Chapter 5
Disgorgement of Profits in Belgian Private Law

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Abstract The traditional rendition of Belgian law does not list disgorgement as a remedy. In reality, however, disgorgement is ordered in certain circumstances, but it is generally not recognized as such. For example, case law on personality rights and intellectual property rights contains examples where courts, under the banner of loss compensation, in fact set damages at a level higher than the actual losses to force the wrongdoer to hand over his profits. Also, non-compliance penalties are set at a level to provide an incentive to obey a court order, requiring the amount to be equal to the profits that can be made by ignoring the order. On the other hand, some instances of primary proprietary rights to profits can alternatively be understood as examples of disgorgement as a remedy for infringements of rights. Examples are the right of an owner to the fruits a *male fide* possessor realizes from his property and the right of the *solvens* to the income the bad faith *accipiens* has earned from an undue payment. In the view of the national reporter, Belgian private law apparently includes a (hidden) general principle that gives the holder of a subjective right a claim for disgorgement of profits realized by another person who in bad faith infringed the exclusive authority of the rightholder. This general principle has not (yet) been explicitly recognized by the courts, but it helps to understand what courts are actually doing in cases that cannot be explained under standard rules of civil liability.

Keywords Agent • Bad faith • Civil liability • Compensation • Compliance penalty • Confiscation • Damages • Duty to account • Good faith • Disgorgement • Fraud • Fruits • Infringement of right • Intellectual property right • Loss • Moral damages • Personality right • Profit • Proprietary claim • Undue payment • Unjust enrichment

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Introduction

While loss compensation is considered to be a "horizontal system" called civil liability, based on general principles applicable to all legal relations independently of their legal qualification,[1] the standard narrative of Belgian private law does not contain a similar chapter on disgorgement of profits, providing an overview of the conditions under which this remedy is available.[2] However, if one searches Belgian legal reality for gain-based remedies, they can be discovered here and there, even though they tend to be camouflaged under the (misleading) banner of compensation (civil liability) or as a material rule of law giving the claimant a primary right to the profits, and hence not presented as a remedy (proprietary claims).

Civil Liability

No Disgorgement in Theory

General Rules

Belgian civil liability is based on three constitutive elements: (a) a loss, (b) a fact recognized as a basis for liability – such as negligence or breach of statutory or regulatory duty[3] for the fault-based liability of Article 1382 of the Belgian Civil Code ("CC") – and (c) causation, showing that the loss was caused by the fact that serves as the basis for the liability. A loss is a negatively valued difference between the actual situation the harmed party is in and the hypothetical position it would have been in if the fact would not have occurred.[4] Establishing the existence of a loss is a necessary condition: without a loss, no claim in civil liability arises.[5]

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[1]Under Belgian law, a differentiation is recognized between contractual and extracontractual liability. However, practice shows that the historically different principles governing both systems have grown very close together, so that nowadays on most issues contractual and extracontractual liability are governed by the same rules, even though some minor differences remain. See Cornelis (2013), no. 10, p. 993; Van Ommeslaghe (2010), no. 799, p. 1136; Dubuisson (1998), 99; Biquet-Mathieu (2000), 461–464; Wéry (2010), no. 536, p. 472; no. 560, pp. 496–497.

[2]For a proposed theory of disgorgement under Belgian private law, see Kruithof (2011). See also infra the text accompanying notes 150–151.

[3]In Belgium, breach of statutory or regulatory duty is as such considered to be a wrong under Article 1382 CC. See Cour de Cassation 16 May 2011, no. 320, *Pasicrisie Belge* 2011, 1339, *Arresten van het Hof van Cassatie* 2011, 1230; Cour de Cassation 8 November 2002, no. 591, *Pasicrisie Belge* 2002, 2136, *Arresten van het Hof van Cassatie* 2002, 2417; Bocken et al. (2014), no. 148–152, pp. 92–95; Vansweevelt and Weyts (2009), no. 190–193, pp. 137–139.

[4]Dirix (1984), no. 5–7, pp. 15–17; no. 27, p. 33; Ronse et al. (1984), no. 5.1 and 5.2, pp. 7–8 and no. 22, p. 27; Simoens (1999), no. 6, p. 15; Cornelis (2001), no. 1, p. 21.

[5]Dirix (1984), no. 1, p. 13; Ronse et al. (1984), no. 2, pp. 2–4; Simoens (1999), no. 5, p. 13.

Civil liability results in an obligation to "undo" the loss.[6] The injured party is restored into the situation it would have been in if the event would not have occurred.[7]

In principle, the harmed party has a right to specific restoration,[8] but it is also obliged to accept such restoration if it is offered.[9] In case of reputational harm, for instance, the imposed remedy often takes the form of apologies or a retraction of the wrongful insult or the unwarranted accusation, or the publication of the court's decision.[10]

In practice, however, civil liability almost always results in damages. Still, the Belgian standard theory of liability considers damages to be a subsidiary remedy, only available if specific restoration is not possible in fact or would place an extremely unreasonable burden on the person held liable, so that by claiming this remedy, the victim would abuse its right to restoration.[11] In this view, damages are functionally a substitute for specific restoration and thus must be "equivalent" to restoration, usually referred to as "integral compensation" (*restitutio in integrum*). The damages compensate the loss and nothing but the loss.[12]

In setting damages, courts are not supposed to take into account other elements such as the seriousness of the wrong, whether a party is insured, or the fact that the tortfeasor obtained a gain.[13] Belgian law does not know punitive damages.[14] The idea is that civil liability is *not supposed to punish the wrongdoer*.[15] Integral

[6]Cornelis (2001), no. 3, p. 24; Simoens (1999), no. 9, p. 20.

[7]Cour de Cassation 9 April 2003, no. 235, *Pasicrisie Belge* 2003, 765, *Arresten van het Hof van Cassatie* 2003, 919; Cour de Cassation 2 May 1974, *Pasicrisie Belge* 1974, I, 906, *Arresten van het Hof van Cassatie* 1974, 633; Ronse et al. (1984), no. 220, pp. 163–165.

[8]Cour de Cassation 21 April 1994, no. 189, *Pasicrisie Belge* 1994, I, 388, *Arresten van het Hof van Cassatie* 1994, 392; Cour de Cassation 26 June 1980, no. 686, *Pasicrisie Belge* 1980, I, 1341, *Arresten van het Hof van Cassatie* 1979–1980, 1365; Ronse et al. (1984), no. 278, pp. 211–212.

[9]See e.g. Commercial Court Antwerp 22 April 1993, *Rechtspraak van de Haven van Antwerpen* 1994, 176; Dirix (1984), no. 58, p. 49.

[10]For examples, see Van Oevelen et al. (2007), no. 15, p. 978; Van Oevelen (1982), no. 16–17, pp. 435–436; see also de Callataÿ and Estienne (2009), 481–482.

[11]Schuermans et al. (1994), no. 1.2, pp. 858–859.

[12]Ronse et al. (1984), no. 220, pp. 162–164; no. 230–232, pp. 172–174; Dirix (1984), no. 28, p. 33; Simoens (1999), no. 10, pp. 21–23; Nordin (2014), no. 34–35, pp. 19–20; Weyts (2011b), no. 2, p. 174; Weyts (2005–2006), no. 5, p. 1642; see Cour de Cassation 17 January 1929, *Pasicrisie Belge* 1929, I, 63; Cour de Cassation 15 May 1941, *Pasicrisie Belge* 1941, I, 195; Cour de Cassation 26 October 2005, no. 542, *Pasicrisie Belge* 2005, 2044, *Arresten van het Hof van Cassatie* 2005, 2046; see the case law reported in Schuermans et al. (1984), no. 26, pp. 606–608; Schuermans et al. (1994), no. 1.6, pp. 884–900; Van Oevelen et al. (2007), no. 14, pp. 975–976.

[13]Ronse et al. (1984), no. 267–275, pp. 200–208; Weyts (2011b), no. 2, p. 174; Weyts (2005–2006), no. 5 and 6, 1642; Cauffman (2007), no. 28, p. 818; specifically about the seriousness of the wrong, see Nordin (2014), no. 97 et seq., pp. 64 et seq.

[14]Schuermans et al. (1994), no. 1.2, pp. 857–858; Baeteman et al. (2001), no. 214, p. 1704.

[15]This principled objection to punitive damages is shared by several authors. See e.g. Simoens (1999), no. 139, pp. 263–264; Cornelis (1989), no. 7, p. 12. Some others do not agree with this

compensation means that the loss is not only the minimum but also the maximum a judge can grant.[16] So in determining the amount of damages, the court has to deduct the profits the injured party has gained from the loss he suffered.[17] The idea is that civil liability is *not supposed to enrich the injured party*.[18] The combination of these principles seems to leave no room for any gain-based damages.

