Employer's copyright under pressure

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Introduction

In a case concerning a statutory arrangement for orchestral musicians of the National Orchestra of Belgium (NOB), the CJEU rendered a decision on 6 March 2025 that may have implications for the employer's copyright which currently exists under Dutch law (*werkgeversauteursrecht*).[2] This article, which was written before the Court rendered its decision, is based on the opinion of advocate general Szpunar of 24 October 2024.[3] *If* Szpunar's opinion has been followed by the Court, this could have implications for a number of Dutch copyright provisions,[4] namely employer's copyright law (Section 7 Copyright Act), 'disclosure copyright' (Section 8 Copyright Act) and client- and employer's copyright on designs (Sections 3.8 and 3.29 BCIP).[5] This is certainly not a purely theoretical issue, given the practical and commercial interest in exploitation of creative performances made on commission or in employment (e.g. advertising campaigns, product designs, texts, photography). In this article, we discuss these possible implications and – in anticipation of the Court's ruling in the NOB case – make a preliminary proposal for adjustments to these various provisions. Finally, we make some concrete recommendations for contract provisions in agreements with employees and contractors, to offset the possible effects of the CJEU's ruling.

The Belgian NOB case

Musicians are performing artists. As such, they have neighbouring rights to their performances. Put short, this basically means that they, amongst other things, can prohibit others from recording and reproducing their performances. For orchestras like the NOB, this effectively means that they need permission from all involved musicians to exploit their performances, for example by releasing recordings of NOB concerts via streaming services.

From 2016, (collective bargaining agreement) negotiations took place between the NOB and unions representing the musicians belonging to the orchestra. These negotiations were mainly focussed on the amount of remuneration musicians received from the NOB for their performances. After these negotiations broke down in 2020, several musicians launched successful infringement proceedings based on their neighbouring rights against the NOB for exploiting their performances via streaming services. Following this issue, the NOB requested the Belgian government (as the NOB is a government organisation) to determine the amount of musicians' fees by royal decree ('RD').

The RD, published on 4 June 2021, entails that performers employed by the NOB are obliged to transfer their neighbouring rights to the NOB in exchange for a fixed annual gross fee of 600 euro's.[6] Several musicians dissatisfied with this arrangement asked the Belgian Council of State to annul the RD. The Belgian Council of State then referred questions of interpretation to the CJEU. Summarized, the main question to be answered by the CJEU in this case is whether the RD violates European

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[2] CJEU 6 March 2025, C-575/23 (ONB). This publication was written on 3 February 2025 in the expectation that the CJEU would broadly follow the conclusion of its advocate general.
[3] CJEU Opinion A-G M. Szpúnar, 24 October 2024, C-575/23, ECLI:EU:C:2024:923 (ONB). See also D.J.G. Visser, P.J. Kreijger & I. Toepoel, 'Belgian doubt about employer copyright', IEF 21743, pp. 5-6 and Teunissen, Copyright 2024, pp. 161-163.
[4] If the CJEU did not follow this conclusion at all, this publication can go straight into the litter box.
[5] Benelux Convention on Intellectual Property.
[6] Provided they have worked a full year.

harmonised law on copyright and neighbouring rights.[7] Advocate general Szpunar is of the opinion that this is the case. He considers that performers hold exclusive neighbouring rights under which they can authorise or prohibit the exploitation of their performances by others.[8] This means that any exploitation of those performances requires the prior consent of the performers.[9] These exclusive rights cannot be converted into a remuneration claim in exchange for a compulsory transfer of rights under a unilateral statutory arrangement such as the RD.[10] In addition, Szpunar explicitly considers that it is irrelevant that the musicians are employed by the NOB: the exclusive neighbouring rights accrue to all performers – regardless of whether they are employees or not.

If the CJEU has followed AG Szpunar in his conclusion that such an arrangement impairs the right of the performer (as guaranteed by various European directives) to consent to the use of his rights and the right to receive fair remuneration for doing so, then that judgment would also apply to authors. What would that mean for employer's copyright in the Netherlands?

Employer's copyright law in the Netherlands

Section 7 of the Dutch Copyright Act ('DCA') reads as follows:

> Where labour which is carried out in the service of another consists of creating certain literary, scientific or artistic works, the person in whose service those works were created is considered to be author unless the parties have agreed otherwise.

Under this article, the employer is deemed to be the creator (author) of the works created by employees in the course of their employment. Section 7 thus entails a so-called 'fictitious authorship' of the employer. The article does not designate the employee (the natural person who actually creates the works) as the author. By designating the employer directly as the author, a transfer of rights is no longer necessary.

