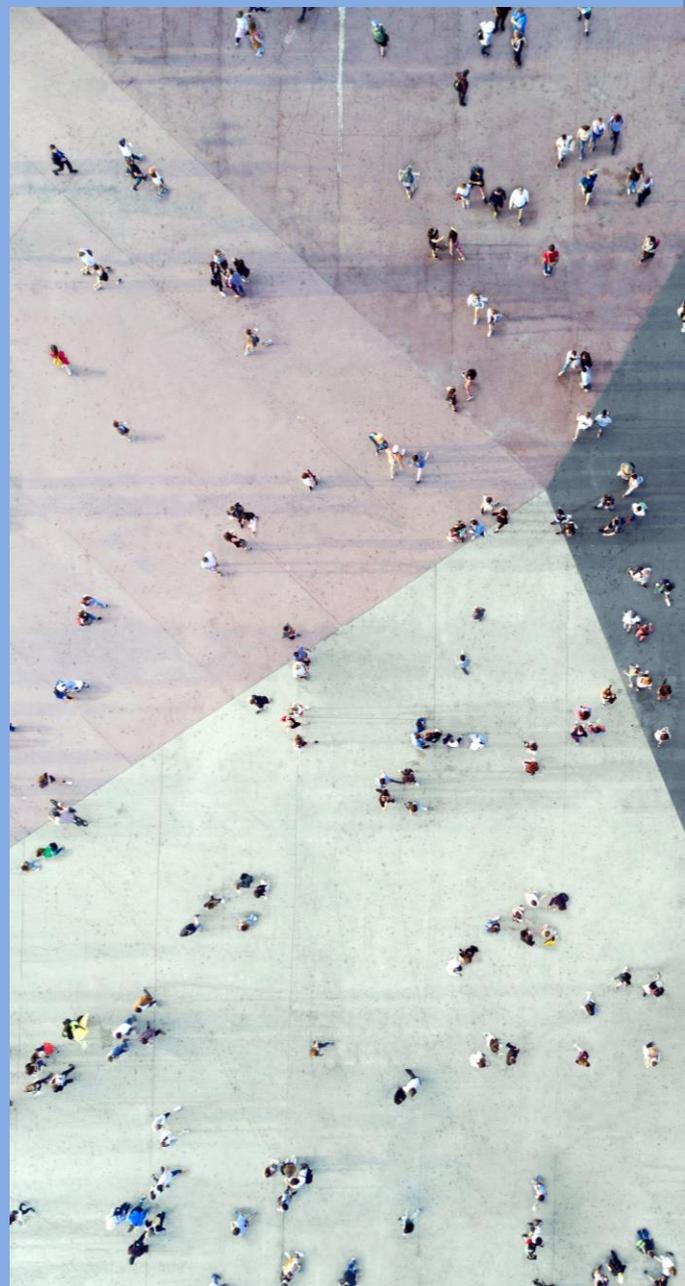


Bird & Bird

Reform of the tax regime for copyright royalties

Client alert

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With effect from 1 January 2023, the Omnibus Law of 26 December 2022 made some remarkable changes to the tax regime for copyright royalties. The IT sector in particular seems to be the scapegoat. The other sectors remain otherwise unaffected, except perhaps a possible limit on the amount that can be paid out as copyright royalties.



General Principles

The tax regime

As before, the new tax regime establishes a 15% rate for copyright income. However, if one uses the copyrights to perform a professional activity, this income - above the recharacterisation thresholds described below - will lose its favourable tax regime and be taxed as professional income at the progressive rate.

Taxation will initially take place by deducting a creditable withholding tax – 15% up to the threshold(s) and 30% above those – by the copyright debtor or the first Belgian intermediary (in the case of foreign copyrights).

Moreover, the effective tax rate is further reduced by the application of flat-rate costs that can be deducted from the gross amount of the income concerned. These flat-rate costs are 50% of the first bracket of €10,000 (indexed amount of €18,720 for tax year 2024) and 25% of the second bracket of €10,000 (i.e., up to €20,000, or the indexed amount of €37,450 for tax year 2024).