There is one rule in Belgian private law – which itself is not an element of liability law as such, as it has a much more general application – that when applied in a liability dispute causes the rules of liability law to result in a disgorgement.[19] Under liability law, if a loss is caused both by a tort committed by a third person and a wrong committed by the victim itself, the burden of the loss is split among them: in such a case, third party liability is limited to part of the loss, which is called "divided liability".[20] However, this result is considered inacceptable when the third party committed an intentional wrong taking advantage of the negligence of his victim. In such a case,[21] the highest court, specifically invoking the general principle *fraus omnia corrumpit*, ruled that a person that has committed an intentional wrong is precluded from invoking the negligence of the injured party in order to have the damages he owes reduced: one should not be able to profit from one's fraud or dishonesty with the aim of hurting another or gaining a profit in an illegitimate manner.[22]

objection, and would prefer some form of punitive damages, without however having elaborated under which conditions they would organize such remedies. See e.g. Weyts (2011b), no. 6 and 7, pp. 176–177; Weyts (2005–2006), no. 3, p. 1641; no. 16, p. 1646; Verjans (2013–2014), no. 28, p. 536; Cauffman (2007), no. 28, p. 818; Baeteman et al. (2001), no. 213, p. 1704; Guldix and Wylleman (1999), no. 44, pp. 1653–1655. Recently a PhD dissertation was defended trying to develop a theoretical framework for punitive damages under Belgian civil liability law, basing this remedy on the general principle of *fraus omnia corrumpit*. See Nordin (2014), no. 113, pp. 85–86.

[16]Cauffman (2007), no. 28, p. 818.

[17]Weyts (2005–2006), no. 8, 1643; Ronse et al. (1984), no. 519 et seq., pp. 360 et seq.; Simoens (2005), 389–393; Schuermans et al. (1984), no. 86, p. 851; Schuermans et al. (1994), no. 122.1, p. 1401; Van Oevelen et al. (2007), no. 126, pp. 1496.

[18]Supercompensatory damages would result in an unjust enrichment of the victim. See Nordin (2014), no. 76 et seq., pp. 50 et seq.; Ronse et al. (1984), no. 173.

[19]See Nordin (2014), no. 107, p. 80.

[20]See Bocken et al. (2014), no. 117, pp. 76–77; Vansweevelt and Weyts (2009), no. 1292 et seq., pp. 821 et seq.

[21]The case in which the principle was stated (Cour de Cassation 6 November 2002, no. 584, *Pasicrisie Belge* 2002, 2103, *Arresten van het Hof van Cassatie* 2002, 2383), involved criminal fraud by a manager of a collective investment scheme which had been able to succeed because of the lack of supervision by the bank promoting the scheme. See also Cour de Cassation 9 October 2007, no. 465, *Pasicrisie Belge* 2007, 1739, *Arresten van het Hof van Cassatie*, 2007, 1883.

[22]See Lenaerts (2013–2014), no. 14–18, pp. 369–372; Lenaerts (2014), no. 15–19, pp. 104–107.

No Specific Rules for Violations of Competition Law

Belgian law does not contain specific rules with respect to the private enforcement of competition law.[23] Therefore, questions relating to the annulment of agreements between companies or decisions of associations of companies that restrict competition, injunctive relief in the form of a cease and desist order against restrictive practices or abuses of a dominant position, or private pecuniary remedies in cases of violations of competition rules are to be answered on the basis of the general principles of private law.[24] As Belgian law considers any violation of a statutory or regulatory behavioral rule to constitute a wrong in the sense of Article 1382 CC,[25] the claimant only has to prove the violation of competition law and the fact that he has suffered a loss as a consequence of this violation.[26] As mentioned, the remedy under these general rules is purely compensatory in nature.[27]

The Belgian general rules[28] allow for courts to follow the guidelines that were issued in the Oxera Study[29] as well as those included in the Practical Guide the European Commission has published.[30] In particular, Belgian civil liability allows the so-called passing on defense, reducing the damages owed to the injured party if that party has been able to pass the higher price it paid to its supplier on to its own customers. The principle of integral damages requires the court to take into account not only the loss but also any gains the injured party may have realized because of the loss occurring event,[31] and in establishing the actual loss, the court has to take

[23]The statutory provisions containing competiton rules, codified in Book IV of the new Economic Law Code, contain no explicit basis for bringing private actions for breaches of competition law and provide no specific private remedies.

[24]Taton et al. (2013), no. 34, p. 21; Schoors et al. (2011), no. 13, p. 201.

[25]See supra note 3.

[26]Waelbroeck et al., 5; contra: Schoors et al. (2011), no. 15, p. 202; for a more nuanced view, see Gilliams and Cornelis (2007/2), 16–17; see also Verougstraete and A. Bossuyt (2009), 18.

[27]Weyts (2011b), no. 36, p. 198. However, recently a PhD dissertation has been defended arguing that damages, awarded based on civil liability, not only have an enforcing *effect* but can be considered as civil sanctions having the *function* of enforcing certain legal behavioral rules. See Nordin (2014), no. 187, p. 143.

[28]For a specific application of the general rules of Belgian civil liability relating to economic losses to the situation of violations of competition law, see Taton (2013), 1051–1056.

[29]Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts, Study prepared for the European Commission, Oxera and a multi-jurisdictional team of lawyers led by Assimakis Komninos, December 2009, <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf>; see on this conclusion Schoors et al. (2011), no. 18, p. 203.

[30]See Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union accompanying the Communication from the Commission on Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, Commission Staff Working Document, SWD(2013) 205, C(2013) 3440, 11 June 2013.

[31]See supra note 17 and accompanying text.

into account all developments relating to the loss, even if they took place after the loss occurrence.[32]

Almost no actual court decisions have been reported.[33] Based on general principles, however, I see no basis under Belgian law for awarding a party injured by an anti-competitive practice anything more than full compensatory damages. I also have not observed any indication that Belgian courts in such cases would be prepared to impose any remedy which in effect would result in a disgorgement of profits.[34]

Hidden Disgorgement Possible in Practice (but Rare)

Deciding on the extent of the loss is a question of fact,[35] to be answered by the trial court. The Belgian highest court for civil disputes (*Cour de Cassation – Hof van Cassatie*) has no jurisdiction to establish facts or to review the factual findings of lower courts: it only can reverse and remand judgments of lower courts that contain procedural errors or errors on questions of law.[36] So while the highest court will reverse a judgment if it awards higher damages than the loss it established,[37] it cannot intervene if a lower court were to award damages equal to the loss it establishes, but in reality has valued this *factual loss* at an inflated amount.

In principle, the courts have to establish the loss as it occurred (*in concreto*). However, if the pecuniary equivalent of this loss cannot be determined, the court is allowed to estimate the damages *ex aequo et bono* and award a lump sum.[38] This creates a margin within which a trial court can in reality set damages at a higher level

[32]Schoors et al. (2011), no. 25, p. 205. On this principle in general, see Bocken et al. (2014), no. 346–347, pp. 209–210. On this basis, the highest court has for instance ruled that the court has to take into account that the injured party who claims damages for the loss caused to his house in fact has been able to sell that house without any depreciation: Cour de Cassation 3 December 1981, *Pasicrisie Belge* 1982, I, 460, *Arresten van het Hof van Cassatie* 1981–1982, no. 224, 465.

[33]Taton et al. (2013), no. 52, p. 27; see also Waelbroeck et al., 1.

[34]Cf. Waelbroeck et al., 11, who answer the question whether damages are assessed on the basis of the profit made by the defendant or on the basis of injury suffered by the plaintiff by only referring to the general principle of integral damages, including material and moral losses.

[35]Cour de Cassation 20 February 2006, no. 100, *Pasicrisie Belge* 2006, 413, *Arresten van het Hof van Cassatie* 2006, 414; Van Oevelen et al. (2007), no. 21, p. 1003.

[36]Article 608 of the Code of Civil Procedure.

[37]Such a decision violates the legal principle of the compensatory nature of liability. See Van Oevelen et al. (2007), no. 21, p. 1004.

[38]Cour de Cassation 3 March 2008, no. 149, *Pasicrisie Belge* 2008, 597, *Arresten van het Hof van Cassatie* 2008, 623; Cour de Cassation 9 October 1997, no. 395, *Pasicrisie Belge* 1997, I, 995, *Arresten van het Hof van Cassatie* 1997, 948; Schuermans (1969), no. 10, p. 81; Schuermans et al. (1977), no. 14, p. 463; Schuermans et al. (1984), no. 18, p. 555; Schuermans et al. (1994), no. 18.1, pp. 1019–1020; Van Oevelen et al. (2007), no. 17, p. 979; Ronse et al. (1984), no. 356–365, pp. 255–261.

than the actual loss in order to punish the wrongdoer[39] or to force him to in effect disgorge the whole or part of his illegitimately obtained gains, without presenting it as such.

This is most clearly possible in cases awarding moral damages, compensation for losses that do not consist of a reduction of the pecuniary situation of the victim.[40] Under Belgian civil liability, moral losses are fully compensated.[41] The highest court has ruled that moral damages only serve to compensate for pain or any other moral suffering, and in particular cannot be used to punish the wrongdoer.[42] However, courts can only estimate moral damages *ex aequo et bono*.[43] In doing so, they can set the damages at a higher level than the actual loss, by holding the losses to be higher than they are in reality. Such a decision is a finding of fact, which is as such "cassation proof".

Even though most moral damages awarded by Belgian courts can be characterized as relatively low, one cannot escape the impression that sometimes courts set the amount not merely based on the suffering by the victim, but also on the seriousness of the wrong.[44] Moral damages aim to compensate for suffering and pain, and it can easily be reconciled with the compensatory nature of civil liability to justify higher damages by pointing out that the intensity of suffering is in fact influenced by the seriousness of the wrong.[45] Hence, courts can and sometimes do take the type of wrong and the intentions of the wrongdoer into account when setting moral damages.[46] Most cases involving amounts of damages more probably linked

[39] See also Nordin (2014), no. 294, p. 221; no. 298, pp. 223–224.

[40] Dirix (1984), no. 86, p. 62.

