the urgency of the measures and the judge has a wide margin to evaluate which preliminary measure is appropriate. The measures may entail the prevention of an imminent infringement or a provisional prohibition against continuing the alleged infringement. The measures ordered are provisionally enforceable.

Secondly, summary proceedings and *ex parte* proceedings are available. If the claimant can prove urgency (i.e. if an interim injunction needs to be obtained without delay), he/she can apply to the president of the enterprise court, or of the court of first instance to order a preliminary decision in summary proceedings (Article 584(1) of the Judicial Code).⁴⁰⁷ Urgency can be proved by demonstrating that an immediate decision is necessary to prevent considerable prejudice or serious inconveniences. In addition, the applicant must demonstrate the *prima facie* validity of the IP right and, in the context of the balancing exercise performed by the court, that his/her interest outweighs those of the alleged infringer.

In the case of proof of exceptional urgency, a preliminary decision can even be requested through *ex parte* proceedings (Article 584 (3) Judicial Code).

The measures requested in summary and *ex parte* proceedings may vary and include a temporary injunction to prevent any imminent infringement of an IP right, on a provisional basis and subject, where appropriate, to a recurring penalty payment. The court might also forbid the perpetration of the continuation of the alleged infringing activity or make such continuation subject to the lodging of guarantees to ensure the compensation of the rightsholder. Such measures may also include the temporary seizure or delivery up of the goods suspected of infringing an IP right so as to prevent their entry into or movement within the channels of commerce.

Any provisional and precautionary measures ordered through summary (and *ex parte*) proceedings will lapse if the petitioner does not initiate proceedings on the merits within the time period indicated in the order or, if no time period is indicated, within 20 working days or 31 calendar days, whichever is later, after service of the order (Article 1369ter(1) of the Judicial Code).

With regard, more specifically, to blocking injunctions, in light of the broad competences of the judges in both proceedings on the merits and in summary proceedings, it is possible to order such injunctions against an intermediary whose services are used by a third parties to infringe IP rights. In order to impose measures that block the further provision of services by an intermediary to an infringer who uses its services to infringe an IP right, it is not required for the intermediary to be liable, nor that

⁴⁰⁷ Urgency can be proved by demonstrating that an immediate decision is necessary to prevent considerable prejudice or serious inconveniences. In addition, the applicant must demonstrate the *prima facie* validity of the IP right and, in the context of the balancing exercise performed by the court, that his or her interest outweighs those of the alleged infringer.

proceedings be brought against the alleged infringer, nor that the intermediary be known in the first place.⁴⁰⁸ When a blocking injunction is imposed on an Internet Service Provider (ISP), it has in practice two main types of technical means at its disposal to implement them. These are, on the one hand, Domain Name System (DNS) blocking and, on the other, Internet Protocol (IP) blocking. DNS blocking involves the ISP removing a specific domain name from its database or, in other words, removing the link between a domain name and an IP address. IP blocking, on the other hand, means that the ISP makes a specific IP address inaccessible from its servers, so that the user will no longer be able to connect to the desired site, either via the domain name or directly via the IP address.⁴⁰⁹

Regarding “dynamic” injunctions, Belgian courts have generally been reluctant so far to grant measures which could be described as “dynamic”.⁴¹⁰

The existing measures and procedures are also available to the online piracy of live sports events. Indeed, courts can issue a blocking injunction to intermediaries whose services are used for the illegal transmission of live sports content. The fact that the event is live has no impact on the legal proceedings, only on the implementation of the injunction.

6.2.3.6. Measures against end-users

On 21 April 2010, a draft bill “aimed at promoting cultural creation on the internet”⁴¹¹ had been tabled by Senator Monfils, which provided for a four-stage graduated response procedure against subscribers (end-users). However, following the hearing of interested parties in the Senate on 11 May 2011, the senator withdrew the graduated response system from this bill.⁴¹²

6.2.3.7. Criminal sanctions

Provided that the audiovisual sports content is protected by copyright or related rights, rightsholders may file a complaint (*plainte*) with the authorities to trigger the criminal prosecution of infringement. The public prosecutor (*Ministère public*) is entitled to

⁴⁰⁸ Janssens K, “Targeting the middle man: het opleggen van maatregelen aan tussenpersonen in de strijd tegen namaak en piraterij” in Petillon F (ed), *Handhaving van intellectuele rechten in België. 10 jaar implementatie van de handhavingsrichtlijn 2004/48*, Larcier, 2018, p. 42.

⁴⁰⁹ Campolini P, Hermoye S and Lejeune F, “Droit d’auteur et contrefaçon dans l’environnement internet : les injonctions contre les intermédiaires”, *A&M*, 2017/3, p. 257, No. 34.

