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Digitization of Audiovisual Materials by Heritage Institutions: Models for Licenses and Compensations

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Summary

The full report is available in Dutch at:
<http://beeldenvoordetoekomst.nl/nl/research/digitalisering-audiovisueel-materiaal-erfgoedinstellingen-modellen-voor-licenties-en>

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The digitization and distribution of audiovisual material raises major copyright problems. While digitizing for preservation purposes has been permitted since 2004 under strict conditions in accordance with Art. 16n of the Dutch Copyright Act, for the reutilisation of digitized material (e.g. on websites or by means of retransmission by radio or television) permission must be sought and obtained from large numbers of claimants. For large digitization projects, such as *Beelden voor de Toekomst* (Images for the Future), this means a rights clearance operation of dizzying proportions. In addition, digitization projects face great uncertainty with regard to the level of the copyright license fees due. As a result, questions arise as to how the problem of rights management can be efficiently solved and on which basis a reasonable fee may be calculated, taking into account the rights of right-holders to reasonable remuneration and the interest of public heritage institutions and the general public in an optimally complete, accessible and affordable digital archive. These two questions are central in this research.

Rights clearance

Regarding the issue of rights clearance, it should be noted that the current debate on so-called orphan works obscures a larger and more deep-rooted problem. The licensing issues of large-scale digitization projects lie not so much with the difficulty of tracing right-holders, as with the vast *number* of right-holders from whom permission must be obtained.

Individual licensing would only appear to be possible in relation to relatively easily identifiable right-holders, particularly broadcasters and (to a lesser extent) film producers. If public broadcasters for their own reasons were to refuse to grant such permission, in line with Art. 2.238alid 3 (c) of the Dutch Media Act, which requires broadcasting organisations to make their programming material available to the Dutch Institute for Sound and Vision, introducing a provision on compulsory licensing in the Media Act might be worth considering.

With regard to other right-holders (particularly authors, performing artists, photographers and visual artists), the instrument of collective rights management offers a promising, but for the time being far from perfect, solution. The collective rights management organisations (CMOs) that have emerged so far cannot provide full legal certainty. The mandate of such organisations is constricted by the limited number of their members, their relatively short history and the old age of the public heritage material. Recently concluded collective licenses provide for an ‘opt-out’ option to cater to the interests of right-holders who do not want to give up their exclusive rights. The limited mandate of the CMOs explains why indemnities (warranties) play a central role in evolving collective licensing practices. The legal certainty that such indemnity clauses provide to cultural heritage institutions is however only of limited significance and does not, for example, guarantee that the CMO-represented right-holders will not seek injunctive relief on the basis of their exclusive rights.

The legal certainty required by cultural heritage institutions in the longer term may only be obtained by legislative measures. Of such possible measures, two are discussed in this chapter: compulsory collective management of rights and extended collective licensing.

Applying the model of compulsory collective rights management to digitization projects may be attractive to cultural heritage institutions for several reasons. Where the rights of right-holders are managed by one or more CMOs, both the problem of ‘outsiders’ and of orphan works is immediately solved. In addition, this system provides a powerful impetus to right-holders, including film producers, to entrust their digitization rights to a collecting society. Moreover, it prevents producers of films essential to the cultural heritage from abusing their ‘hold-out’ position by imposing unreasonable licensing terms.

A slightly less restrictive regulatory measure which pops up regularly in discussions about digitization and copyright is that of the model of extended collective licensing (ECL). This legal concept, which originated in the Scandinavian countries, is characterized by a combination of voluntary collective rights management and a statutory expansion of the scope of application of collective licenses to right-holders who are not connected to the collecting society. Although the ECL model offers many practical advantages, an inherent weakness of this approach is its dependence on the existence of a solid infrastructure of collective rights management. This model is only applicable in areas where representative CMOs are already operational.

In order to satisfy the legitimate needs of right-holders (particularly film producers) to individually exercise potentially valuable rights over recent films, there may be cause for restricting an adopted legal measure, whether that be compulsory collective management or ECL, at certain points. Thus, for example, the application of the measure could be limited to cultural heritage institutions designated by governmental decree that by virtue of their public mission make available to the public cultural heritage material on a non-commercial basis. Another option might be making such legal provisions applicable only to audiovisual cultural heritage material that is older than, for example, ten years. Through such a window-arrangement film producers would be able to exploit the digital rights over their film catalogue on an individual basis without ‘unfair competition’ from cultural heritage institutions.