[41] See already Cour de Cassation 17 March 1881, *Pasicrisie Belge* 1881, I, 163; Simoens (1999), no. 136, pp. 257–258; Van Oevelen (1982), no. 10, p. 431.

[42] Cour de Cassation 20 February 2006, no. 100, *Pasicrisie Belge* 2006, 413, *Arresten van het Hof van Cassatie* 2006, 414; Cour de Cassation 10 October 1972, *Pasicrisie Belge* 1973, I, 147, *Arresten van het Hof van Cassatie* 1973, 146; e.g. Court of First Instance Hasselt 14 June 2010, *Auteurs & Media* 2011, 250; Court of First Instance Brussels 7 April 2009, *Auteurs & Media* 2010, 99; Weyts (2005–2006), no. 13, p. 1644.

[43] Weyts (2005–2006), no. 13, p. 1644; Schuermans et al. (1984), no. 18, p. 556; Schuermans et al. (1994), no. 18.2, pp. 1025–1026; Van Oevelen et al. (2007), no. 17, p. 980.

[44] See e.g. Court of First Instance Brussels 16 November 1999, *Auteurs & Media* 2000, 132.

[45] Jocqué (2007), no. 75, p. 79; Cauffman (2007), no. 33, p. 820. See e.g. Court of Appeal Liège 16 January 1962, *Revue Générale des Assurances et des Responsabilités* 1964, no. 7204; Court of First Instance Antwerp 14 January 1960, *Revue Générale des Assurances et des Responsabilités* 1963, no. 7084; see also Schuermans (1969), no. 51, p. 126; see also Schuermans et al. (1977), no. 31, p. 506; no. 32, p. 509.

[46] A clear example is the decision of the Ghent Assize Court in the case of Kim De Gelder, who was convicted for his "Dendermonde nursery attack", killing three and wounding twelve more, ordering him to pay moral damages to the victim's next-of-kin far exceeding the usual amounts, stating that his atrocious attack was not comparable to traffic violations and more middle of the road delicts. See "De Gelder moet slachtoffers hogere schadevergoeding betalen", *De Standaard Online*, 30 September 2013; "Zaak De Gelder: Eén miljoen euro schadevergoeding", *De Standaard* 1 October 2013, 12.

to the profits made by the wrongdoer, involve the infringement of personality rights, and they will be dealt with *infra*.[47]

Non-Compliance Penalties Can in Fact Disgorge Profits

Some Belgian scholars object to supercompensatory damages because in their view such a remedy would create an "unjust" enrichment of the injured party.[48] Framing it that way, the descriptively correct statement that civil liability does not give an injured party a right to more than compensation, is turned into a broader normative principle that would exclude an injured party from having any right to anything different or more than compensation on any another basis. By generalizing such a principle outside the realm of civil liability law, the appearance is created that private law in general would never allow an injured party to obtain a "windfall profit" from an occurrence.

This, however, is descriptively not correct, as courts for instance can and do impose a non-compliance penalty, to be paid when the court's order is not complied with.[49] Such a penalty has to be paid to the claimant,[50] and in no way reduces that person's right to full compensation of losses suffered.[51]

Although such civil penalty is not possible for orders for the payment of a sum of money,[52] and therefore liability decisions seldom include such penalties,[53] one can find judgments based on liability including a non-compliance penalty if they award specific restoration. Most such cases involve orders of a person that has infringed a personality right of the victim to refrain from further infringements, or involve the court ordering the publication of the judgment as a form of specific restoration of the loss consisting of reputational harm suffered by the injured party because of the wrongful act of the person held liable.[54]

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[47] See infra text accompanying notes 105–136.

[48] Weyts (2005–2006), no. 8, p. 1643; no. 30, p. 1651; Guldix and Wylleman (1999), no. 44, p. 1655; Schuermans et al. (1984), no. 86, p. 850; Schuermans et al. (1994), no. 122.1, pp. 1399–1401; Van Oevelen et al. (2007), no. 125, pp. 1494–1495.

[49] Article 1385*bis-nonies*, Code of Civil Procedure, introduced by Act of 21 January 1980 ratifying the Benelux-Convention holding a Uniform Statute on a Non-Compliance Penalty, Moniteur belge 20 February 1980.

[50] Article 1385*quater*, Code of Civil Procedure.

[51] Article 1385*bis*, Code of Civil Procedure; see Cour de Cassation 28 April 1987, no. 502, *Pasicrisie Belge* 1987, I, 1002, *Arresten van het Hof van Cassatie* 1986–1987, 1135.

[52] Article 1385*bis*, Code of Civil Procedure.

[53] Schuermans et al. (1994), no. 24, p. 1055.

[54] Civil liability does not impose a duty to abstain from committing a wrong. Liability is therefore no basis to order a person to refrain from committing a wrong. See Cornelis (2001), no. 2, p. 22; Cour de Cassation 4 January 1984, no. 227, *Pasicrisie Belge* 1984, 468, *Arresten van het Hof van Cassatie* 1983–1984, 493 (holding that an order not to repeat a wrong cannot constitute

It is clear that courts in practice tend to set the penalty high enough for it to have a dissuading effect. Although this is almost never specifically stated in the court's reasoning, this means that the gains the wrongdoer can expect from refusing to comply are taken into account.[55] Civil non-compliance penalties in this way can and in reality very often do function as a form of disgorgement of profits realized by ignoring a court order, with the aim of providing an incentive to abide by the court's decision.[56]

Confiscation of Proceeds of a Criminal Offence

Belgian criminal law contains a general system of so-called "special confiscation".[57] Traditionally, this sanction was applicable to goods directly resulting from the criminal offence.[58] In cases involving the more serious types of criminal offences – felonies and misdemeanors, called "*crimes*" or "*misdaden*" and "*délits*" or "*wanbedrijven*" – such confiscation is always mandatory; in cases involving the

compensation for losses already suffered); see also Schuermans et al. (1994), no. 24, p. 1055. As a right based on civil liability only arises if all constituent elements are present and the existence of a loss is such an element, declaring somebody liable for "future infringements" – which *per se* cannot have caused any losses yet – is in my view not possible. A right, however, can provide the basis for the rightholder to ask for injunctive relief, confirmed by Article 18 of the Code of Civil Procedure. Such a claim does not require the presence of any loss: the infringement of a right or the threat of such an infringement suffices. This explains why judgments in cases where the wrong consisted of the infringement of a right (e.g. a personality right) can impose injunctive relief while judgments in cases where the wrong did not consist of the infringement of a right because only an interest of the victim was hurt can only impose restoratory or compensatory remedies. Belgian courts, however, do not always specify the exact legal basis for their orders, which explains why some authors have considered such orders a remedy based on civil liability. See e.g. Bocken (1986).

[55] See e.g. Court of First Instance Ghent 19 November 2003, *Auteurs & Media* 2004, 384 (penalty of €12,400 for Omega Pharma if it reuses Kim Clijsters' name in publicity, but granting Kim only €1 damages for the infringement that had already taken place); Court of First Instance Brussels 17 May 2002, *Auteurs & Media* 2003, 138 (€300 in damages for unauthorized use of photographs of girls by Christian Dior, but setting a non-compliance penalty of €2,480 per violation of the order prohibiting further use); Court of First Instance Brussels 19 May 2000, *Auteurs & Media* 2000, 338 (702,000 BEF in damages for unauthorized broadcasting of secretly filmed private conversation, adding a penalty of 5,000,000 BEF for each instance violating an order to refrain from reusing the footage).

[56] While most authors recognize that non-compliance penalties create incentives, they still tend to see them more as civil penalties for wrongdoing, much akin to punitive damages, and they do not explicitly recognize the disgorgment function these penalties in fact perform and have. See e.g. Nordin (2014), no. 291, pp. 218–219. In my opinion, this is the result of Belgian scholars being familiar with the concept of punitive damages but much less so with the concept of disgorgement.

[57] See about this system Rozie (2005); Desterbeck (2007), 51–71; Dejemeppe (2004).

[58] See Article 42, 2°, Belgian Penal Code (hereinafter referred to as "PC"), providing confiscation of "choses qui ont été produites par l'infraction".

least serious types of offences – infractions, called "*contraventions*" or "*overtredingen*" – such confiscation is only ordered if specifically provided by statute.[59]

Over the last decades, this system has been extended to all advantages obtained because of the offence,[60] so that not only the direct product of the crime itself (*productum sceleris*) but more general any advantage gained because of the offence (*lucre sceleris*) can be taken from the convicted offender.[61] Strictly speaking, such a "taking" is really an obligation of the convicted offender to disgorge his profits from the offence. This type of confiscation can be ordered in any criminal conviction, but only if it is claimed by the public prosecutor.[62]

The proceeds of special confiscation go to the Belgian State. However, the confiscated goods can be given to the civil party – a victim of the committed offence – if this person has a proprietary claim on these goods based on civil law.[63] Criminal special confiscation itself, therefore, does not grant civil parties any claims on illegally gained profits.

Proprietary Claims for Profits

In traditional Belgian doctrine, some forms of disgorgement are conceptually not understood to be a remedy for certain wrongs, but seen as a proprietary claim of a rightholder under a material rule of law.

Fruits of Property

Belgian property law states that the owner of a good also becomes the owner of its fruits.[64] This rule does not only apply to natural fruits of plants and in a broader sense the young of animals or increase in livestock, but also to so-called "civil fruits", such as for instance interest on capital or rental income from an asset. The

[59] Article 43, PC.

