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Electronic Rights in Belgium and France: *General Association of Professional Journalists of Belgium v. Central Station* (Brussels Court of First Instance, October 16, 1996; Brussels Court of Appeals, October 28, 1997); *Union of French Journalists v. SDV Plurimedia* (Strasbourg Court of Grand Instance, February 3, 1998) Symposium on Electronic Rights in International Perspective

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Electronic Rights in Belgium and France: *General Association of Professional Journalists of Belgium v. Central Station* (Brussels Court of First Instance, October 16, 1996; Brussels Court of Appeals, October 28, 1997); *Union of French Journalists v. SDV Plurimedia* (Strasbourg Court of Grand Instance, February 3, 1998)

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I. BELGIUM

Like many national presses in Europe, the Belgian press divides ideologically. Each daily newspaper represents the views of a political party, or expresses the perspective of a political or religious belief. Newspaper readers therefore tend to select the newspaper that most closely corresponds to their world-view. Ten publishers of Belgian dailies and weeklies formed a consortium, Central Station, to operate a website that would offer a crossection of all the participating periodicals' articles on a variety of subjects. The articles would appear in print in their separate newspapers in the morning, but would be available that evening on the Central Station website. Fee-paying users could search the website by subject, and could call up one, some, or all of the different newspapers' articles on that subject. While the publishers cooperated with each other to create and maintain the website, they neither sought permission from the authors of the articles published in the daily print editions, nor offered to pay them for the electronic dissemination of the articles via the website.

The writers therefore sued Central Station for copyright infringement, alleging that neither the employment contracts of employee journalists, nor the individual contracts of freelance contributors, authorized the licensing of their articles to the third-party website. Unlike the U.S. Copyright Act, Belgian copyright law does not contain a works-made-for-hire provision. Employee journalists are the statutory authors of their work, but, under the 1886 Copyright Act that applied to the employee journalists in this case, they are also presumed to have transferred publication rights to the employer periodicals.[1] (The 1994 Belgian Copyright Act requires a written contract of transfer.[2]) On the other hand, that presumption of transfer does not cover *all* publication rights; the writers retain those publication rights that fall outside the scope of the employment relationship. In the *Central Station* case, therefore, the Belgian courts had first to determine whether the presumed transfer of rights from the

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1. *See* Copyright Act of March 22, 1886 (Montieur Belge, March 26, 1886) (Belg.). For an English translation, see UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, Beligium (1992).

2. Copyright Act of June 30, 1994 (Moniteur Belge, July 27, 1994) (Belg.). For an English translation, see 1 INDUSTRIAL PROPERTY & COPYRIGHT (WIPO Monthly Review) Text 1-01 (1995).

employee journalists extended to the employer's republication of the articles in a *third-party* website/database that combined articles from many different newspapers. With respect to the freelance journalists, the question was whether the actual contracts passed with the individual writers could be interpreted to cover the hiring party's licensing of the articles to the third-party website/database.

The first level court held, with respect to the freelance journalists, that the 1994 Copyright law applied to the freelance authors, and not only required authors' grants of copyright to be in writing, but further directed that the contract was to be narrowly interpreted regarding both the scope of the grant of copyright and the means of exploitation covered. Thus, Central Station would have had to obtain the written accord of the freelance authors to the inclusion of their articles on the website. Central Station could not produce any such writings, and therefore conceded that it would no longer disseminate freelance-written articles unless the authors gave their consent to the participating newspapers to license the website dissemination of articles initially published in the newspapers.

Regarding the employee authors, the first level court ruled that the implicit transfer of rights to the newspapers resulting from the employment relationship would extend to Central Station if the dissemination of the articles on the Internet through the intermediary of Central Station "corresponds strictly to the activity of the publishers with whom the journalists have contracted, if this distribution is the natural complement of the written press . . ." The court found important differences between the print and website versions of the publications. First, the website's public was far more international than the print publications'. Second, the Central Station system made it possible to select articles by subject matter, combining a variety of newspapers, while the context of the print publication was limited to articles sharing the political and social tendencies of the print publisher. Moreover, Central Station was not set up to replace print journals, but rather to offer a selective distribution of the newspapers' contents. Because the numerous differences between the print journals and the website were not limited to changes introduced solely by the medium transfer from hard copy to digital, the court held that the authorization from the newspapers to Central Station to redisseminate articles on the website exceeded the scope of the implicit grant of rights from the journalists to their employers.

