

## Dies Irae at the Belgian National Orchestra: the Brussels Court of Appeal rules on musicians' neighbouring rights



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The health crisis has not eased the tensions between the management and the trade unions of the Belgian National Orchestra (“BNO”). The pandemic has even caused an additional outbreak of ‘fever’, which even a Brussels Court of Appeal ruling on 7 May 2021 will probably not be enough to ‘cure’... At issue is the fate of musicians' rights to reproductions and broadcasts of their performances.

### **The dilemma of orchestras during a health crisis**

In Belgium, as in many other countries, the COVID-19 pandemic has led to a ‘freeze’ in public musical performances. In this context, several ensembles have been forced to turn to new sources of funding, such as streaming. Others, because of their status as public interest organisations, have chosen to broadcast concerts via the internet for non-commercial purposes, without any form of remuneration, with the sole aim of complying with their management contract and preserving contact with their audience.

### **Performers’ rights in the firing-line**

It is well-known that composers enjoy copyright over their works (provided they are original). On the international scene, authors’ rights are based on the Berne Convention of 1886 for the Protection of Literary and Artistic Works. A convention for which composers such as Giuseppe Verdi campaigned hard.

What is less well-known among the public at large is that performers also benefit from similar rights, called “rights related to copyright” or “neighbouring rights”. These were enshrined in the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, as well as in Council Directive (EEC) No 92/100 of 19 November 1992 on rental right and lending right and on certain rights related to copyright (since codified by

Directive 2006/115/EC of 12 December 2005). In Belgium, neighbouring rights were first granted to performers under a Law of 30 June 1994 (“1994 Law”). These various texts are based on the recognition that the economic value of a work does not depend solely on its author, but also on those who perform it. It is in the light of this observation that the legislators wanted to guarantee performers fair remuneration in the event of public communication of their performances by the new mass media that appeared at that time.

Under these neighbouring rights, performers enjoy, like authors themselves, exclusive rights - in particular, the right to authorise or prohibit the reproduction and communication to the public of their performances. The right of reproduction includes not only the performers’ right to control fixations (on a sound or audiovisual medium) of their unfixed performances, in any form, whether direct (from a live performance) or indirect (from a radio broadcast), temporary or permanent, in whole or in part, but also the right to control the reproduction of fixations of their performances. The right of communication to the public includes, amongst other things, the right to authorise or prohibit the broadcasting and cable retransmission of a performer's performance.

### **Neighbourhood quarrels**

Within the BNO, since the 1994 Law came into force, the exploitation of neighbouring rights has always been negotiated on a case-by-case basis. Despite several attempts, no collective agreement has been reached. The arrival of new management in 2016 only exacerbated tensions with the unions. Faced with the stalemate, the board of directors unilaterally decided in April 2020 to allocate a lump sum of €600 to the orchestra's musicians for neighbouring rights, “as a provisional measure”. A decision, imposed *manu militari*, that did not please everyone...

From then on, the management assumed the right to freely broadcast the musicians' performances. On 7 May 2020, it decided to stream a Haenchen/Vondracek/Bruckner/Brahms concert recorded on 6 December 2019 on the BNO's YouTube channel and Facebook page. On 13 June 2020, it did the same for the chamber music concert “Operas and Dances in Southern Europe” recorded the day before, authorising a third party, BOZAR, to broadcast it on its own website. A week later, it was the turn of a symphonic music concert recorded on 20 June 2020 to be broadcast on the platforms of the BNO and BOZAR, as well as on the websites of two Belgian broadcasting organisations. The same happened with another chamber music concert on 26 June 2020.

For 32 of the 79 members of the orchestra, this was the ‘final straw’: they summoned the BNO before the President of the Brussels Court of First Instance. A judgment was handed down on 7 August 2020, which found in favour of the musicians and ordered the BNO to stop streaming the disputed concerts on the internet. The BNO appealed... and lost. In a judgment of 7 May 2021, which has left nothing to chance, the Brussels Court of Appeal has confirmed, in substance, the first judgment.