⁴¹⁰ In other words, measures whose purpose is to order the blocking not only of domain names (or more generally of means to access the infringing content) existing at the time the injunction is issued, but also of any other domain names (or new means of access) which, after the injunction, would be used to share some infringing content and would be notified to the intermediary by the rightsholders.

⁴¹¹ “Proposition de loi favorisant la protection de la création culturelle sur internet”, *Doc. Parl.*, Sénat, 2010-2011, No. 5-741/1.

⁴¹² “Les travaux du groupe belge de l’ALAL”, *Ing-Cons.*, 2011/5-6, p. 613-614.

prosecute on its own motion. Various public authorities are empowered to conduct investigations into acts of counterfeiting and piracy.

Charges of criminal infringement are brought before, and tried by, a criminal court (*tribunal correctionnel*). A civil suit may, at the option of the claimant, be joined to a criminal prosecution.⁴¹³

The general rules of the Criminal Code apply to criminal infringement. To start with, they allow for the confiscation of infringing copies and devices. Article XV.131/2 empowers the criminal court to seize earnings accruing from infringing acts, to take account of them in evaluating the corresponding damages, and to award them to the injured owner. Under Article XV.131/1, the court may order the closure, either temporary or final, of the establishment run by the defendant once convicted. Under Article XV.131/1, the court may order that the judgment be affixed on the infringer's property for a period that it will determine; it may also order that the judgment be published at the infringer's expense.

Criminal offences are punishable with a “level 6” penalty (Article XV.104 ELC), which consists of a criminal fine of between EUR 500 and EUR 100 000 and/or imprisonment of between one year and five years (Article XV.70(7) ELC). Various factors, including repeated convictions (Article XV.74), are relevant.⁴¹⁴

Table 20. National regulation applicable to audiovisual sports content

| Specific features on sports | Description |
|---|---|
| Specific rules on sports content copyright | No, national copyright law |
| Specific rules on the use of sports content in social media | No (but a decision of the Belgian Supreme Court, dated 24 June 2015, ruled on the publication of protected content on social media) |
| Competent bodies (other than judicial bodies) | No |
| Entitlement to take legal action | Yes, any rightsholder is entitled to take legal action (e.g. producer, broadcaster) |
| Codes of conduct | No |
| Specific proceedings | No |
| Specific remedies | No |

Source: Belgian response to European Audiovisual Observatory standardised survey

⁴¹³ Strowel A and Cabay J, “Belgium”, in Geller P E, Nimmer M B and Bently L (eds), *International Copyright Law and Practice*, New York, Matthew Bender, 2018, §8[4][b].

⁴¹⁴ *Ibid*, p. 96-97.



Table 21. National remedies in case of copyright infringement

| Typology | Description |
|---|--|
| Criminal prosecution and criminal sanctions | Yes |
| Differentiation of criminal sanctions based on acting for profit | No |
| Removal and blocking injunctions | Yes |
| Dynamic and/or live blocking injunctions | Not mentioned in the law |
| De-indexing injunctions | Yes |
| Damages and orders to cease and desist | Yes |
| Administrative offence and remedies | No |
| Notice and take-down procedures | Not provided by legislation, but broad frame defined by case law |

Source: Belgian response to European Audiovisual Observatory standardised survey

6.2.4. Case law

In this section, relevant national cases concerning copyright are reported in the table below, with particular reference to the following content: communication to the public; knowledge and awareness of illegal activity; notice and take-downs; measures against end-users and criminal sanctions, in relation to online infringement of audiovisual sports content.

Table 22. Relevant case law related to copyright infringement of audiovisual sports content

| Content | Substance of the decision | Decisions |
|---|---|---|
| Communication to the public | <p>The retransmission of work previously broadcast via cable or satellite by the original broadcasters by means of an internet stream made available to the subscribers of a system, constitutes a communication to public.</p> <p>There is no communication to the public in cases in which ISPs offer access to the internet which contains unauthorised copyrighted materials, within the meaning of Article XI.165, but the ISP's liability is subject to the conditions of the liability exemption regime.</p> | <p>Not directly related to sports content:</p> <p>Commercial Court of Antwerp dated 4 November 2014</p> <p>Brussels Court of First instance dated 13 March 2015</p> |
| Hosting providers' knowledge and awareness | <p>"Deliberate ignorance" is not a means to avoid knowledge and awareness.</p> | <p>Court of Cassation</p> |



| Content | Substance of the decision | Decisions |
|----------------------------|---------------------------|-----------|
| of illegal activity | | |
| Notice and take-down | N/A | N/A |
| Measures against end-users | N/A | N/A |
| Criminal sanctions | N/A | N/A |

Source: Belgian response to European Audiovisual Observatory standardised survey

6.2.4.1. Communication to the public

No (published) case law was identified which applies the notion of communication to the public to the dissemination of audiovisual sports content.

However, two judgements, which deal with elements concerning the notion of communication to the public in relation to an audiovisual work are relevant.