[60] See Article 42, 3°, PC, providing confiscation of "avantages patrimoniaux tirés directement de l'infraction, aux biens et valeurs qui leur ont été substitués et aux revenus de ces avantages investis", inserted in the PC in 1990. See Deruyck (1998). In the context of fighting money laundering, the text was again adapted in 2002 and now special confiscation is even possible for advantages for which there are serious indications that they result from the offence or from identical acts for which the defendant does not supply a credible alternative explanation. See Article 43*quater*, §2, PC. See De Samblanx et al. (2004).

[61] See Van Den Wyngaert (1999), 362.

[62] Article 43*bis*, first paragraph, PC.

[63] Article 43*bis*, third paragraph, PC.

[64] Article 547 CC.

person contributing the labor that has made it possible to produce these fruits is only to be compensated for his costs.[65]

However, while the owner can always revindicate his good, the same is not true for the fruits. Only a possessor *mala fide* is obliged to give the fruits he produced to the owner of the good.[66] A *bona fide* possessor can keep the fruits he has produced up to the moment he discovered his possession was tainted, at which moment he ceases to be in good faith.[67] With respect to fruits, the *bona fide* possessor is thus legally treated in the same way as an usufructuary.[68]

Although the traditional theory or narrative of Belgian law presents this as a rule of material property law, including in the concept of property a *ius fruendi*, understood as a property right in the fruits, it can also be understood as a remedy: any person who in bad faith uses someone else's property to produce a gain, can be forced to hand over (disgorge) the "civil fruits" (profits) realized through this illegitimate use.[69] Apparently, this disgorgement of profits is available to the owner against someone else in bad faith trying to realize gains by using his good and thereby infringing his subjective right of ownership, specifically aimed at preventing such bad faith infringement to be lucrative, and possibly providing the owner with a windfall profit.[70] Against a possessor in good faith realizing the same profits, the owner has no such claim.

Interest on Undue Payment

One can recognize a similar remedy in the rules relating to undue payments.[71] According to the basic principle, the *accipiens* – i.e. the person who has received a payment by error – is bound to make restitution to the *solvens* – i.e. the person from whom he has unduly received it.[72] However, the *accipiens bona fide* does not have to pay interest and can keep the fruits gained from the undue payment.[73] The *accipiens*

[65] Article 548 CC.

[66] Article 549 CC. See Dekkers and E. Dirix (2005), no. 473, p. 173; De Page (1942), no. 154, pp. 133–134; Van Neste (1990), no. 250–253, pp. 429–433; Van Oevelen (1990), no. 17, pp. 1109–1110; Court of Appeal Brussels, 11 March 1969, *Pasicrisie Belge* 1969, II, 134.

[67] Article 549–550 CC.

[68] Article 585–586 CC.

[69] See e.g. Cour de Cassation 2 October 2008, no. 521, *Pasicrisie Belge* 2008, 2119, *Arresten van het Hof van Cassatie* 2008, 2125.

[70] See Kruithof (2011), no. 17–18, pp. 32–36.

[71] Cf. Van Oevelen (1990), no. 17, p. 1109, who notes the similarity of the relevance of good and bad faith in both the rules on undue payment and on proprietary claims on fruits.

[72] Article 1376 CC. See Sagaert (2007), 79–88.

[73] Cour de Cassation 20 June 1996, no. 247, *Pasicrisie Belge* 1996, 673, *Arresten van het Hof van Cassatie* 1996, 625; Cour de Cassation 18 May 1995, no. 245, *Pasicrisie Belge* 1995, 1044,

mala fide, on the other hand, is not only required to return the undue payment itself, the capital, but also has to pay interest and hand over the fruits he has gained from the day of payment.[74] Again, if one looks at it from our analytic perspective, this is an example of a remedy of disgorgement of profits (fruits or interests) imposed when a person in bad faith infringes on the rights of another, to make sure this person does not earn any gains from its bad faith.[75]

Cases on the Border: Civil Liability or Proprietary Claims?

In some circumstances, it is theoretically debatable whether the sum awarded by a court is to be considered a form of compensation based on liability or a proprietary claim to profits based on a subjective right. In these cases, mostly involving infringements of intellectual property rights or personality rights, one can see courts and doctrine struggling with remedies that seem opportune and appropriate in the given circumstances but that do not really fit theoretically into the frame of civil liability. Although most courts and literature continue to treat these cases under the umbrella of civil liability, I have suggested that they can be better understood as examples of bad faith infringements of subjective rights, giving the rightholder not only a claim to compensation based on civil liability but also a remedy consisting of disgorgement of profits based on the infringed right itself.[76]

Arresten van het Hof van Cassatie 1995, 495; see e.g. Court of Appeal Mons 17 March 1995, *Journal des Tribunaux* 1995, 684; Court of Appeal Brussels 19 November 1971, *Jurisprudence Commerciale de Belgique* 1972, 22, *Pasicrisie Belge* 1972, II, 23, *Revue de la Banque* 1972, 357.

[74]Article 1378 CC. Court of Appeal Brussels 13 December 2007, *Tijdschrift voor Fiscaal Recht* 2008, 445; Court of First Instance Mons 10 September 2003, *Courrier Fiscal* 2003, 684; Court of Appeal Brussels 20 June 2003, *Jurisprudence Fiscale* 2004, 705. Recently, the highest court has ruled that the accipiens has to pay interest from the moment he was asked to return the unduly paid sum, and cannot be ordered to pay interest for the period between the moment of the undue payment and the moment he was summoned to restitution unless the court establishes that he accepted the payment in bad faith: Cour de Cassation 12 November 2012, no. 609, *Pasicrisie Belge* 2012, 2192, *Arresten van het Hof van Cassatie* 2012, 2504.

[75]See Kruithof (2011), no. 35, p. 52.

[76]There is no rational reason why the principle should be restricted to infringements of the right of property. If the holder of a property right has a claim of disgorgement of the profits realized by another person that has realized these gains through his bad faith infringement of the property right (Article 549 CC), such a remedy should also be available to the holder of a personality right or the holder of an intellectual property right or the holder of any kind of subjective right that has been infringed in bad faith in order to realize a profit. Whether one calls this a primary right or a remedy is not the main concern here, the point is that the principle should not (and in my view, in the light of constitutional equal treatment requirements, cannot) be limited to property rights alone.

Infringement of Intellectual Property Rights

The Belgian rules on intellectual property contain several remedies against infringements. Apart from injunctive relief,[77] the rightholder can claim damages, and in case of bad faith infringement,[78] he can claim civil confiscation or some form of disgorgement of profits.

Compensatory Damages

The statutory provisions on intellectual property rights explicitly state that the rightholder can demand compensation for the losses he has suffered from an infringement,[79] a claim he under Belgian law also has based on the general principles of civil liability.[80]

An infringement of an intellectual property right can cause different types of losses.[81] First, there is the *lucrum cessans*, i.e. the profits the rightholder normally would have gained from the exploitation of his right but that now are no longer available to him because the infringer appropriated opportunities that should have been exclusively enjoyed by the rightholder. Second, there is the *damnum emergens*, usually consisting of the costs the rightholder had to make in investigating and

[77] Article XI.334, Code of Economic Law. Article 2.22 and 3.18 of the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005; see De Meyer (2008); Michaux and De Gryse (2007), no. 25–31, pp. 633–637.

[78] Bad faith means that the infringer knew or had to know that the idea was protected by an intellectual property right and that his use without permission boiled down to an infringement of that right. See Court of Appeal Brussels 4 April 2007, *Auteurs & Media* 2007, 466. However, all relevant circumstances have to be taken into account, including the attitude of the right holder after he learns of the infringement which creates doubt about the extent of his right. See Cour de Cassation 25 February 2010, no. 131, *Pasicrisie Belge* 2010, 574, *Arresten van het Hof van Cassatie* 2010, 555.

[79] Article XI.335, §1 and 2, second paragraph, Code of Economic Law; Article 2.21.1 and 3.17.1 of the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005.

[80] Michaux and De Gryse (2007), no. 40, pp. 640–641; Buydens (1995); Janssens (2007–2008), no. 21, p. 938; Keustermans and De Maere (2009), 388–389. Although there has been some discord in Belgian case law and doctrine, the majority position has traditionally held that any infringement of an intellectual property right is as such a sufficient basis for liability: based on the principle that any breach of a statutory or regulatory duty constitutes a wrong (see supra note 3), the infringement of an intellectual property right is a fault, irrespective of whether it was committed in good or in bad faith. Court of Appeal Antwerp 23 January 2012, *Intellectuele Rechten – Droits Intellectuels* 2012, 374; Court of First Instance Ghent 10 January 2007, *Intellectuele Rechten – Droits Intellectuels* 2007, 13; see Ronse (2008), no. 8–11, pp. 228–231; Aelbrecht (2005), 380–382.

[81] Michaux and De Gryse (2007), no. 41, p. 641; Aelbrecht (2005), 376–379; see also Nordin (2014), no. 446–448, pp. 346–349.

prosecuting the infringement and potentially also the reputational harm he suffers as a consequence of the infringement.[82] Third, there can be moral losses.