First, the Court has noted that there was no agreement between the parties regarding the

continued streaming of the audiovisual recordings in which the orchestra's musicians participated. They had only authorised streaming of the disputed concerts on the evening of the recording. The BNO claimed that a provisional agreement had been in force for many years without the slightest objection from the trade unions and the musicians. However, Article XI.205, § 3 of the Belgian Code of Economic Law stipulates that vis-à-vis performers "all contracts must be proven in writing". In this case, such written proof was missing.

The Court has also stressed that the orchestra's musicians are only performers of a sound work (a score) and not of an audiovisual work. Therefore, it has refused to apply Article XI.206 of the Code of Economic Law, under which the performers of an audiovisual work are presumed to have assigned their neighbouring rights to the producer of this work, namely the BNO. This legal presumption, according to the Court, does not apply to audiovisual recordings of concerts. Moreover, the production of audiovisual works is not part of the BNO's mission.

The BNO also unsuccessfully claimed to have a statutory authorisation to use the musicians' performances (a so-called "compulsory licence") under Article XI.212 of the Code of Economic Law. This provision states that, in certain cases, performers cannot object to the broadcasting or to the communication to the public of their performances. However, this only applies when those performances have been fixed on a phonogram and the broadcasting or public retransmission has taken place "lawfully". In this case, the performances in question had neither been fixed on a phonogram nor reproduced with the musicians' permission prior to the streaming of the concerts.

### **Abuse of the law?**

In desperation, the BNO also argued that, even if the musicians were entitled to object to the streaming of the disputed concerts, such an objection constituted an abuse of rights in the current context of the health crisis. In its view, the continued broadcasting of the musicians' performances did not harm their interests since, pending a regulatory initiative, a sum of €600 (which was higher than the amounts paid to artists in other Belgian philharmonic orchestras) had been paid to them by way of remuneration for their neighbouring rights. According to the BNO, a ban on broadcasting the orchestra's performances was even likely to harm the musicians, since such broadcasting entitles them to receive a fair remuneration from collecting rights societies.

This allegedly explained why less than half of the orchestra's members had taken part in the legal action. On the other hand, a ban on broadcasting the disputed concerts during the lockdown period was allegedly likely to cause significant harm to the BNO: it made it impossible for it to preserve the agreements concluded with third-party broadcasting organisations and to respect its management contract, which obliges it to maintain the programming of concerts. The BNO emphasised, in passing, that it did not itself receive any remuneration from these broadcasts.

These arguments also did not convince the Court. The Court emphasised that the BNO was well-aware that it did not have the necessary authorisations from the musicians; so, its decision to proceed with the unauthorised exploitation of their performances showed its desire to engage in a

show of force in the context of a conflict that was well-known to the various parties involved.

### **No ‘judgment of Solomon’**

The Court concluded that the law in this case was on the performers’ side. Not content with confirming the contested decision of the Court of First Instance, in that it had ordered the cessation of all streaming of the disputed concerts, on any platform whatsoever, the Court also ordered the cessation of the broadcasting “of any current and future fixation and any exploitation of the sound and audiovisual fixations of the public or private concerts of the BNO musicians by any means of communication to the public unless the musicians give their authorisation.” However, the Court has wisely limited the injunction to fixations that do not benefit from the legal exceptions and limitations set out in Article XI.217 of the Code of Economic Law, thus reserving, in particular, the broadcasting of short fragments, for information purposes, on the occasion of reports on current events.

Correctly reasoned, the 7 May 2021 judgment is not surprising to specialists in copyright and related rights. Nevertheless, in practice, it could seriously hamper the day-to-day management of the activities of orchestras that are struggling to reach an agreement with their members on the remuneration for the exploitation of neighbouring rights. In the end, would it not be Apollo, or Euterpe, who would be called to pay the bill?

Therefore, it is to be hoped that this ruling will enable the parties to resume their dialogue and quickly reach an agreement on the terms and conditions for the exploitation of the neighbouring rights of the orchestra's musicians or, failing that, the public authorities will promptly decide to adopt the necessary regulations in order to resolve the situation. In the corridors of the BNO, it is rumoured that a royal decree is being prepared to that effect. While waiting for this possible “Last Judgment”, it is becoming urgent that the concert halls finally reopen!