A judgment of the Commercial Court of Antwerp dated 4 November 2014⁴¹⁵ contains interesting elements concerning the notion of communication to the public in relation to an audiovisual work. This case concerns the Bhaalu system, which was launched by Belgian company Right Brain in 2013. The system functions as a modern video recorder and allows a user to store TV programmes in the cloud and then stream them to their TV screen, smartphone or tablet, wherever that user may be at the time. However, Right Brain marketed Bhaalu without having concluded any agreement with the rightsholders (i.e. the broadcasters). The Flemish broadcasting organisations VRT, Medialaan and SBS Belgium argued that Right Brain was infringing their copyrights and sued Right Brain for damages. The questions at issue were whether the use of the Bhaalu system was within the scope of the private copying exception,⁴¹⁶ which does not require the consent of the rightsholders, and whether there was a communication to the public, which does require the consent of the rightsholders.

First, in its judgment, the court referred to Article XI.215(1°)(d) ELC, which provides that only the broadcaster has the right to communicate its broadcasts in such a way that they are accessible to members of the public at a place and time individually chosen by them. The court then examined whether there was a communication to the public that required the consent of the rightsholder. In this regard, the court concluded that if the Bhaalu system retransmits works previously broadcast via cable or satellite by the original broadcasters (VRT, Medialaan and SBS) by means of an internet stream made available to the subscribers of the Bhaalu system, who can receive this retransmission by logging on

⁴¹⁵ President of the Commercial Court of Antwerp, 4 November 2014, AM 2015/1, pp. 80-92. The judgment was appealed.

⁴¹⁶ Article XI.190(9) ELC.



to the Bhaalu server, this constitutes a communication to the public (although these users are entitled to receive this broadcast on their television set). Finally, the court analysed the criterion of a 'new public' as developed by the Court of Justice in its *TVCatchup* judgment.⁴¹⁷ The Commercial Court of Antwerp rightly found that this criterion was not relevant in this case. After all, if the retransmission takes place by means of another specific technical method, a renewed consent of the rightsholders is already required, so that it is not necessary to examine whether there is an expanded audience. Since the consent of the broadcasters was not obtained, the court concluded that the Bhaalu cloud video recorder constitutes an unauthorised communication to the public and that the Bhaalu system can no longer be commercialised.

Another judgment of the Brussels Court of First Instance of 13 March 2015⁴¹⁸ also contains some interesting elements. In this case, the Belgium collective management organisation SABAM considered that, since ISPs offer access to the internet, which contains copyrighted materials, ISPs can be considered as communicating these materials to the public within the meaning of Article XI.165 ELC. The court noted that all parties agreed on the fact that the communication is preceded by a primary communication to the public within the meaning of Article XI.165. This initial communication is made by internet users or content providers and is addressed to the entire internet community (or part of it, if access to the content is subject to conditions) and subject to copyright. The court then considered whether the ISPs' role is limited to the provision of equipment enabling communication, or whether it is broader. If the former applies, there is no communication subject to copyright, since recital 27 of Directive 2001/29 makes it clear that the mere provision of physical facilities enabling communication does not amount to communication under copyright law. Under the latter hypothesis, the court investigated whether the situations of "upstream" and "downstream" internet traffic mentioned by SABAM could include a second communication, which would follow the initial communication and would also be subject to copyright. Upstream internet traffic allegedly includes communication from internet users who upload copyrighted materials. The court found that, in this case, the user's ISP is the only recipient of the communication. Therefore, there is no communication "to the public" within the meaning of Article XI.165.

In a situation of downstream traffic, the alleged communication is made by ISPs to their customers and occurs whenever customers download copyrighted content from the internet. The court found that ISPs merely enable the "originating communication", since the ISPs' customers are part of the public to whom the "originating communication" is addressed. As a result, there is no other communication than this one. The court concluded that ISPs are not components of the communication process but intermediaries indispensable to the functioning of the internet, which is the medium chosen by internet users to communicate. The court also made clear that the fact that measures can be taken

⁴¹⁷ CJEU, 7 March 2013, *TVcatchUp*, C-607/11.

⁴¹⁸ Court of First Instance Brussels, 13 March 2015, *IRDI*, 2015, p. 101.



against intermediaries enabling counterfeiting does not imply that intermediaries are subject to copyright.

As a result, the court concluded that ISPs do not communicate copyrighted content to the public within the meaning of Article XI.165 of the Code of Economic Law and therefore should not pay copyright fees to SABAM.⁴¹⁹ The appeal lodged by SABAM was rejected both in appeal (judgement of the Brussels Court of Appeal of 3 June 2016) and in cassation (judgement of 20 October 2017).

6.2.4.2. Online infringement of audiovisual sport content

In Belgium, no case law has been detected concerning online infringement of audiovisual sports content.

