

KUNSTVALLEI:
USUFRUCTUARY RIGHT TO DATA

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Kunstvallei: Usufructuary Right to Data

It is clear that in the modern world, personal and other data are of great importance and this fact becomes relevant in ever more sections of society. Smaller companies and institutions as well as the giants of this world now embrace the importance of personal and other data. However, new legislation has not yet caught up with this trend, which results in grey areas around the question of who exactly owns the right to particular personal data.

This question is central to this article, which focuses on the world of the artist. A brief summary of the issues at stake can be formulated as follows. An artist - who may be working as part of a group - creates a particular production and performs it in theatres, playhouses or on the concert stage. These performances are attended by an audience who will have bought tickets at the relevant venue. The personal details and data which the audience members provide to the venue in the process are saved by the venue. The artists do not have access to and are not able to use these data, although it would commercially benefit them to do so and they may in fact have a right to such data.

Aim of the Kunstvallei Project

This is the reasoning behind the Kunstvallei Project. The project is based on the premise that the (performing) artists have - and should have - an equal interest in the personal and other data 'harvested' by the venues during ticket sales. The present situation has arisen historically, because in the past, such personal and other data were not regarded as having value in their own right. Therefore, the data are often saved in the venue systems without the artists ever being able to view them. Through the Kunstvallei Project the artist is able to draw in an audience that is genuinely interested in the performances by that particular artist, based on preferences demonstrated by attendance at previous performances. The project is based not only on the copyright act, but also on the much neglected moral rights, which will be discussed below.

From a technical perspective, the Kunstvallei Project is a large database, where each artist has their own ISNI Code¹ (a unique ID). The venues and producers are also allocated ISNI Codes. All users will use their code to keep information about new performances permanently up to date and to make it available to others (including producers, journalists and the public). A more detailed explanation of the workings of the Kunstvallei Project is found in an article by Mr M.J. Trapman, who leads the Kunstvallei Project.²

¹ The ISNI Code is an ISO certificated code (comparable to ISBN): <http://www.isni.org>.

² M.J. Trapman, *Kunstvallei over het voetlicht. Naar een groter publiek*, 2016.

Copyright and related rights

First, it is important to outline the current copyright law. In the Netherlands, copyright is based on two principles: the principle of fairness and that of social utility.³ Copyright revolves around the concept of a "work". A "work" protected by copyright could be anything and this article will not aim to present an exhaustive list. A "work" can be many things, including a painting, a book or a song. Performances given by artists in theatres and playhouses are no doubt "works" as well, protected by copyright.⁴ Copyright arises automatically when a work is created - it requires no registration. The person creating the work is the "creator", itself a pivotal and important concept within copyright law. Copyright expires 70 years after the death of the creator, from the first day of January following the year in which the creator has died.⁵ In principle, the creator is the only person able to exercise the rights arising from copyright.

Copyright has two aspects.

On the one hand, there are **economic rights**, that is the right to exploit the work (commercially) and on the other hand there are **personality rights**, that is the right to be recorded as the creator at, in, in relation to or on the work.

Economic rights

Copyright is the exclusive right of the creator of a work that is protected by copyright, to publish and copy the work.⁶ These are referred to as the economic rights of the copyright. This article is limited to the publishing concept, which briefly means that the creator of a work may perform the work on stage and so make it available to the audience.⁷

Economic rights are transferable and they are in fact often transferred.⁸ In practice, in the case of performing art, artists are usually dependent on theatres or playhouses in order to show their work protected by copyright, i.e. the performance, to their audience and to exercise their right to publish in this way. Artists often transfer their economic rights to producers in order to increase the performances.

These are important points to take into account.

³ Spoor / Verkade / Visser 2005, § 1.9, p. 10.

⁴ Article 10(1)(2,3,4) and (5) Copyright Act. A work can be protected by copyright if the work may be perceived by other people, has an original character and the personal stamp of the creator. The original character and personal stamp may not arise from a technical effect:

HR 16 June 2006, *NJ* 2006, 585 (*Lancôme/Kecofa*).

⁵ Art 37 Copyright Act.

⁶ Articles 1, 12 and 13 Copyright Act.

⁷ HR 27 January 1995, *NJ* 1995, 669.