Which rights are eligible?

The regime applies to the rights outlined in Title 5 of Book XI of the Economic Law Code (formerly, the 'Copyright Law'), in particular:

- copyright rights relating to an original literary or artistic work (art. XI.165 ELC);
- the neighbouring rights relating to the artist's performances (art. XI.205 ELC);
- statutory or compulsory licences, in particular, the equitable remuneration obtained by the rightholders for situations where the law prohibits them from opposing the reproduction of their works and/or performances (e.g., copy for private use, reprography, public lending, equitable remuneration of neighbouring rights).

The explicit reference to this Title 5 and both articles in the ECL give rise to controversy as to whether or not the IT sector is excluded (see in more detail below).

Who is eligible?

Henceforth, the tax regime is limited to the 'original' rightholder, or his heirs and legatees. Moreover, the 'original' rightholder must avail of an "artwork certificate", if not, he must meet additional special conditions (see below).

Which income qualifies?

Both the income from the transfer of rights ('sales proceeds') and the granting of a licence to it ('royalties') benefit from the favourable regime. Incidentally, this should not be confused with the sales proceeds of the (art) work itself: these remain taxable as professional or miscellaneous income. In order not to disguise such sales as a copyright transfer, there must also be an exploitation purpose in the hands of the transferee (see below).

This qualifying income can be obtained either directly or through the intervention of a recognised copyright levy society (such as SABAM, Playright, Auvibel, SOFAM, etc.). If the income is obtained directly, additional special conditions must still be considered.



Special conditions

Exploitation or actual use

In principle, the parties must have the 'intention' to exploit or actually use the works or performances, in accordance with honest, professional practices, except in the case of an event caused beyond the will of the parties. Thus, non-exploitation or non-use does not automatically lead to exclusion. However, one will have to be able to prove intent upon audit, as well as the fact that the lack of exploitation or use falls within the normal professional use of these rights (e.g., the non-publication of photographs whose copyrights were acquired, due to decisions by the final editors).

Artwork certificate or public exploitation

In principle, an original rightholder should avail of an artwork certificate. This certificate is issued – in the context of an unemployment regime – to an 'art worker' who is professionally active in the creative sector, such as the visual or audio-visual arts, music, literature, theatre, choreography and cartooning.

If the rightholder does not have such a certificate, or in the case of heirs or legatees, the recipients of the income must further specify the manner in which they envisage the exploitation or effective use:

- i either by communication to the public, for public performance or broadcasting,
- ii or by reproduction.

Since these are the only modes of exploitation and the law already provides for an exploitation requirement, one may question the added value of this condition.



In addition, through the parliamentary proceedings, the tax authorities have made it clear that in their view, 'reproduction' is not an alternative to 'communication to the public', but rather a part of it. In other words, there must be communication with the 'general public' at all times. This would *de facto* exclude communications to more private groups (such as employees within a company). This reservation is particularly important in the discussion on software (see below, on the IT sector).



Reduced recharacterisation thresholds

Income above certain thresholds will lose the favourable regime and be taxed as professional income if the copyrights are "used" for the exercise of the professional activity of the income recipient. The new regime provides for three thresholds, which - to be clear - are only relevant if the author or performer uses the copyrights or neighbouring rights for the exercise of his professional activity. In practice, the tax authorities often seem to forget that "obtaining" the copyrights as a result of the professional activity does not mean that the copyrights are also used for the professional activity. Case law reminds them of this from time to time.

Absolute limitation

The absolute threshold amount of €37,500 (indexed to €70,220 for the assessment year 2024) continues to apply unchanged. Up to this amount, the legal presumption of movable income applies in principle.