6.2.4.3. Knowledge and awareness of illegal activity

Under Article 14 of the E-Commerce Directive, a liability exemption for hosting providers is provided on condition that the provider does not have actual knowledge of illegal activity or information or that the provider, upon obtaining such knowledge or awareness acts expeditiously to remove or to disable access to the information.

In Belgium, the liability exemption system for hosting providers is set forth in Article XII.19 ELC, which provides for an exclusion of liability (criminal and civil) for any hosting ISP acting as an intermediary within the meaning of this law, insofar as its activity is of a purely technical, automatic and passive nature and, consequently, the intermediary has neither knowledge of nor control over the information that is transmitted or stored.⁴²⁰

In order to benefit from this exemption, the intermediary cannot therefore have: (i) actual knowledge, resulting, for example, from a notification of the presence of illegal content (notice and take-down); or (ii) indirect knowledge through facts suggesting the illegal nature of the information. Once knowledge has been established, the exemption will only apply if the service provider acts promptly to remove or block access to the illegal information.⁴²¹

With regard to so-called "deliberate ignorance", the Belgian Supreme Court has already ruled that a participant in a criminal offence cannot take measures so as not to

⁴¹⁹ L'Ecluse P and Lefever V, "Brussels Court of First Instance holds that Internet service providers should not pay copyright fees", 20 April 2015, Brussels Court of First Instance Holds that Internet Service Providers Should Not Pay Copyright Fees- Articles Droit de la propriété intellectuelle - lexgo.be, <https://www.lexgo.be/fr/articles/ip-it-telecom/droit-de-la-propri-t-intellectuelle/brussels-court-of-first-instance-holds-that-internet-service-providers-should-not-pay-copyright-fees,94426.html>.

⁴²⁰ Cass., 3 February 2004, AM 2005/3, p. 259.

⁴²¹ Jongen F and Strowel A, *Droit des médias et de la communication*, Bruxelles, Larcier, 2017, p. 788.



know about the planned offence and then hide behind the argument of ignorance.⁴²² Therefore, the design of a website so as to avoid any concrete knowledge of the illicit sharing of protected content thanks to the website may nevertheless trigger some liability of the intermediary.⁴²³

6.2.4.4. Notice and take-down requirements

In a 2001 judgment in the case of *Belgacom v. IFPI – Universal*, the Brussels Court of Appeal drew specific guidelines for copyright owners and ISPs, which resemble a framework for notice-and-takedown.⁴²⁴ Although such guidelines have not been statutorily confirmed, they may be useful to determine whether ISPs remain shielded after a copyright infringement notice. The guidelines may be summarised in the following three steps:⁴²⁵

- The claimant, for example, the rightsholder, should notify the service provider of the presence of content to which the claimant objects and state the reasons why, prima facie, the content is infringing or otherwise illegal. The notice must be sufficiently specific and detailed so as to allow the hosting provider to identify the disputed content.⁴²⁶
- The hosting service provider should prove within three business days that the flagged content is legal, in the absence of which it must suspend or restrict access to it.
- The claimant should accept liability, and hold the service provider harmless, in the event that the content at issue is subsequently declared to have been legally posted.

In this respect, the Belgian courts have been quite ready to impose injunctive relief on online intermediaries, the scope of which has been questioned by the CJEU. In the case of SABAM, an order was imposed by a Brussels court of first instance for an access provider to generally filter its service, at its own expense, to prevent file sharing.⁴²⁷ In another case, a social-network provider was similarly ordered to monitor for copyright infringement the

⁴²² It should also be noted that the recent case law of the European Court of Human Rights and Belgian and European commentators tend to advocate for a more flexible criterion of knowledge.

⁴²³ Cass., 16 December 2003, *RABG*, 2005, p. 546.

⁴²⁴ Brussels, 13 Feb. 2001 (*NV Belgacom Skynet v. Vzw IFPI Belgium & NV Universal*), A&M, 2001/2, 279, English translation in ECDR, 2002, p. 57.

⁴²⁵ Strowel A and Cabay J, “Belgium”, in Geller P E, Nimmer M B and Bently L (eds), *International Copyright Law and Practice*, New York, Matthew Bender, 2018, §8[4][c][ii].

⁴²⁶ See also Civ. Brussels, 2 April 2015 (*X v. Y and Telenet*), A&M, 2015/5-6, p. 398

⁴²⁷ Civ. Brussels, 29 June 2007, A&M, 2007/5, 476, IRDI, 2007, 442, note F. Petillion, *on appeal to Brussels*, 28 Jan. 2010 (*SABAM v. Scarlet Extended*), A&M, 2010/2, 176, referring questions to CJEU in Case C-70/10, decided on 24 Nov. 2011.



user-generated content that it hosted.⁴²⁸ The CJEU has clearly rejected the possibility of imposing such a filtering measure on intermediaries for two reasons: (i) the imposition of such an obligation constitutes a general surveillance obligation which is formally prohibited by Article 15(1) of Directive 2000/31 and (ii) the measure in question unduly infringes various fundamental rights recognised by the EU legal order, including the intermediary's freedom of enterprise and the fundamental rights of internet users to receive and communicate information and to protect their personal data.