⁸ Article 2 Copyright Act

Personality rights

Besides the economic rights described above, Article 25 of the Copyright Act also grants the creator personality rights (*droit moral*).⁹ These confer on the creator certain rights to protect the integrity of the work and the relationship between the creator and the work.¹⁰ These personality rights continue to exist even when the copyright (the economic rights) itself has been transferred. Personality rights are not transferable, because the work will always remain the creation of the creator, contributing to the artist's reputation.¹¹ Personality rights consist of the following three elements:¹²

- i. the right to be acknowledged by name or by another indication as the creator of the work (*droit de proclamer la paternité de l'oeuvre*);¹³
- ii. the right to resist alteration of the work by others and publication in an inappropriate form or context (*droit au respect*)¹⁴;
- iii. the right to make alterations in the work at the artist's own discretion (*droit de repentir*).¹⁵

These moral rights have been recognised globally:

they have been included in Section 6^b of the Berne Convention¹⁶:

"1. Independent of the economic rights and even after transfer of these rights, the creator retains the right to claim authorship of the work and to resist any deformation, mutilation or other alteration of the work or any other change thereto which might damage the creator's honour or good name. (...)"

Section 5 of the Beijing Treaty on Audiovisual Performances contains the moral rights:

(1) Independent of the economic rights and even after transfer of these rights, the performing artists has the following rights concerning his or her live performances or performances recorded in audiovisual media:

- i) the right to be acknowledged as the performer of the performances, except if it is necessary to omit this due to the way in which the performance is used; and*
- ii) to resist any deformation, mutilation or other alteration of the artist's performances which might damage the artist's reputation, taking into the account the nature of audiovisual recordings.*

The Beijing Treaty must here be mentioned not only because copyright plays a central role, but also because related rights play a role. These are the rights to protect the performances of performing artists. This article is not intended to give a detailed explanation of these rights.

⁹ Article 25 of the Copyright Act does not contain an exhaustive list of these rights, HR 1 July 1985, *NJ 1986,682 (Frenkel/KRO)*.

¹⁰ Gielen et al. 2011, p. 459.

¹¹ Gielen et al. 2011, p. 476.

¹² Gielen et al. 2011, p. 475.

¹³ A concrete example would be a press photo printed in a newspaper, where the name of the photographer is printed underneath the photo.

¹⁴ A concrete example would be art installed in a public area, where the council wants to demolish part of the work of art.

¹⁵ A concrete example would be if the work was used in such a way by another person that an incorrect version of the original work results.

¹⁶ Berne Convention for the Protection of Literary and Artistic Works, 9th September 1886. Such a provision is also part of Section 5 of the Beijing Treaty on Audiovisual Performances.

The rights of performing artists are related to copyright (also referred to as 'neighbouring rights'). Although performing artists produce a creative performance, that performance is not deemed capable of giving rise to copyright. When an artist performs their own work, they can appeal to the Copyright Act (as creator of the work) and to the Related Rights Act, hereafter: "WNR" (as performing artist). The Beijing Treaty (referred to above) is applicable to such performing artists.

The object of protection on the basis of the WNR is the activity carried out by the performing artist as such.¹⁷ This is assumed to be activity of an artistic nature showing personal input.¹⁸ The right arises at the time that the work is performed by the performing artist. On having arisen, the right is granted to the performing artist themselves.

The performing artist has a number of rights. To a large extent, the economic rights correspond to copyright,¹⁹ in that immaterial publication is of central importance.²⁰ The WNR grants moral or personality rights only to the performing artists.²¹ To a large extent, these rights correspond to the personality rights as they exist in copyright.²² The performing artist is entitled to resist publication of the performance without acknowledgement by name or other indication as the performing artist, unless this would be unreasonable.²³ As an extension to the right of acknowledgement by name, the law grants the performing artist the right to resist publication of the performance under a different name or indication.²⁴

This concludes the brief overview of copyright and the WNR. Let us now return to the situation referred to in the introduction to this article.

The theatres/playhouses and ticket agencies actually sell the tickets for the artists so that they can show their work protected by copyright to the public.

¹⁷ Article 1 WNR.

¹⁸ Spoor/Verkade/Visser 2005, § 17.9, p. 650-651.

¹⁹ Art. 2 WNR; Gielen et al. 2011, p. 542.