The Brussels Court of Appeals affirmed, but on somewhat different grounds. The appeal concerned only the respective rights of the newspapers and the employee journalists; the issue of the freelancers having apparently dropped out after the newspapers' concession before the court of first instance. The appellate court agreed with the court below that the resolution turned on an appreciation of the scope of the implied license from the journalists. Because the contracts between the journalists and the publishers appear to have been oral agreements, no written contracts having been produced, the court concluded that the contractual relationship between the journalists and the publishers was *intuitu personae*, a civil law concept meaning that the parties had contracted obligations specifically with and toward each other; these obligations therefore were unassignable to third parties. (For an American analogue, imagine that Alice Author had signed a book publishing contract with Prestige Publisher, and had succeeded in persuading Prestige to revise Prestige's boiler plate contract clause that makes the author's obligation to write the book a personal obligation, but permits the

publisher to assign its obligation to publish to whomever it chooses. The revision makes the publisher's obligation to publish unassignable, except as part of Prestige's entire business. Alice and Prestige now have mutual personal obligations, and Prestige may not authorize Pulp Publishers to edit and disseminate Alice's manuscript under the Pulp imprint.)

The appellate court, like the first instance court, emphasized the ideological, political, moral and social differences between newspapers. But where the first court highlighted these differences as part of a demonstration that the Central Station website was not the same *product* as the print journals, the appellate court stressed the differences in order to show that Central Station did not involve the same *party* as that with whom the journalists had contracted. The appellate court ruled that in the absence of a written agreement, the employee author can only have granted to the publisher the right to "set forth the journalist's ideas typographically, ideas that the journalist has translated in his articles for a very specific publication in one determined newspaper or magazine." The article thus is destined for the specific public of a particular periodical, not for the largest possible public that might be interested in the information contained within the article. The court held that the author of the article is deemed to have granted only those rights necessary to bring the article to the newspaper's specific public. When the publisher grants to a third party the right to bring the article before a larger public, the publisher has exceeded the scope of its personal contract with the journalist.

Under either the appellate court's or the first instance court's approach, the existence of an employment agreement is insufficient in itself to convey the electronic rights at issue in the *Central Station* controversy. By contrast, had any of the publishers sought simply to issue a digital version of that publisher's newspaper, for example, on CD ROM, the courts' reasoning may well have condoned that use. In that case, no other publishers would have been involved, and, assuming the CD ROM reproduced the entirety of the newspapers, the product would have been a simple medium transformation rather than a new and different agglomeration of newspapers and features. On the other hand, it is possible that a different public would buy the CD ROM product than purchased the daily papers, and that the Belgian courts would therefore consider the CD ROM product to be a different publication requiring a new authorization.

II. FRANCE

In the French action, print and television journalists sought a preliminary injunction (*ordonnance en référé*) against a third-party website that the employers, a newspaper publisher and a television broadcaster, had licensed to transmit material from the newspaper and from a local television news program. The employers neither sought the journalists' permission, nor compensated them for the website transmissions. Although the employers were the copyright holders of the collective print work and of the audiovisual work, both the copyright law and the employees' collective bargaining agreements restrained the employers' prerogatives. Principles of labor law required the journalists' express consent when an article is published in more than one journal, the court declared; these principles apply to reproduction of articles on

the Internet. Moreover, the court continued, the digital communication results in a distinct product. As a matter of copyright law, the court stated, a contract will not be interpreted to cover modes of exploitation that were unknown at the time of contracting unless the contract expressly covers new exploitations; even if the contract does, it must also provide for a royalty to the authors in the event of a new exploitation.[3] Without those provisions, the employees' contracts do not transfer rights to new modes of exploitation; if the employer never received those rights, the employer cannot in turn transfer them to a third-party website operator. The court concluded that Plurimedia, the website operator, should have verified that the publisher and the broadcaster in fact had the rights that they purported to grant to Plurimedia.

The Strasbourg court's decision breaks no new legal ground. Indeed, a French legal commentator writing in April 1997 on the Belgian first instance decision, asserted that the Belgian decision "merits approval not only as a matter of Belgian law, but also in regard to French law, since by virtue of the combination of the Labor law code and the Intellectual property code, the publisher may not, in the absence of a written authorization specifying the conditions under which a reproduction is permitted, republish an article by an employee journalist."[4] Some French publishers, implicitly conceding the protection French copyright law currently affords authors' rights to control or receive compensation for new modes of exploitation, reacted to the Strasbourg court's decision by urging amendment of the French law "in the direction of American-style copyright."[5] A comparison of the national laws and decisions to date concerning electronic rights does indeed point up the greater publisher-friendliness of U.S. copyright law. Because much of that solicitude for publisher-grantees is peculiar to the U.S. copyright act, it is worth considering in a separate Comment what are the international implications of the disparities in copyright regimes.

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3. *See* Code de Propriété Intellectuelle [C.P.I.] art. L. 131-6 (Fr.).

4. Caroline Ganz, *Les journalistes cèdent-ils automatiquement l'exploitation de leurs articles sur Internet à leur employeur?* 74 REVUE DU DROIT DE LA PROPRIÉTÉ INTELLECTUELLE 16 (April 1997).

5. Yves-Marie Labé, *La presse s'interroge sur les droits d'auteur liés aux médias électroniques*, LE MONDE, Feb. 6, 1998, at 20, col.1.