In the case of online piracy of audiovisual sports content, provided that content is protected by copyright or related rights, the rightholder may notify the service provider of infringement and request 'prompt' removal in accordance with the liability exemption regime in Chapter 6 of Book XII ELC. Depending on the service provider, a notice and take-down procedure may be in place. If not, reference might be made to the aforementioned Brussels Court of Appeal case law. However, the assessment of 'prompt' action will still be made on a case-by-case basis.

6.2.4.5. Removal and blocking orders

In order to remove and block illegal content, Belgian courts often apply blocking injunctions against intermediaries such as access providers. This method is used in the context of digital networks. It regularly happens that the offenders cannot be identified or reside in jurisdictions far away from the place of the damage, and there is thus a need to direct the action against the intermediaries located in Belgium.⁴²⁹

The case law essentially concerns the following types of intermediaries:⁴³⁰

- Internet Service Providers (ISPs): quite an extensive jurisprudence⁴³¹ concerns the actionability and possible liability of ISPs; holders of IP rights or their representatives (for example, SABAM) have on several occasions requested courts to block access, by the ISP's clients, to peer-to-peer file-sharing sites (for example, The Pirate Bay). The notion of an intermediary is broad and is not limited to intermediaries expressly referred to in the law on electronic commerce such as ISPs and hosting providers. This notion may include, for example, an operator that provides so-called housing services (i.e. rental services of computer servers

⁴²⁸ Civ. Brussels, 28 June 2010 (*SABAM v. Netlog*), referring questions to CJEU in Case C-360/10, decided on 16 February 2012.

⁴²⁹ Brison F and Vanhees H, p. 1229.

⁴³⁰ Belgian national group (AIPPI), "Joint liability for IP infringement", pp. 4-5, available at : Joint liability for IP infringement - Report Belgium - Version 4.5 - 23-04-2018 [5094585].docx (uliege.be), <https://orbi.uliege.be/bitstream/2268/245996/1/Joint%20liability%20for%20IP%20infringement%20-%20Report%20Belgium%20-%20final.pdf>.

⁴³¹ See for example, Court of Cassation, 22 October 2013, *IRDI*, 2014, p. 365; Brussels, 28 January 2010, *AM* 2010, p. 176; Antwerp, 26 September 2011, *RABG*, 2011, p. 1269; Brussels Court of First Instance, 29 June 2007, *IRDI*, 2007, p. 442.



allowing access to the internet), an operator that provides domain name management services, an operator that offers its subscribers an online service allowing them to record and access television broadcasts in violation of the rights of the broadcaster at a time and place individually chosen by each subscriber.

- Online marketplaces: other cases involve online marketplaces, such as eBay.
- Transport, shipping agents, etc.: another category of recurring cases concerns intermediaries that play a role in the transportation and importation of goods that enter the territory of the EU and infringe IP rights.⁴³²

Furthermore, there is some case law on the type of blocking recommended. In particular, in a judgment of 26 September 2011, the Antwerp Court of Appeal considered that it was its duty to specify the details of the measures imposed. In the context of an injunction against ISPs, the court considered that DNS blocking was the most acceptable solution (instead of IP blocking). According to the court, in addition to the fact that the IP blocking technique requires more investment, it entails the risk of blocking all the internet sites grouped under the same IP address and thus making perfectly legal and lawful information inaccessible at the same time.

The procedure for obtaining a blocking injunction only requires the claimant to demonstrate the right asserted and its violation. The one requirement to be fulfilled is the usefulness of the injunction. Indeed, Belgian law does not require intermediaries to have knowingly adopted the infringement of IP rights. Article XVII.14 of the same code confirms the absence of any condition of fault and/or "intention" of the infringer or the intermediary.⁴³³

Regarding dynamic injunctions, Belgian courts have so far generally been reluctant to grant such measures. By way of illustration, the Brussels Court of First Instance, in its decision of 9 August 2013, refused to grant an application to make inaccessible not only the three domain names specifically identified in the proceedings, but also any new domain name notified by the applicant which would refer to a website essentially devoted to the illegal supply of products, components or information which infringed the directory of rightsholders. The court recognised that the appearance of new means of access to infringing websites is characteristic of the use of the internet and that it is a common means of committing such copyright infringements. However, it considered that granting as broad a measure as the one requested by the applicant would be contrary to Article 6 of the Judicial Code.