²⁰ Article 2(1)(d) WNR.

²¹ Article 5 WNR.

²² Gielen et al. 2011, p. 545; Article 25 Copyright Act

²³ Article 5(1)(a) WNR.

²⁴ Article 5(1)(b) WNR.

In practice personality rights are often ignored

Despite the fact that the personality rights (moral rights) are essential for the existence or continuation of copyright, they are often ignored and neglected. Often, the reason given is that acknowledging all creators would take too much time, for instance in the theatre brochures or even in the programmes. This means that the audience does not find out about the creator of the performances they are watching. In turn, the creator does not get to know their audience.

The Kunstvallei Project is intended to remove these practical objections and to allow the artists to exercise their personality rights by linking their ISNI Code to the Code of a work and subsequently to the code of any performance of the work. The practical objections that have often been raised to the artist being able to exercise their personality rights can be removed by technology.

Personal data and other data as an asset

Customers buy tickets from the theatres/playhouses or ticket agencies for the performance by the performing artist. When ordering the tickets, the customer enters personal details (including their name, address and date of birth). The ordering process also creates data about the type of performances a customer attends (such as cabaret, dance, drama, musicals) and the content of the performance (e.g. classical ballet, modern dance).

In other words, two types of data are 'harvested' that are of interest. On the one hand there are the personal details and on the other hand there are data about the performance, in other words, the preferences of the audience members.

Personal details

In the Netherlands, the Personal Data Protection Act is in force, hereafter referred to as the "WBP", which lays down legal guarantees concerning the protection of personal data. This law protects the individual against damage to their honour and good name and against invasion of privacy.²⁵ This Act implements the Constitution and conventions on human rights, which are founded on the right to respect of privacy and protection of privacy.²⁶

According to the WBP, personal data is any data concerning an identified or identifiable natural person.²⁷ The personal data provided by audience members when ordering tickets are directly identifiable data, as they consist of a name and address and often a date of birth.²⁸

²⁵ MvT, kamerstuk 25892, nr. 3, "*Regels inzake bescherming van persoonsgegevens (Wet bescherming persoonsgegevens)*".

²⁶ Article 10 of the Dutch Constitution; Article 8 of the European Convention on Human Rights.

²⁷ Article 1 WBP.

²⁸ MvT kamerstuk 25892, nr. 3, "*Regels inzake bescherming van persoonsgegevens (Wet bescherming persoonsgegevens)*".

Besides the personal data, the data about attended performances are also of interest.

Data about attended performances

Artists have an interest in knowing which audiences attend which kinds of performances, from a commercial perspective, at the very least. It could be argued that these are also a type of personal data, as they may lead to a natural person and taken together with personal data they may certainly be viewed as sensitive personal data, since the choice of attended performances could point to a person's political leanings, religious background or sexual preferences. As this has not (yet) been tested in court, in this article I shall distinguish these types of data from 'conventional' personal data.

Nowadays, such personal and other data represent economic value, which artists can use to carry out more highly targeted marketing. However, artists and producers rarely have access to these data, in contrast to the theatres/playhouses and ticketing agencies. Thus we can see the artist's interest in these data.

Bearing in mind the Copyright Act, the artist would be able to increase their reputation amongst the public by publishing their work. Using their performances, the artist would be able to communicate more directly with their audience.

The audience members - i.e. people who have bought tickets in the past - could be more easily approached using personalised adverts and suggestions for subsequent performances. It is therefore not only in the interest of the artists, but also of producers and venues, to be able to deploy this publicity when buying/selling new performances.

Later on in this article I shall discuss the legal basis for this idea.

Using personal and other data: three parties

The use of any data other than personal data is not covered by any extensive law. Nor has anything been laid down as to the property rights in such data. In contrast, personal data are provided for thoroughly in the WBP.

The use of personal data for commercial or ideological purposes requires unambiguous permission from the person to whom the data relate (the data subject). The person processing the personal data is referred to as the data controller. The controller may outsource processing of the data to a third party, the data processor.

I would like to apply these legal instruments to the situation in which tickets are sold for attendance at plays, dance performances etc.