The NOB case concerns the admissibility of a compulsory transfer of rights. The figure of fictitious authorship as set out in Section 7 DCA is therefore not directly at issue in this case. Nevertheless, if the CJEU would rule that a compulsory transfer of neighbouring rights is contrary to European law (as Szpunar concludes), then this will raise the question of how such a ruling relates to a provision such as Section 7 DCA, pursuant to which the employer is directly designated as the author, and not the actual author who creates the work. Moreover, Section 7 does not provide for an obligation for the employer to pay fair compensation to the employee specifically in return for the copyright (the employee is of course entitled to wages).

Unlike the RD, Section 7 DCA allows parties to contractually deviate from the main rule (the employer is author) ("*unless the parties have agreed otherwise*"). Also, the extent of the remuneration is not stipulated in Section 7 DCA, and can therefore be taken into account when determining the salary (either individually or through collective bargaining).[11] The Belgian regulation that is the subject of the NOB case is different: the RD provides for a compulsory transfer in exchange for a fixed lump-sum compensation, while Section 7 provides for a non-compulsory arrangement that does not prescribe

[7] These include Directive 2001/29 (Copyright Directive), Directive 2006/115 (Rental and Lending Rights Directive) and Directive 2019/790 (DSM Directive).
[8] Par. 32 conclusion Szpunar.
[9] Par. 33 conclusion Szpunar.
[10] Par. 34 conclusion Szpunar.
[11] The proposal currently pending before the Senate for the Strengthening copyright contract law Act (Parliamentary Paper number 36536) also provides for a regulation whereby a collectively agreed remuneration is deemed to be fair compensation within the meaning of the DCA.

the size of the compensation.[12] It is also relevant that in the case *Luksan/Van der Let*, the CJEU ruled earlier in the context of film works that a rebuttable presumption of transfer (to the producer) is permissible.[13] In addition, the 2007 directive harmonising the duration of copyright, for example, assumes that member states may designate a legal person as the rightholder[14] while the directives on databases and computer programs allow or even prescribe employer's copyright.[15]

Although the CJEU in the NOB case does not have to give a ruling on 'fictitious authorship' as such, the ruling could nevertheless lead to a discussion on the validity of Section 7 DCA going forward.

If the Dutch legislator wants to settle the debate on the validity of Section 7 DCA, the obvious solution would be to change the employer's fictitious authorship into a rebuttable presumption of transfer (in line with *Luksan/Van der Let*), for which the employer would owe the employee fair compensation. Section 7 DCA would then possibly look like this:

> Section 7(1): Where labour which is carried out in the service of another consists of creating certain literary, scientific or artistic works then, unless the parties have agreed otherwise, *the copyright to those works shall be deemed to be transferred in full to the person in whose service those works were created.*
>
> Section 7(2): *Regardless of the method of transfer, the person in whose service the works were created shall owe the author fair compensation for the transfer of rights and the exploitation of the works. Fair remuneration shall [however] be presumed to be included in the author's wages.*

By doing so, the legislator would put beyond doubt that the employer's copyright provided for by Section 7 DCA is based on a rebuttable presumption of transfer and that the actual creator of the work is paid via its salary. Of course, both the freedom to agree otherwise and the possibility to determine the salary level through (individual or collective) negotiations should remain intact.

Section 8 DCA ('disclosure copyright')

The Netherlands has no "client copyright": there is no provision in the DCA under which the client of a work commissioned by him is deemed to be the author.[16] There is however Section 8 DCA, which stipulates that works published by a public institution, association, foundation or company without naming a natural person as the author belong to the disclosing entity.[17] Section 8 DCA is particularly relevant for the publication of works made by external anonymous contractors (such as copywriters,

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[12] J.J.C. Kabel, 'The significance of the Luksan/Van der Let judgment for Dutch copyright law', *AMI* 2012/5, p. 200-201, concludes that the fact that Section 7 DCA is of regulatory law makes this provision "Union-proof".
[13] ECJ EU 9 February 2012, C-277/10, ECLI:EU:C:2012:65. Interestingly, Szpunar's opinion in the NOB case does not mention this judgment at all. A possible reason for this could be that the *Luksan/Van der Let* case relates to the special position of the film producer.
[14] Directive 2007/116 (Duration Directive), Article 1(4): "Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply".
[15] Article 4 Database Directive and Articles 2 and 3 Software Directive. Article 2(3) Software Directive reads as follows: "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract."
[16] Like the *work-for-hire* concept, as it is known in US law.
[17] Unless it is proved that such disclosure was unlawful.

translators and advertising agencies). Although Section 8 DCA is, like Section 7, not mandatory (i.e. parties can agree otherwise), we think there is a good chance that the outcome of the NOB case could give rise to the same discussion as with regard to Section 7 DCA.