Relative limitation

However, this absolute limit can be further reduced if the transfer or grant of a licence of copyright and neighbouring rights is accompanied "by a rendered service". In that situation, the threshold amount will be limited to 30% of the total remuneration received, including the remuneration "for the services rendered". However, a grandfathering regime allows a higher percentage during a two-year transition period: for assessment year 2024 (income of 2023), it will be 50% of the total; for assessment year 2025 (income 2024), 40% of the total; and from assessment year 2026 (income of 2025) onwards, 30% of the total. In other words, to the extent that these percentages are exceeded, the recharacterisation into professional income will come into play if the entitlements are used for exercising the professional activity.

To be clear, the new limitation does not apply if the transfer is not accompanied by a service rendered, nor does it apply if the copyrights are acquired subsequently, separately from the initial remuneration, which includes the remuneration for the service rendered. This includes, in particular, remuneration collected through a copyright levy society. These will therefore never be subject to the relative limitation threshold.

Average limitation

Finally, if one has made use copyrights in the four previous taxable periods, the average amount of which exceeds "the absolute limitation threshold" of €37,500 (to be indexed), then the copyrights of the year in question are no longer legally presumed to be "movable income" (even with respect to the part that does not exceed the limitation). Any reclassification into professional income then plays for the whole, without limitation, from the first euro. Thus, if the rights in question are "used for exercising the professional activity of the income recipient", the entire income will be taxed as a professional income.



Transitional regime for the "losers"

For those receiving remuneration that did qualify for application of the old copyright tax regime but does not qualify for the reformed regime any longer, there is a transitional regime of one year (i.e., until the end of 2023).

Under this arrangement, royalties for assessment year 2024 (income of 2023) will still qualify for the favourable tax regime but under a triple restriction:

- i the same requalification thresholds of the new regime apply;
- ii the absolute threshold amount is halved (to €18,750 (to be indexed – or €35,110 for assessment year 2024);
- iii the flat-rate cost deduction brackets are also halved (i.e., 50% on the first bracket of €5,000 (to be indexed – or €9,360 for assessment year 2024) and 25% on the second bracket of €5,000, respectively).

From assessment year 2025 onwards, there will no longer be a transitional arrangement, and the relevant income will be taxable under the ordinary rules.



Special focus on the IT sector

It is no secret that, because of the proliferation of the favourable regime mainly in the IT sector, the Tax Authorities drafted the legal text that excludes software developers. Because of the political disagreement on this within the government, there has been no explicit mention of excluding software developers at any point in drafting the new regime. Nevertheless, each camp defends its view in favour or against this sector - via insinuations in parliamentary works or positions in the press or on social media. One side takes a restrictive interpretation of the text of law, while the other comes with a common law interpretation.

The restrictive interpretation relies first and foremost on the exclusive reference to Title 5, the 'copyright law' (without Title 6, the 'software law'), and the 'literary or artistic work referred to in Article XI.165 of the Economic Law Code' (and thus not a 'literary or artistic work' assimilated to it by Article XI.294 of the ELC). Moreover, if the tax law refers to a certain article in another legislation, it only refers to this notion and not to the broader provisions and interpretations specific to this other legislation. It then becomes, as it were, its own tax concept that differs from the common law meaning. Consequently, software cannot be part of the tax concept.