According to the general principle of liability, the awarded damages have to equal the actual losses ("integral compensation").[83] The extent of the loss has to be judged *in concreto*.[84] However, in practice it can be very hard to exactly establish the extent of the losses. Therefore, damages in cases of infringement of intellectual property rights are very often set as a lump sum.[85] Several judgments have awarded damages set at a multiple of the normal or usual license fee, considered necessary to avoid it being lucrative to systematically infringe on intellectual property rights, knowing that one will not always be caught and therefore still be better off if one only risks having to pay the avoided fee.[86] Some courts have explicitly stated that they set the amount of damages so that the infringer will not be able to keep gains from his infringement.[87]

However, the highest court has recently reaffirmed the general principle that damages cannot be set higher than the actual loss. It ruled that awarding 25 % on top of the avoided licensing fee to finance the *global* battle against violations of intellectual property or to provide for an *incentive* to seek the permission of the rightholder, is not consistent with Belgian civil liability law.[88] But as already pointed out, the trial courts sovereignly establish the facts and thus the extent of the loss.[89] Therefore, nothing keeps a court from for instance finding that the *actual losses* of the company whose copyright on professional software that had been illegally

[82]Reputational harm can also be considered to be *lucrum cessans*, as the pecuniary value of reputation in a business context is a present value of potential future earnings. A decrease in the present value of an intellectual property right can be seen as *damnum emergens* as it lowered the actual market price of this right, but this lower price is nothing but a reflection of the diminished prospect earnings from this right, a *lucrum cessans.*

[83]Court of Appeal Brussels 3 May 2005, *Auteurs & Media* 2005, 419; Court of First Instance Brussels 8 December 2004, *Auteurs & Media* 2005, 249; Ronse (2008), no. 12, p. 231; Janssens (2007–2008), no. 21, p. 938; Aelbrecht (2005), 375–376; see also supra note 12.

[84]This means, for instance, that a court is not bound by tariffs unilaterally set by collecting societies, even if these tariffs have been communicated to the government in accordance to author rights legislation. Van Oevelen et al. (2007), no. 14, p. 977; see also Puttemans (2004), no. 40, pp. 38–39; no. 96–97, pp. 72–74.

[85]Schuermans et al. (1984), no. 18, p. 556; Van Oevelen et al. (2007), no. 3, p. 954.

[86]See e.g. Court of First Instance Louvain 2 May 2006, *Auteurs & Media* 2006, 457; Court of First Instance Brussels 20 April 2006, *Auteurs & Media* 2006, 335; Court of First Instance Kortrijk 20 April 2004, *Auteurs & Media* 2005, 57; Court of Appeal Brussels 23 March 2001, *Auteurs & Media* 2001, 373; Court of Appeal Brussels 23 March 2001, *Auteurs & Media* 2001, 373; see Ronse (2008), no. 12, pp. 231–232; Aelbrecht (2005), 373–374; Weyts (2011b), no. 26, pp. 190–191; Keustermans and De Maere (2009), 390.

[87]Court of Appeal Brussels 4 April 2007, *Auteurs & Media* 2007, 466; Court of Appeal Antwerp 21 December 2009, *Auteurs & Media* 2011, 182.

[88]Cour de Cassation 13 May 2009, no. 314, *Pasicrisie Belge* 2009, 1167, *Arresten van het Hof van Cassatie* 2009, 1254.

[89]See supra text accompanying note 35–37.

copied and used by the employee of another company amounts to much more than the originally avoided license fee,[90] thereby using the concept of compensation to in effect impose some form of disgorgement of profits.

Civil Confiscation: Optional Disgorgement

The infringer in bad faith can be forced to hand over any goods infringing the intellectual property right ("civil confiscation"). If these goods are no longer in his possession, the court can award the rightholder a payment equivalent to the price the infringer has received in return for these goods.[91]

Civil confiscation is to be distinguished from the possibility courts have to order the transfer of the infringing goods to the rightholder as a form of compensation, in which case the rightholder has to compensate the infringer if these goods have a higher value than his losses.[92] Under civil confiscation, the value of the confiscated goods is counted towards the damages owed,[93] but the rightholder never has to compensate the infringer if the value he receives through civil confiscation is higher than the losses he suffered because of the infringement.[94] The amount the court can award in cases of infringement in bad faith based on the civil confiscation provisions is therefore "noticeably greater" than the amount in damages based on civil liability, applicable in case of infringement in good faith.[95]

The similarity between this civil confiscation and the rule on fruits of general civil law property discussed earlier[96] is striking: the infringing goods can be considered to

[90] Court of Appeal Ghent 19 January 2009, *Auteurs & Media* 2009, 384; see also Court of Appeal Antwerp 13 October 2008, *Auteurs & Media* 2009, 391. See also the examples of more recent not (yet) published decisions reported in Deene and De Cort (2012), no. 31, and in Deene (2011), no. 49, p. 449.

[91] Article XI.335, §3, Code of Economic Law. Before the amendment of this provision by the Act of 9 May 2007 on the Private Enforcement of Intellectual Property Rights, which has adjusted Belgian law to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, the statutes imposed mandatory civil confiscation in case of bad faith infringement. However, courts were reluctant to establish bad faith because this would force them to impose this remedy. See the Explanatory Memorandum accompanying the Draft Statute on Private Enforcement of Intellectual Property Rights, *Documents Parlementaires* Chambre 2006–2007, no. 51 K2943/001, 26 February 2007, 31; Michaux and De Gryse (2007), no. 46, p. 642; Ronse (2008), no. 28, pp. 247–248. Now, the statute leaves it up to the court to decide whether it is appropriate to impose this remedy.

[92] See Article 2.21.3 of the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005; Article XI.335, §2, second paragraph, Code of Economic Law; See Fossoul (2007), 957; Ronse (2008), no. 21, p. 241.

[93] Article XI.335, §3, Code of Economic Law. See Michaux and De Gryse (2007), no. 46, p. 642; Ronse (2008), no. 28, p. 248.

[94] See Janssens (2007–2008), no. 29, p. 940.

[95] Court of First Instance Brussels 8 December 2004, *Auteurs & Media* 2005, 249.

[96] See supra text accompanying notes 64–70.

be "fruits of the intellectual property", and only the possessor in bad faith is required to hand them over to the owner, the rightholder. A possessor in good faith has to compensate the rightholder for his losses based on civil liability if he infringed the intellectual property right, but he does not have to hand over the "fruits" he realized.

Disgorgement of Profits (or Is It Loss Compensation?)

In case of bad faith infringement, the statutory provisions on intellectual property rights also provide that the court can order the disgorgement of all or part of the profits realized by the infringer.[97] The aim of this remedy, which following the example of German law was first introduced in the former Benelux Uniform Trademark Act and subsequently kept in the Benelux Convention on Intellectual Property (Trademarks and Designs) and then generalized for all intellectual property rights – but unfortunately, as shall be shown, in a distorted manner – is to avoid that the wrongdoer who willingly and knowingly infringes someone else's intellectual property right would be able to keep his gains even after having been held liable by a civil court.[98]

In the structure of the Belgian statute on intellectual property rights, this specific remedy is placed in a provision that in its first paragraph clarifies how the court can establish the amount of (compensatory) damages in cases where the exact extent of the loss cannot be determined. The statutory provision also explicitly states that the court can order this type of disgorgement "by way of compensation of the losses", suggesting that this remedy is not really a true disgorgement of profits.[99]

However, if this were the correct understanding of this statutory provision, it is difficult to explain why this remedy is limited to cases of bad faith. Under Belgian law, *any* infringement of an intellectual property right is a wrong[100] and therefore under civil liability gives a right to full restoration, which can always take the form best fit for the circumstances. Understood as nothing more than a specific manner of estimating damages for actual losses, this provision is therefore

[97] Article XI.335, §2, third paragraph, Code of Economic Law. In calculating this profit, only the costs directly related to the infringing production activity will be deducted from the returns earned by the infringor. Ronse (2008), no. 23, p. 243.

[98] See the Explanatory Memorandum accompanying the Protocol of 2 December 1992 that introduced this remedy in Article 13, A, paragraph 5, of the Benelux Uniform Trademark Act, that preceeded the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005; Benelux Court of Justice 11 February 2008, *Revue de Droit Commercial Belge* 2008, 413; Cauffman (2007), no. 18–19, pp. 812–813.

[99] See Ronse (2008), no. 23, p. 244; Weyts (2011b), no. 30, p. 193; Explanatory Memorandum accompanying the Draft Statute on Private Enforcement of Intellectual Property Rights, *Documents Parlementaires* Stukken Chambre 2006–2007, no. 51 K2943/001, 26 February 2007, 30; Nordin (2014), no. 449, p. 352. For an example, see Commercial Court Antwerp 2 July 2010, reported in: Deene (2011), no. 50, p. 449.

[100] See supra note 80.

completely superfluous.[101] The only rational explanation why this particular remedy would be limited to bad faith infringements is that this form of "damages" would possibly be greater than the losses, as it is based on the illegitimate profits made.[102] This alternative interpretation would also bring the Belgian statute on intellectual property in line with the provision on disgorgement of profits in the Benelux Convention on Intellectual Property (Trademarks and Designs),[103] which allows for disgorgement of profits in cases of bad faith infringements as a separate remedy, independent of compensation.[104]

Infringement of Personality Rights

An area where some deviation from general civil liability principles can be observed going into the direction of some form of disgorgement of profits under the guise of damages,[105] is the field of personality rights.[106] Although such rights are not statutorily defined or protected in Belgium,[107] they are recognized by most authors

[101]Cf. Ronse (2008), no. 23, pp. 244–245, who does subscribe to the view that this remedy is a type of compensation only, but then realizes that this means this remedy in reality will never be invoked, as it does not offer anything extra over what the rightholder can already obtain by way of restoration based on Article 1382 CC.