Client/employer design copyright (BCIP)

Section 3.8 (1) BCIP stipulates that the employer of an employee who has designed a design in the course of his employment is considered the designer (and thus the rightholder) of that design. Pursuant to section 3.8 (2) BCIP, the client who has a design produced on commission is considered the designer. In both cases, it is possible to deviate from this main rule ("*unless otherwise agreed*").

The outcome of the NOB case is irrelevant to the validity of Section 3.8 BCIP.[18] This however cannot be said for Section 3.29 BCIP. This article says that when a design is designed under the circumstances mentioned in Section 3.8 BCIP, the copyright to that design also belongs to the employer or client. Unlike 3.8, Section 3.29 BCIP does not provide for the possibility to deviate from the main rule. Should the CJEU follow Szpunar's opinion, Section 3.29 should at least include a derogation possibility and a rebuttable presumption of transfer:

> Where a design is created in the circumstances referred to in Article 3.8, the copyright relating to the design shall*, unless otherwise agreed, be deemed to have been transferred in full to the person in whose service or on whose instructions said design has been produced*.

Conclusions and recommendations

As explained in this article, the outcome of the NOB case will give further fuel to the discussion on the validity of the arrangements of Sections 7 and 8 of the DCA in light of European law. The same applies to Section 3.29 BCIP. The legislator could make changes to these provisions to offset the effects of the NOB case, but that will surely take time. In the meantime, it is advisable to include clear provisions providing for an effective transfer of rights in agreements with both employees and contractors alike. Such transfer should preferably not be limited to copyrights, but include all IP rights that may be created in the context of the performance of the agreement. After all, a contractual transfer of rights is allowed and, regardless of the outcome of the NOB case, not inherently unreasonable (moreover, patent law and neighbouring law also have arrangements under which the employer is granted exploitation rights. While these arrangements are set up differently, their purpose is essentially the same).[19] By way of illustration, such an arrangement as may be included in the employment contract is shown below, followed by a brief explanation:[20]

IP clause employment contract

1. Employee expressly acknowledges that all intellectual property rights, including but not limited to copyrights, patent rights, trademark rights, design rights and database rights, and all other intellectual property or similar rights vested in works or other products or performances protected by these rights that he creates, develops or co-develops in the

[18] Incidentally, in European design law there seems to be no room for a client design right such as is currently possible on the basis of Article 3.8(2) BCIP. Only the employer is designated as the rightholder with regard to designs designed by employees. See Article 11(3) of Design Directive 2024/2823.
[19] Section 12(6) Patents Act, Section 3 Neighbouring Rights Act.
[20] We leave open the question of whether this provision should be regulated individually or in a collective agreement. From the perspective of IP law, the proposed clause results in a valid assignment. Incidentally, in addition to our proposed provision, the agreement should also provide for a provision that has the necessary confidentiality obligations for the employee or contractor.

course of his employment for Employer in the performance of his duties or using Employer's resources, shall vest in Employer by operation of law.

2. To the extent that any such intellectual property rights do not accrue to Employer by operation of law, Employee hereby assigns such rights to Employer in advance, which assignment is hereby accepted by Employer. Upon request, Employee will provide all necessary cooperation to Employer to (further) formalise and/or register the transfer of these rights, including the signing of documents.

3. The parties agree that the fair compensation referred to in the applicable laws and regulations shall be deemed to be included in the salary to be paid to Employee.

4. Employee hereby waives, to the extent permitted by law, any rights to attribution and moral rights in respect of the works, products or performances developed by him in the course of his employment.

Explanation

In the first paragraph of the provision set out above, the parties confirm that all relevant IP rights accrue to the employer, as is also the legislator's starting point. To the extent that this would not be the case, the second paragraph provides for an effective transfer of rights: under Dutch law, this is a valid transfer without the need for additional documents to be signed. Nevertheless for further assurance, the employee must cooperate with the employer to the extent that further formalities would be necessary. The third paragraph states that the fair compensation is part of the salary. To the extent allowed, employee waives his moral rights in paragraph 4.