Nevertheless, blocking injunctions, in other circumstances, have been applied. In particular, in the light of the CJEU UPC Telekabel Wien judgment, the Amsterdam Court of Appeal recently ordered a dynamic blocking injunction. An argument in favour of dynamic

⁴³² See for example, Commercial Court Antwerp, 6 May 2008, *IRDI*, 2008, p. 260; Commercial Court Antwerp, 24 February 2011, *IRDI*, 2011, p. 320.

⁴³³ "[T]he president of the commercial court shall ascertain the existence and order the cessation of any infringement of an intellectual property right, [...] § 4. The president may also issue a cessation order against intermediaries whose services are used by a third party to infringe a right referred to in paragraphs 1 to 3"



injunctions can also be found in a Belgian Supreme Court judgment of 22 October 2013, concerning the blocking of access to content hosted by the server linked to the domain name *thepiratebay.org* by using all possible technical means including, at the very least, the blocking of all domain names that redirected internet users to this server. One of the ISPs' grounds against the dynamic blocking injunction consists in the fact that the blocking order and also the list of domain names to block as established by the court would represent a violation of Article 15(1) of the E-Commerce Directive, concerning the general monitoring prohibition.

On this last point, the court dismissed the appeal and held that the order to block access to the illicit content, including also all the domain names, did not entail the monitoring obligation, as provided by the E-Commerce Directive. Thus, the ISPs were not asked to control the information or actively monitor facts or circumstances, indicating the illegal activity.

6.2.4.6. Measures against end-users ordered by the courts

Belgian courts do not issue measures against end-users.⁴³⁴

6.2.4.7. Compensation criteria adopted by the courts

No Belgian case law has been detected concerning online piracy of audiovisual sport content.

From a legislative perspective, the civil law requires: i) a material component, corresponding to the royalty that the claimant could normally obtain for the infringing use of his/her work; and ii) a moral component, corresponding to the fact that the author's exclusive rights have been violated. The following factors were considered by courts: i) as material components, losses incurred on the market⁴³⁵ and costs of discovery and of litigation; ii) as moral components, the impact of sales at any discounted price upon the

⁴³⁴ This is also due to the fact that rightsholders in Belgium always preferred the strategy of cutting off the illegal offer and promoting legal content instead of going after end-users.

⁴³⁵ In the absence of specific evidence, courts use royalty rates fixed by collecting societies as customary indications of market damages, even though those fees are not binding upon third parties. See Brussels, 23 March 2001 (*Le Vif Magazine v. SOFAM & Wibin*), A&M, 2001, p. 375, note Derclaye E and Cruquenaire A, JLMB, 2002, p. 859; Brussels, 25 September 2001 (*Ed. Des Eperonniers v. SOFAM*), A&M, 2004, p. 327; Civ. Brussels, 30 May 2003 (*SOFAM v. Père Ubu*), A&M, 2004, p. 337; Brussels, 24 May 2012 (*Shimera*), ICIP, 2012/2, p. 373 (treating the tariffs used by a collecting society as a reference point for the assessment of damages, but finding that the imposition of a penalty for failing to ask for a prior authorisation from the rightsholder was not compatible with the requirement of Article 13 of IPRED, that damages be "appropriate to the actual prejudice"). Cf. Brussels, 11 October 2013 (*Bulex v. SABAM*), A&M, 2014/1, 34, JLMB, 2014/10, p. 462 (assessing damages by reference to collecting society tariffs, including a 30% penalty clause imposed by the collecting society for failing to seek prior authorisation).



claimant's credibility in the marketplace and upon the value of its goods, the claimant's absence of control on the quality of infringing goods, the resulting reduction of the claimant's bargaining power, etc.

On the other hand, the Belgian Supreme Court may overturn a decision granting the amount of claimed damages by referring to the need to finance the general fight against piracy or by referring to the need to have, on top of royalties, an additional lump sum to have some deterrent effect.⁴³⁶ That said, it must be recalled that civil actions may be joined to criminal prosecutions for infringement.⁴³⁷

The plaintiff has the right to full compensation for the prejudice suffered and, when the amount of the prejudice cannot be assessed, the court can impose the payment as compensation relying on a rule of reason and equity.

The judge may order the delivery up to the plaintiff of the infringing goods, as well as of instruments used to commit the infringement.

Where it is proven that the defendant acted with "bad faith", the judge may order the transfer of the benefits resulting from the infringement to the plaintiff,⁴³⁸ and only the expenses directly related to the infringing activities may be deducted to calculate the benefit made by the infringer. Also, in such cases, the judge may order the confiscation of the infringing goods and of instruments used for the infringement.⁴³⁹ If the defendant did not act in bad faith, the award will be offset against the damages due to the plaintiff.

6.2.4.8. Criminal sanctions ordered by courts

There are no cases related to the application of criminal sanctions to online piracy of audiovisual sports content in Belgium.

⁴³⁶ Court of Cassation, 13 May 2009 (*X v. SABAM and IFPI Belgium*), A&M, 2009/4, p. 384.