[102]For an example, see Commercial Court Liège 18 October 2000, *Revue de Droit Commercial Belge* 2000, 386.

[103]Article 2.21.4 of the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005: "In addition to or instead of the action for compensation, the holder of a trademark may institute proceedings for transfer of the profits made following the use referred to in Article 2.20 (1), and for the provision of accounts in this regard. The court shall reject the application if it considers that this use is not in bad faith or the circumstances of the case do not justify such an order." See also Article 3.17.4. of this Convention. Cf. Ronse (2008), no. 25, p. 246, who suggests that the interpretation which reduces the disgorgement of profits remedy in other statutes on intellectual property to a form of compensation leads to a different protection of brand names and designs on the one hand versus the other intellectual property rights on the other, which might not pass the constitutional equal treatment test.

[104]See for a recent application Court of Appeal Brussels 12 June 2012, *BMM Bulletin*, Beneluxvereniging van Merken- en Modellengemachtigden 2012, 174; see also Puttemans (2004), no. 40, pp. 38–39; no. 44, pp. 41–42.

[105]One author has called it "un certain utilitarisme dans l'application faite des règles de la responsabilité civile: le résultat recherché semble parfois commander la solution retenue." Langenaken (2011), no.28, p. 436.

[106]These rights give the holder legal control and authority in relation to other persons over the protection and the use of the intrinsic elements or expressions of his personality. Guldix (1986), no. 195–200; Guldix and Wylleman (1999), no. 3, p. 1594; Y.-H. Leleu (2010), no. 102.

[107]Belgian law does not know a provision like the one found in Article 9 of the French Civil Code, protecting the privacy of persons. There is, however, an indirect recognition of the portrait right in Article XI.174, Code of Economic Law, which limits the intellectual property right of a photographer with respect to portraits, by stating that the author or owner of a portrait or any other

as being part of existing positive law,[108] as the highest court recognizes them to be based on the general principle of law that prohibits the intrusion into someone else's personality.[109]

Restoration in case of an infringement of a personality right in Belgium often takes the form of damages.[110] Analysis of the case law shows that although plenty of judgments continue to apply the general principles of civil liability, requiring the showing of specific losses caused by a wrongful act for liability to attach and imposing an obligation to pay damages equal to losses suffered, some systematic deviation from this pattern can be discerned.

First, in many cases the infringement of the personality right is in itself considered to be a sufficient basis for liability.[111] Some scholars have defended this, arguing that the infringement of a subjective right is as such a wrongful act.[112] That this theory correctly reflects practice, is witnessed by the fact that often courts require showing that harming someone's reputation – which is not a subjective right but a mere legitimate interest, only protected by civil liability – was done in a wrongful way for liability to attach,[113] but do not require such showing when the

person possessing a portrait does not have the right to reproduce it or to make it public without the permission of the portrayed person or, during 20 years after his death, without permission of his heirs.

[108]There are, however, some authors that dispute this characterization and that qualify them not as rights but as mere liberties. See e.g. Langenaken (2011), no. 16, pp. 430–431; see also Rigaux (1990), no. 660 et seq., pp. 734 et seq.; Rigaux (1992), no. 133 et seq., pp. 134 et seq.; Gutwirth (1993), 647 et seq.; Gutwirth (1998).

[109]Cour de Cassation 17 December 1998, no. 525–526, *Pasicrisie Belge* 1998, 1233, *Arresten van het Hof van Cassatie* 1998, 1141. The first court decisions mentioning such rights date from the seventies, the first doctrinal studies of personality rights date from the eighties. See Guldix and Wylleman (1999), no. 2, p. 1592.

[110]de Callataÿ and Estienne (2009), 481.

[111]I write "in many cases", as this is not always the case. For the continuing line of Belgian court decisions requiring the finding of a wrong separate from the infringement of the personality right itself, for liability to attach, see Langenaken (2011), 426.

[112]As opposed to under Dutch law (see Article 6:162(2) New Dutch Civil Code), infringement of a right is in the traditional rendering of Belgian law not recognized as a separate type of wrong. However, Hubert Bocken has shown that an infringement of a subjective right is also a wrong under Belgian law, as the negation of a subjective right in itself implies the violation of a specific behavioral rule existing in objective law that requires respect for the rights of others. An infringement of a subjectif right is therefore a violation of a specific behavioral rule, and as such a wrong in the sense of Article 1382 CC. See Bocken (2000); Vandenberghe (1984), no. 2, p. 130; see also Verjans (2013–2014), no. 9, pp. 525–526.

[113]See Court of First Instance Tournai 22 November 2010, *Auteurs & Media* 2011, 109 (court distinguishes harming somebody's reputation, only resulting in liability if it was done in a wrongful way, and violating somebody's right to privacy, which in itself is sufficient for liability); Court of First Instance Brussels 20 September 2001, *Auteurs & Media* 2002, 77 (explicitly recognizing the right to one's portrait as a subjective right but holding the interest one has in one's good name and reputation not to be a subjective right, so compensation in case of reputational harm is only due when the good name or reputation was harmed in a wrongful way).

privacy of a person is infringed or his name, image[114] or voice are exploited without his permission.[115] As opposed to his reputation or good name, a person's privacy, name, image and voice are protected by a personality right, and the infringement of this right is in itself a wrong.

While the traditional view remains that the private law protection of personality rights once they are infringed is limited to the remedies offered by civil liability,[116] some authors have argued that the personality right itself can serve as a basis for a claim of damages.[117] Under this theory, damages can be awarded without the requirements of civil liability having been met. And indeed, while some courts explicitly state that the infringement of the personality right is a wrong on which civil liability can be based, there are plenty of court decisions that go straight from the establishment of the fact of the infringement to the conclusion that damages are due, without referring to a tort and without even mentioning Article 1382 CC.[118]

[114] As portrait rights are explicitly recognized in Article XI.174, Code of Economic Law, infringing such right is a violation of a statutory rule and as such generally recognized as a wrong under Belgian law. See Verjans (2013–2014), no. 10, p. 526.

[115] See e.g. Court of First Instance Brussels 28 September 2010, *Auteurs & Media* 2011, 334 (use of portrait without permission is an infringement and in itself wrong, even if person was acting in good faith); Court of Appeal Ghent 21 February 2008, *Auteurs & Media* 2008, 318 (use of pictures of Kim Clijsters for commercial purposes without permission); Court of Appeal Ghent 5 January 2009, *Auteurs & Media* 2009, 413; Court of Appeal Brussels 16 May 2007, no. 2005/AR/2710 (use of picture of celebrity for promotion of travel products marketed by television is wrong even when picture was taken with permission to use for promoting television show), reported in: Deene (2008), 523; Court of First Instance Ghent 19 November 2003, *Auteurs & Media* 2004, 384 and Court of First Instance Hasselt 19 December 2003, *Auteurs & Media* 2004, 388 (use of Kim Clijsters' name for commercial purposes without her permission is in itself a wrong warranting civil liability); Court of First Instance Dendermonde 26 October 2001, *Rechtskundig Weekblad* 2002–2003, 1068 (use of a nobel family name for a restaurant without permission of family is wrong); Court of First Instance Brussels 19 January 2001, *Auteurs & Media* 2002, 450, *Rechtskundig Weekblad* 2001–2002, 207 (immitation of voice of singer Rocco Granata in commercial is violation of his personality right and serves as a basis for awarding damages). For other examples, see Guldix et al. (2009), no. 104, pp. 872–873; Dubuisson et al. (2009), no. 36, p. 47.

[116] See e.g. Weyts (2011b), no. 10, p. 179. This author explains the fact that courts very easily conclude that an infringement of a personality right in itself constitutes a wrong on which liability can be based by pointing out that personality rights are "special" rights or "important" rights that need extra sensitive protection. See also Weyts (2011b), no. 12, p. 180; Vansweevelt and Weyts (2009), no. 195, p. 140. However, no criteria are given allowing to decide which rights are special and why, nor is shown what the link would be between this special character and the different remedy available in case of infringement. For other authors taking this position, see Milquet (1989), 46–47; Cornelis (1989), 150–151; Langenaken (2011), no. 12, p. 429; Verjans (2013–2014), no. 4, pp. 523–524.

[117] Guldix and Wylleman (1999), no. 9, p. 1607; no. 22, pp. 1629–1630; see e.g. Court of First Instance Ghent 24 June 2002, *Auteurs & Media* 2003, 143 (exploiting somebody's picture without permission is a violation of a personality right, giving the right holder a claim for compensation independent of any civil liability so also without requirement of a fault established).

[118] Guldix and Wylleman (1999), no. 43, p. 1652.