The theatres/playhouses

When a customer orders a ticket for a performance, their personal data are stored for the purpose of being able to inform the customer if the performance is cancelled and to 'be able to carry out research in order to offer a personalised service', as is stated in the Privacy Policy of the Stadsschouwburg theatre in Amsterdam (February 2016 version). The Stadsschouwburg theatre in Rotterdam puts it slightly differently in its Privacy Policy (February 2016 version). The data are stored for this reason: "The data you enter on this site will be used to inform you about the Rotterdamse Schouwburg and its partners in the Theater Rotterdam partnership."

From the privacy policies of various theatres/playhouses, it has not been possible to deduce how exactly the personal data will be used - which is not in accordance with the WBP - nor is it clear how they will be used to make tailored offers to the audiences of future performances.

What is interesting is that theatres/playhouses clearly see the commercial importance of informing the public about potential performances, but have not taken any steps to share this information with artists.

It is permissible under the WBP for theatres/playhouses to store the personal data of their audience.

Ticketing agencies

However, tickets for performances are increasingly bought not from venues, but from a broker in the shape of a ticketing agency. Ticketing agencies have developed the systems for internet ticket sales and are expert in doing so. (Small) theatres/playhouses are no longer able to provide this service themselves. Perhaps the venues do not realise that audience data are being shared with ticketing agencies. If that is the case, it is even less likely that audience members themselves realise this. Ticketing agencies, too, use information about the preferences of the audience to produce targeted offers. They do this on the basis of the Terms and Conditions for using their services, which as a member of the public you must accept if you wish to purchase a ticket through them.

The artist

What about the artist? As the creator of works with copyright - the performances - the artist appears to be losing out entirely. The artist is dependent on venues in order to bring a performance to the public, but is then denied access to the personal details of their audience and the valuable data about audience members' preferences.

The question presented by this article is thus as follows: are data about audience members that are collected at the time of ticket purchase part of the income that the artists generate with their performances and if so, do they have usufructuary rights in these data? In other words: What can the creator of a work protected by copyright legally expect from his or her property?

The grounds for the idea that artists have more rights.

If artists, producers and venues wish to claim the right to use their audience members' personal data, then, in accordance with WBP, they must organise themselves into data controllers and data processors of these data, and reach agreement with the public about the use of these data. This means that their organisation must be underpinned by a governance structure that is clear to all parties involved.

The Kunstvallei Project aims to (re)claim the right of artists to the use of the personal data and other such data. Within the framework of the Kunstvallei on-line platform, the personal and other data about involved parties are entered into a system, with their permission and by themselves. None of the involved parties has direct access to the data and (personal) details of others. However, the system is able to link the data and personal details to the offerings of artists from all disciplines, so that targeted offers can be made to involved parties. This in turn means that the artists will enjoy a type of (indirect) joint use of the data and personal details. Importantly, the data subjects themselves are easily able to manage their personal details and data. The general terms and conditions of the project will form the basis of a governance system whereby all users have a say in the rights to the use of data.

For the audience members, this means that they will receive a wider offering, although limited in that it will be focused on personal preference and location. Currently, all personal details and data about the performances are stored in the small databases of theatres/playhouses or ticketing agencies, each individually too small to build up a functional profile of the audience. Therefore the venues do not yet have the tools to filter the offerings meaningfully. Tickets bought at other venues in the past cannot be brought in to inform future offerings.

The project is anticipating possible future legislation.

Current and future legislation

According to current legislation, there is no direct right to the use of personal and other data, as such use is strictly circumscribed by the WBP. Copyright law does not cover direct use of personal and other data, because in copyright law, the concept of the work is central.

Future legislation will no doubt deal with the right to (the use of) personal and other data, now that the economic value of such data is becoming increasingly apparent. For artists, it is important to safeguard these future data and personal details as one of the pillars of continuity of the profession and trade.

Conclusion

The digital world offers many possibilities and opportunities. The fact that personal details and data represent value is a logical consequence. However, there is still a great deal to discover and to regulate, as current legislation contains loopholes. This is unavoidable, because social developments are always ahead of the development of legislation. In conclusion, artists should realise that they themselves have rights and interests in the personal details and data collected from their audience and that the time has arrived to set up a well-organised, fair and transparent system where artists, audiences, venues and producers have access to and can manage the personal details and data which have been shown to be so valuable. ■

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