⁴³⁷ On criminal prosecutions, see § 8[4][b] *infra*. In some of these joined criminal and civil cases, awards of civil damages have reached hundreds of thousands of euros and in any event have been based on all the various factors explained here as applicable in civil cases. See Liège, 17 October 2007, A&M, 2008/1, p. 43; Antwerp, 19 October 2007, A&M, 2008/1, p. 22; Corr. Brussels, 21 February 2008, A&M, 2008/2, p. 113.

⁴³⁸ See Comm. Antwerp, 5 June 2015 (*SABAM v. ID&T*), *IRDI*, 2015, p. 246 (allocating SABAM half of the gross turnover of the organiser of several electronic music festivals, the organiser having given false information on his revenue in order to limit the amount of royalties to be paid to SABAM and thus having acted in bad faith).

⁴³⁹ Since Belgian law does not require any special knowledge of the infringer as a condition for being ordered to pay damages, it thus appears stricter than Article 13 of the IPRED, which refers to the person who knowingly, or with reasonable grounds to know, engages in infringing activities. The Copyright Act does not expressly distinguish the two ways for calculating the damages proposed by Article 13 of the IPRED, that is, either full compensation of the prejudice or a lump sum of at least the royalties which would have been due.

6.2.5. Reports and studies

On 15 December 2020, the *Conseil supérieur de l'audiovisuel* (the CSA) published its study "*Médias: attitudes et Perceptions*",⁴⁴⁰ on the consumption patterns of audiovisual media services in the *Fédération Wallonie-Bruxelles* (FWB). With this report, the CSA also carried out a complementary analysis on internet offers of illegal audiovisual content. In general, the study reported that consumers consider illegal video-on-demand as a form of free video-on-demand. Among its main conclusions, the CSA recommended (i) organising awareness-raising actions towards retailers involved in the resale of these illegal offers (and the general public); (ii) reflecting on the development of an adapted audiovisual offer; (iii) ensuring workable competition.

It is also worth noting that on 29 June 2012, the Intellectual Property Council issued an opinion on the enforcement of copyright and related rights on the internet,⁴⁴¹ aimed at providing an overview of the various laws applicable to online piracy.

However, these reports do not specifically address the subject of illegal online transmission of sports events.

Regarding national studies and reports on technologies and business models used for the illegal streaming of sports content, on 17 December 2019, the Belgian Entertainment Association gave a presentation on the most commonly used technologies for illegal streaming of content (not specifically sports content), presenting the following five means of piracy:

- Streaming websites characterised by the following elements: films or media played on mobile phones, tablets, laptops or games consoles; media files saved on a separate server or device; no download software needed and quicker option than torrents;
- Torrent websites⁴⁴² with the following characteristics: torrent file download on the device through the use of a torrent website (trackers); online distribution with the extension ".torrent"; requires torrent software; contains all kind of files (audiovisual, music, books, software, games, etc.). It is important to note that the torrent-software itself is not illegal;

⁴⁴⁰ Available at : CSA Rapport scientifique.docx ; <https://www.csa.be/wp-content/uploads/MAP/20201215%20CSA%20Rapport%20scientifique%20export%20final.pdf>, Le droit d'auteur sur internet | SPF Economie (fgov.be), <https://economie.fgov.be/fr/themes/propriete-intellectuelle/droits-de-pi/droits-dauteur-et-droits/droits-dauteur/le-droit-dauteur-sur-internet>.

⁴⁴¹ Available at : Handhaving van auteursrecht op het internet - Ontwerp van advies van de Raad voor de Intellectuele Eigendom (fgov.be), <https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-29062012.pdf>.

⁴⁴² Such technology is also particular because the user who download something also uploads content at the same time. In terms of copyright, it means that the right of communication to the public is also involved, not just the reproduction right.



- Cyberlockers/file hosting sites with the following characteristics: “file hosting” platform used to share a large amount of files; via URL-link, free accounts with limited storage; different from torrent website (file is downloaded from one source) and no download software needed;
- Streaming applications: free software allowing users to stream films, series, etc.; files are streamed and available for desktop PCs, smartphones, tablets and with Chromecast, Apple TV, etc. As far as sports content is concerned, there are also many streaming sites that allow consumers to view live sports content. For example, the www.footlive.me website broadcasts a large number of football matches (Belgian and other) live via its platform. The servers of these sites are usually hosted in foreign countries;
- IPTV (Internet Protocol TV) or TV channels via the internet: offers 7 000+ up to 12 000 broadcasting channels worldwide; TV channels, films, live broadcasting (linear), also on-demand content, films and series; video files from different sources (servers) in data packages are retrieved from the internet; IPTV channels can be viewed on many devices such as the use of VLC on PCs, etc. and very cheap price subscription (EUR 5-20 per month or EUR 45-150 per year).