An infringement of a personality right can cause pecuniary losses, for instance when the infringement results in a loss of opportunity for the rightholder to earn income from exploiting the aspect or expression of his personality that the wrongdoer used without his permission.[119] Because in practice many court decisions award a lump sum, they do not give much insight in the elements that in fact determine the height of the damages, so we cannot verify if the profits the wrongdoer realized were taken into account.[120] Occasionally, however, a court hints that the amount of damages awarded was in fact based on the profits the wrongdoer had been able to realize thanks to the illegitimate use of an aspect or expression of the personality of the rightholder.[121]

An infringement of a personality right can also cause moral losses, such as psychological suffering or discomfort, physical pain or emotional distress.[122] As was already mentioned, such damages are set as a lump sum, as there is no way to exactly establish the pecuniary equivalent of such losses.[123] A historically very important author on Belgian civil law has written that the mere fact that a subjective right of a person was infringed or not respected constitutes a moral loss, irrespective of any other interest of the rightholder being hurt.[124] While nowadays few authors still invoke such a general principle,[125] it is generally agreed that in

[119] Although historically the Belgian courts considered the personality right to one's image to be aimed at protecting the moral, psychological or emotional interests of a person, since the eighties the courts have come to recognize that the portrait right also serves to protect economic interests of the portrayed person. See Voorhoof (2009), 152. See e.g. Court of First Instance Brussels 19 January 2001, *Auteurs & Media* 2002, 450, *Rechtskundig Weekblad* 2001–2002, 207 (awarding the singer Rocco Granata 500,000 BEF as compensation for lost income when his voice was immitated in a recording of a commercial, explicitly based on an estimation of the fee he could have charged for singing the song, which he had refused); for a much older case, see Court of First Instance Brussels 29 June 1981, *Rechtskundig Weekblad* 1981–1982, 2616 (awarding 20,000 BEF to an amateur whose picture taken dressed up in a clown character was used without permission in a published calendar and in publicity for such calendars, specifically referring to the income he could have earned when asked to pose for that picture).

[120] Guldix and Wylleman (1999), no. 39, p. 1650.

[121] See e.g. Court of Appeal Ghent 21 February 2008, *Auteurs & Media* 2008, 318 (Court awarded Kim Clijsters damages set at €790 or 10 % of the return – i.e. price times number of circulation – the publisher of a poster-magazine had realized through the sale of an issue of the magazine including a poster with Kim together with Justine Henin, after noting that this was the only picture of Kim in the magazine, while all other pictures and posters showed Justine Henin. Kim had asked €25,000 in damages, but the court refused that amount as it was more than the total return of the magazine, which was circulated at 2,000 copies and sold at €3.95 per copy).

[122] Cour de Cassation 3 February 1987, no. 322, *Pasicrisie Belge* 1987, I, 646, *Arresten van het Hof van Cassatie* 1986–1987, 724.

[123] Guldix and Wylleman (1999), no. 41, p. 1651.

[124] De Page (1964), no. 951*bis*B.5°, p. 955; see also De Page and Masson (1990), 955.

[125] The highest court has ruled that the infringement of a subjective right in itself does not necessarily constitute a loss under Article 1382 CC, so that no liability attaches if the claimant does not show that his interests were violated, separately from the violation of his right. See Cour de Cassation 21 June 1990, no. 615, *Pasicrisie Belge* 1990, 1204, *Arresten van het Hof van Cassatie*

case of infringement of personality rights, the rightholder feels his value as a person diminished by the negation or dismissal of his legal power of self-determination.[126] However, there remain authors that object to this automatism and who protest against this conflation of the concepts of wrong and loss.[127]

Some authors have argued that the claim for damages in case of infringement of a personality right can be based directly on the right itself and does not need to be based on civil liability, so that the requirement under liability of an actual loss is not applicable here, allowing the courts to award damages while the injured party in fact did not suffer a loss.[128] In effect, the conceptually different constituent elements of civil liability, fault and loss, are "merged" into one single requirement in cases involving personality rights, consisting of the infringement of the right. Based on this sole requirement, some courts impose a remedy of damages.[129]

While up to the seventies, such awards tended to be very low and courts in fact only awarded nominal damages to allow for the principled establishment that a wrong had occurred but did not use the instrument of civil liability to try to create incentives to promote the recognition of personality rights,[130] analysis has shown that since the eighties and definitely since the mid-nineties,[131] Belgian courts

1989–1990, 1358; Cour de Cassation 19 March 1991, no. 376, *Pasicrisie Belge* 1991, 670, *Arresten van het Hof van Cassatie* 1990–1991, 755; Simoens (1999), no. 8, pp. 18–20.

[126]Guldix and Wylleman (1999), no. 41, p. 1651; Guldix (1986), no. 312; Baeteman et al. (2001), no. 210, p. 1700; de Callataÿ and Estienne (2009), 495, criticizing a judgment by the Court of First Instance Brussels 20 February 1996, *Auteurs & Media* 1998, 259, that found the right to one's portrait infringed but refused to award any damages as in the eyes of the Court no loss had been caused, because according to these authors the absence of prior approval by a person for the publication of their nude picture in itself is moral loss. See e.g. Court of Appeal Ghent 20 September 2006, *Auteurs & Media* 2007, 386; Court of Appeal Antwerp 11 October 2005, *Auteurs & Media* 2006, 202; Court of First Instance Antwerp 12 June 2008, *Auteurs & Media* 2008, 321, *Rechtspraak Antwerpen Brussel Gent* 2008, 1267; Court of First Instance Liège 12 December 1997, *Revue de Jurisprudence de Liège, Mons et Bruxelles* 1998, 819.

[127]See e.g. Langenaken (2011), no. 23, p. 434; Cornelis (1989), 150; see e.g. Court of First Instance Brussels 17 April 2004, *Auteurs & Media* 2005, 81; Court of Appeal Antwerp 5 May 2003, *Rechtskundig Weekblad* 2004–2005, 1145, *Auteurs & Media* 2004, 67, *Nieuw Juridisch Weekblad* 2003, 1193; Court of First Instance Kortrijk 17 November 1989, *Tijdschrift voor Gentse Rechtspraak* 1990, 116; Court of First Instance Brussels 20 February 1996, *Auteurs & Media* 1998, 259.

[128]Guldix and Wylleman (1999), no. 22, pp. 1629–1630.

[129]Guldix and Wylleman (1999), no. 25, pp. 1632–1633. For a very explicit example, see Court of First Instance Antwerp 24 June 1985, *Rechtskundig Weekblad* 1985–1986, 2645; see also Court of First Instance Brussels 28 September 2010, *Auteurs & Media* 2011, 334 (use of a portrait without permission gives person right to moral damages without specific loss to be shown); Court of First Instance Dendermonde 26 October 2001, *Rechtskundig Weekblad* 2002–2003, 1068 (family members have a moral interest to protest against the illegitimate use of their name).

[130]Schuermans et al. (1977), no. 1, p. 439 and court decisions cited there; Van Oevelen (1982), no. 20, p. 438; see also de Callataÿ and Estienne (2009), 484.

[131]Some have remarked that the change was triggered by the Dutroux-case, involving the kidnapping and murder of several children, that as a side effect brought several high profile cases

have been more willing to award higher amounts of moral damages in cases of infringements of personality rights.[132] Specifically, it must be noted that such moral damages are regularly higher than the amounts Belgian courts award for the loss of a loved one or a next-of-kin. As it is hard to accept that the actual moral loss that a person suffers from the infringement of a personality right is much graver than the grievance and emotional distress one suffers when losing a parent, partner or child, one cannot help but feel that the courts in fact base the amounts of damages in cases of infringement of personality rights also on other elements than the extent of the actual loss.

Most often, commentators have interpreted the high awards as attempts of courts to punish for the wrong, independent of its consequences.[133] Occasionally, however, one can find court decisions awarding high moral damages not so much as a reaction to the seriousness of the wrong but rather to tackle the profits the wrongdoer has realized by negating the exclusive rights of the injured party.[134] But even if this is

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of people involved with the criminal investigation that were wrongly accused of improprieties in a hysteric media atmosphere. See de Callataÿ and Estienne (2009), 484–485; see also Verjans (2013–2014), no. 27, p. 535.

[132]See e.g. Court of First Instance Brussels 11 January 2011, *Auteurs & Media* 2013, 263 (€2,000 for publishing nude photograph of celebrity on vacation); Court of First Instance Antwerp 12 June 2008, *Auteurs & Media* 2008, 321, *Rechtspraak Antwerpen Brussel Gent* 2008, 1267 (€9,000 for publishing picture taken for purposes of book about breast cancer above review of the book in a magazine traditionally having a scarcely dressed woman on its cover); Court of First Instance Brussels 30 April 2006, *Auteurs & Media* 2007, 390 (€2,500 for infringement of right of privacy of a private person mentionned by name and address as probably having an affair with a politician); Court of Appeal Antwerp 5 May 2003, *Rechtskundig Weekblad* 2004–2005, 1145, *Auteurs & Media* 2004, 67, *Nieuw Juridisch Weekblad* 2003, 1193 (€2,500 for commercial use without permission of nude photograph taken with permission); see for older cases Schuermans et al. (1984), 517.

[133]See e.g. Langenaken (2011), no. 26, p. 435, and sources cited there.