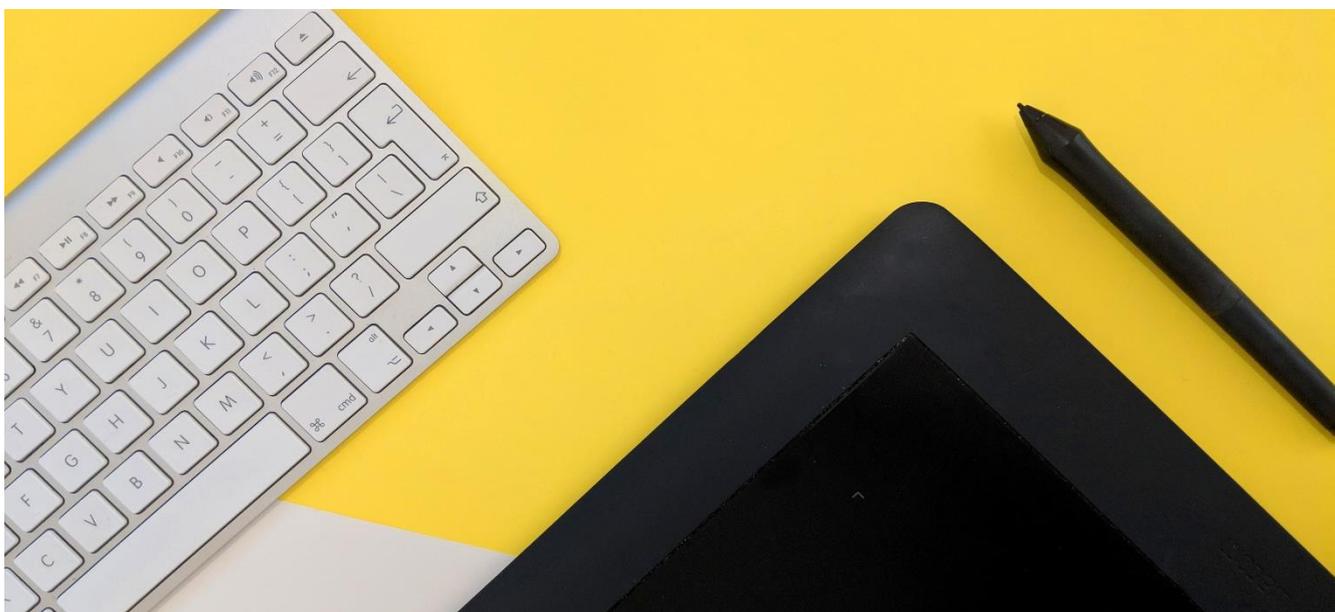
In turn, the common law interpretation relies on the fact that there is only a tax concept if this concept is defined by the tax law itself. If the law refers to a concept in another law, that concept must be understood in its common law meaning (in this case, in its meaning for copyright purposes).

Incidentally, this is in line with the parliamentary preparations that always refer to the interpretation by the European Court of Justice. Since Title 5 (the 'copyright law') also applies (and continues to apply) to software to the extent that Title 6 (the 'software law') does not deviate from it, software is, therefore, part of the qualifying literary or artistic works.

The finance minister first proclaimed that a restrictive interpretation was in order. But under political pressure, he partly retracted his words, referring to common law and European law as interpreted by the Court of Justice, but without explicitly saying that software developers could still benefit from the favourable regime. This, taken together with the refusal of an amendment proposal during the legislative process to explicitly exclude software from the favourable regime, led one of the government parties to proclaim on social media that software developers would, therefore, still be eligible. Through the press, the ruling commission has since informed that they will not issue rulings on software developers because of the restrictive position it has adopted. It is to be expected that the Tax Administration will also issue a circular letter to the same effect.

Moreover, the tax authorities maintain that exploitation requires communication to the general public. Indeed, the tax authorities do not consider reproduction as an alternative mode of exploitation (despite the explicit legal text). This would also potentially exclude software (e.g., when developing software for use in-house).

Thus, software companies wishing to continue the favourable regime will have to brace themselves for a legal battle in the courts.





Social security regime

Under the old regime, the Federal Public Service for Social Security considered the entire financial package of employees as “salary” subject to social security contributions, regardless of the tax qualification (i.e., even if part of the wages qualified as movable income).

A Royal Decree (soon to be published) will align the social security treatment with the tax treatment. Thus, in principle, from 1 January 2023, royalties qualifying for the favourable tax regime will no longer have to be considered as “salary”, provided the following conditions are met:

- i the maximum copyright payment is limited to 30% of the sum of (i) the salary on which social security contributions are due (basic salary, holiday pay, 13th month and any variable salary (bonus, premiums, commissions, etc.)) and (ii) the copyright payment. Exceeding this threshold makes the entire amount qualify as salary;
- ii the remuneration and compensation for the transfer or licence of copyright or neighbouring rights must be determined on an arm’s length basis (the employer must keep proof of this available for audit);
- iii the remuneration must be included in the quarterly return to the National Service for Social Security

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