With reference to sports content, the head of the CSA's Operator and Distributor Unit reported that illegal transmission of sports content tends to take place through IPTV and streaming websites (live). Indeed, the two main ways to access the content are (i) by cracking the encryption of the satellite signal; or (ii) purchasing a legitimate subscription (for example, a Proximus Sport subscription) and then digitising the signal at the output of the decoder and cracking the (High Definition Multimedia Interface (HDMI) and then recovering the signal which will subsequently be transmitted illegally. The pirated signal will then be distributed by CDNs (Content Delivery Networks).

There are no studies describing the legal offers of sports content in Belgium. However, the CSA has a “Guide to Media, Companies, Groups and Sectors” tab on its website which gathers and processes a wide range of information on audiovisual media accessible with a single click (television, radio, on-demand services, electronic media services, etc.). This search tool allows users to know which services are available; who they belong to; what their content is; which media groups are active in the Wallonia-Brussels Federation; and the degree of independence and autonomy of television and radio stations. This information is regularly updated and comes from the annual reports which publishers and distributors are obliged to submit to the CSA, as well as from other public or private sources.

Furthermore, several awareness campaigns have been carried out, especially through videos.⁴⁴³

⁴⁴³ An example of an awareness campaign is the following one:
https://www.youtube.com/watch?v=lf9T_Hppqjk.

Several associations of broadcasters or rightsholders actively work to address the issue of online piracy of audiovisual sports content.

6.2.6. Data compilation

This country report is based on data compiled by Alain Strowel, a professor at the University of Saint-Louis in Brussels and UCLouvain for the French Community and Hannes Abraham, a member of the Brussels Bar since 2012 and a Senior Associate, member of the departments of Intellectual Property & IT Law and Commercial & Corporate Law at Pierstone Brussels.

Belgian public authorities and associations specialised in the audiovisual sector were contacted in order to compile the questionnaire: *Service général de l'Audiovisuel et des Médias*; *Conseil supérieur de l'audiovisuel*; *Société des auteurs et autrices de littérature et de documentaire*; *Union des producteurs francophones de films*; the Belgian Entertainment Association; Cinergie. The *Conseil supérieur de l'audiovisuel* also participated in an interview and the Belgian Entertainment Association provided several documents on the technologies used for committing online piracy.



6.2.7. Annex

Table 23. Overview of relevant transposition measures

| EU directives | National law |
|--|---|
| Conditional Access Directive (98/84/EC) | At the federal level: Act of 12 May 2003 replaced by Books of the Code of Economic Law (ELC) Flemish Community: Decree of 27 March 2009 regarding radio broadcasting and television French Community: Decree of 26 March 2009 regarding audiovisual media services German-speaking Community: Decree of 27 June 2005 regarding radio and television broadcasting |
| Article 5 of Directive 98/84/EC – Infringing activities | Article I.18 ELC; Article XII.21 ELC; Article 2,42° of the Decree of 27 March 2009; Article 1,56° of the Decree of 26 March 2009; Article 2,45° of the Decree of 27 June 2005 |
| InfoSoc Directive (2001/29/EC) | Act of 22 May 2005 (incorporated into the ELC) |
| Article 6 ISD – Obligations as to technological measures | Article XI.291 ELC; Article I.13(7°) ELC |
| Article 8 – Sanctions and remedies | Article XI.291 ELC; Article I.13(7°) ELC |
| IPRED (2004/48/EC) | Judicial Code; Act of 12 May 2003 replaced by provisions of the ELC |
| Article 6 IPRED – Evidence and Article 7 IPRED – Measures for preserving evidence | Article 871 of the Judicial Code Article 1369bis/1 of the Judicial Code |
| Article 8 IPRED – Right of information | Article XI.334(3) ELC |
| Article 9 IPRED – Provisional and precautionary measures | Article 19(3) of the Judicial Code Article 584(1) of the Judicial Code |
| Article 10 IPRED – Corrective measures | Article XI.334(2)(1) ELC, Article 2.22(1); Article 3.18(1) BCIP |
| Article 11 IPRED – Injunction | Article XI.334(1)(1) ELC; Article XIV.14(1) ELC |
| Article 12 IPRED – Alternative measures | - |
| Article 13 IPRED – Damages | Article XI.335(1) ELC; Article 2.21(1); 3.17(1) BCIP |
| E-Commerce Directive (2000/31/EC) | Act of 11 March 2003 (incorporated in the ELC) |
| Article 12-15 ECD – Liability of ISPs | Article XII.17-20 ELC |
| Article 17 ECD – Out-of-court dispute settlement | No specific transposition |
| Art 20 ECD – Sanctions | Transposed in various provisions |



| EU directives | National law |
|-----------------------------|-------------------------------------|
| DSM Directive EU (2019/790) | Not transposed (as at October 2021) |