[134]See e.g. the decision by the Court of First Instance Brussels in the case of the wife of the singer Helmut Lotti, which was described in "'Dag Allemaal' en 'Het Laatste Nieuws' veroordeeld voor publicatie naaktfoto van 'Mevrouw Lotti'", *Knack* 11 September 2013, 44–45. The case involved a nude photograph taken with permission to be published in a poetry book, but shown without permission in a very popular humoristic television quiz, and afterwards several printed media reported about that incident, again publishing the photograph without permission. The court reportedly awarded moral damages of no less than €25,000. The amount is so high compared to other decisions involving nude photographs published without permission (see supra note 132), and the wrong committed by the newspaper and magazine was comparably light, as they in fact were reporting on a row after a television show and therefore could be argued to have been bringing "news", that the only plausible justification for such an amount is to assume that the court was in fact reacting to tabloid style newspapers and gossip magazines earning money on the back of people whose right to privacy and right to their portrait they knowingly violate, and that by setting the damages so high, the court in a way was trying to create incentives so this segment of the press will have less reason to behave in this way. The only fact the court mentioned in its judgment that can be understood as an element helping to set the amount of damages owed to the woman whose personality right was infringed, is the fact that photograph was being published in a newspaper and magazine with (according to Flemish standards) a very high circulation.

the case, it is clear that Belgian courts are very timid in applying this method. In general, they refrain from imposing high damages, even if this would be necessary to have the wrongdoer disgorge the profits he realized through the negation of a personality right of the injured party.[135]

As a matter of theory, the consensus seems to remain that even if one accepts the theory that the remedy in case of infringement of personality rights is not based on civil liability but can directly be based on the personality right itself, this does not change the character of the remedy available, which in the eyes of most authors and courts remains compensatory and therefore not aimed at disgorging profits as such.[136]

For another example, see Court of First Instance Brussels 19 May 2000, *Auteurs & Media* 2000, 338, awarding 702,000 BEF to a woman who had participated in the audience of a television show and whose private conversation in a bar after the apparent ending of the recording of the show had been secretly filmed and included in the show as it was broadcasted, an amount the court explicitly based on the number of viewers of the show, remarking this was appropriate "given the great importance apparently attached to television ratings nowadays". This judgment has been criticized for being punitive, which is considered to be inconsistent with general principles of Belgian civil liability law, by de Callataÿ and Estienne (2009), 500. See also Weyts (2011a), no. 11, 272.

[135]The cases involving Kim Clijsters show this very well. I already referred to one decision supra in note 121 estimating her lost earning opportunity because of the use of her name or picture without her permission as a fraction of the return the wrongdoer realized in sales. In Court of First Instance Hasselt 19 December 2003, *Auteurs & Media* 2004, 388, she was awarded €2,000 in moral damages for a telecommunications company having placed an add in newspapers congratulating her with her reaching her first grand slam final, in fact trying to attract attention to their brand name using Kim's fame. The court holds that Kim had not convinced them that she had potentially lost earnings because of this infringement. In these circumstances, the awarded amount can hardly be understood to only reflect the moral or psychological distress Kim actually must have felt because her personality was not recognized by the outside world and therefore more likely is an attempt by the court to order the company to at least partially disgorge her profits. However, if one looks at the decision in Court of First Instance Ghent 19 November 2003, *Auteurs & Media* 2004, 384, involving exactly the same infringement of Kim's personality rights by Omega Pharma, Kim was only awarded €1 in moral damages, as the Court found that apart from the infringement of her personality right, she had not shown any additional losses. In fact, the moral or psychological distress Kim has felt from both infringements must have been exactly the same, and the difference in awards can only be attributed to the willingness of the Hasselt court to take the illegitimately gained profits of the wrongdoer into account and the unwillingness of the Ghent court to do the same.

[136]Guldix and Wylleman (1999), no. 38, p. 1650; see also Court of First Instance Brussels 20 September 2001, *Auteurs & Media* 2002, 77; Court of First Instance Tournai 22 November 2010, *Auteurs & Media* 2011, 109.

No Disgorgement Based on Unjust Enrichment (*Actio de in Rem Verso*)

Claims based on unjust enrichment are relatively rare in Belgium.[137] As opposed to several other legal systems, Belgian law contains no explicit statutory recognition of this action. It is based on case law, going back to a decision of the highest court of 27 May 1909.[138] Since the eighties, the highest court specifically refers to it as a general principle of law.[139]

As opposed to a claim based on liability, this action is only available if the defendant has been enriched.[140] On this basis one might expect that the claim would result in a duty to disgorge profits. However, this action just as much requires the claimant to be impoverished.[141] The mere infringement of a subjective right of the claimant by itself is under the standard rendition of Belgian law not considered to be an impoverishment, so the claimant has to show that he suffered a disadvantage that has pecuniary value.[142] Without such disadvantage, no action based on unjust enrichment is available, so under Belgian law[143] this action cannot truly be considered to be a disgorgement of profits.[144]

The remedy in case of unjust enrichment may at first sight look like disgorgement, as it is usually referred to as restitution. However, the sum awarded can never exceed the loss suffered, so the claimant can receive no more than compensation.[145] Unjust enrichment is therefore often referred to in Belgian literature as "patrimonial shift without legal cause", stressing that it is the value that shifted from the defendant

[137]Baeck (2012), no. 1, p. 199.

[138]Cour de Cassation 27 May 1909, *Pasicrisie Belge* 1909, I, 272.

[139]Cour de Cassation 17 November 1983, no. 149, *Pasicrisie Belge* 1984, 295, *Arresten van het Hof van Cassatie* 1983–1984, 315; more recently, Cour de Cassation 19 January 2009, no. 43, *Pasicrisie Belge* 2009, 153, *Arresten van het Hof van Cassatie* 2009, 176.

[140]Baeck (2012), no. 8, p. 203; Van Gerven and Covemaeker (2006), 289; De Page (1967), no. 37, pp. 47–48; Sagaert (2007), no. 27, pp. 88–89.

[141]Baeck (2012), no. 13, p. 207; De Page (1967), no. 38, p. 48; Van Gerven and Covemaeker (2006), 289; Sagaert (2007), no. 28, p. 89.

[142]Sagaert (2007), no. 28, p. 89. So an action based on unjustified enrichment is under Belgian law as it is generally understood in the literature today not available under the conditions that it would be under German law (see Dannemann (2009)) or the Draft Common Frame of Reference, which only requires the enrichment to have been attributable to another's disadvantage, which includes another's use of that person's assets (see Articles VII.–1:101 and VII.–3:102(1)(c) DCFR).

[143]This difference between the Belgian understanding of this action and the content of such action in other legal systems has to be stressed. See Zimmermann (1995), 418–421.

[144]Baeck (2012), no. 13, p. 207.

[145]De Page (1967), no. 47, 60–62, who links this to the reticence of the courts to allow for this remedy based on equitable principles; Baeck (2012), no. 67, p. 232; Van Gerven and Covemaeker (2006), 291; Maes (2010), no. 23, p. 210; Van Ommeslaghe (2010), no. 792, pp. 1127–1129; Cauffman (2007), no. 101, pp. 859–860; Sagaert (2007), no. 34, p. 93.

to the claimant that has to be restored, not the enrichment as such.[146] As a result, unjust enrichment under Belgian law is an alternative to civil liability to obtain compensatory relief, damages, in cases where no fault can be established. As it is understood today, it is not a basis for disgorgement of profits without this amount serving to compensate the claimant for an actual loss suffered.[147]

An Agent's Duty to Account: Disgorgement

Under a contract of agency, the agent is bound to account for his management, and to return to the principal everything he received because of his assignment, even if what he received was not owed to the principal.[148] This rule represents the basic principle that agency can never become a source of enrichment for the agent in his relations to third parties.[149] If apart from the agreed remuneration an agent were to obtain any other personal gain because of the way he performs his tasks or uses the power of attorney he has received under the agency agreement, he is not only bound to report this gain but he is also required to hand over these profits to the principal. This means that a principal can force his agent to disgorge his profits if he has used his powers for his personal gain in violation of their agency agreement.

Does Belgian Law Contain a (Hidden) General Rule on Disgorgement of Profits?

Based on an analysis of the examples of disgorgement spread throughout positive law, I have proposed a theory that Belgian private law apparently includes a general principle of law that gives the holder of a subjective right a claim for disgorgement of profits realized by another person because of his bad faith infringement of the exclusive authority the subjective right grants to its holder.[150] This remedy is clearly available in cases of infringement of property rights to physical goods, as the possessor in bad faith has to turn over the fruits he produced. This remedy can

[146]The highest court referred to the general principle of law according to which no one is allowed to enrich himself at the expense of another: Cour de Cassation 27 September 2012, no. 493, *Pasicrisie Belge* 2012, 1746, *Arresten van het Hof van Cassatie* 2012, 2040.

[147]Ronse et al. (1984), no. 275, p. 208, pointing out that the claimant who has been compensated for his loss no longer is impoverished.

[148]Article 1993 CC. See Paulus and Boes (1978), no. 160, pp. 164–166; no. 168–169, pp. 101–104; De Page (1952), no. 420 and 422, pp. 412–417; Foriers (1990), no. 52, p. 68; Foriers (1994), 166.

[149]De Page (1952), no. 422, p. 416; see also Van Ryn and Heenen (1988), no. 27, p. 24; Fredericq (1976), no. 233, p. 268.

[150]Kruithof (2011), no. 37–42, pp. 54–60.

also be recognized in the statutory provisions on intellectual property rights, which allow for civil confiscation of "fruits" of the intellectual property right and thus disgorgement of profits in cases of bad faith infringements. This concept can also help understand what a lot of courts actually are doing in cases of infringement of personality rights that can be economically exploited.

It is too early to tell whether this theory will find any support in Belgium. I hope that this comparative project might shed some light on the question whether the hidden general horizontal principle I think to have recognized in Belgian private law can also be found in other legal systems.[151]

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[151] In my Ph.D. dissertation on conflicts of interest in financial institutions offering investment services I have tried to show that this principle, as I found it hidden in Belgian civil law, can also help to explain the concept of fiduciary duties as it is understood in the United States. See Kruithof (2009), no. 238–243, pp. 251–257.

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