Level of fees

Whichever way licensing with regard to large-scale digitization projects is pursued, the question of the basis on which the amount of remuneration due for re-use should be determined remains a major problem. The digitization and making available to the public via the internet of protected works normally requires the permission of the copyright holders. The Dutch Copyright Act and Neighbouring Rights Act do not provide an indication as to the modality and height of the license fee. While in principle this is a matter for free negotiation between the parties, essentially it involves a situation wherein both parties, whether on the supply or the demand side, enjoy a monopoly position and are thus mutually dependent. The right-holders have a legal monopoly over their work and generally operate collectively, while the cultural heritage institutions are in possession of extensive and unique collections of

works. The cultural heritage institutions are in the best position to digitize these collections and to make them available online, but this requires the consent of the right-owners. In these situations there is a risk that an uncertain situation or stalemate will occur, where the parties cannot agree on the level and modality of the remuneration. As a consequence, with the digitization initiatives at hand licenses were granted for only very short periods of time. This means that after a few years the licenses will have expired and the parties concerned will find themselves back at the negotiating table. What will then be the outcome of negotiations is uncertain. This uncertainty is at odds with digitization projects' objective of making the cultural heritage available in a sustainable manner, and also with the fact that digitization projects are often publicly financed as projects – and not from structural funds.

The remuneration issue is partly an economic issue. Based on economic theory, there are two methods that might be suitable for determining remuneration with regard to mass digitization projects. First, the fee can be linked to the actual use by end users of the material made available online. A disadvantage of this method is the uncertain financial situation that then arises for both parties. In cases of greatly popular works, the cost for cultural heritage institutions may suddenly hugely increase, while low popularity right-holders will receive virtually no remuneration. The second method bases the remuneration on the expected usage by end users and the expected (social) value of that use. The duration of the license is then equal to the pre-fixed time span of the expected use. The advantage of this method is the security it offers to both parties with regard to the duration of the license. The cultural heritage institution can then from the very start of a digitization project reserve the amount that reflects practical value for the relevant period.

It is obvious that the amount of the license fee must initially be related to the remuneration for damages which a right-holder would receive if the use were to take place without permission. However, on the basis of the legal provisions on the recovery of damages and the relevant case law few concrete criteria can be established. Nevertheless, it can be concluded that the courts will be inclined to decide for the prevailing rates in business. When a right-holder turns to the courts in reaction to infringing reuse, it is likely that the court, when estimating the hypothetical license fee, will be guided by the available and relevant fees agreed between the same or similar parties. This means that already agreed license fees between similar parties for a similar work and a similar use may play a role in negotiations between rights owners and cultural heritage institutions. Although these agreements will have the character of a *pilot*, it is possible that their corresponding remuneration agreements could take on a life of their own and affect the price that is customary in the relevant 'market'.

Concrete guidelines cannot really be distilled from competition law either, although this branch of law does place some limits on the free negotiations between rights owners and licensees, such as cultural heritage institutions. In practice, it is very difficult for competition authorities to determine whether the limits of competition law have been exceeded by the type and/or amount of the agreed fee.

German 'angemessene Vergütung' rules with regard to the collective management of rights do offer some relevant clues/starting points. Particularly interesting are the German guidelines for determining a reasonable fee, which inter alia include the indication that CMOs should

take account of the cultural and social interests of licensees in the determination of the license fee. This latter standard appears to be a clear indication that, when large digitization projects funded by cultural heritage institutions are involved, tariffs should not be applied that make the development of such projects (financially) impossible.

An analysis of the fees to be charged under statutory remuneration rights provides additional clues. In all cases the actual or estimated use of the work and the size of the public play a central role. To calculate the extent of the use and the size of the audience different variables are used, such as the number of loans of the work, the number of photocopies, the number of students enrolled in a class, the number of broadcasting hours or the actual audience. The variable component is then multiplied by a certain amount. What is particularly interesting from the viewpoint of the digitization of cultural heritage material is the observation that, in the case of public lending rights, this amount is determined on the basis of the operating budget of the libraries.

Research on the still fledgling licensing practices in digitization projects indicates that parties often choose to relate remuneration to the amount of material that is made available online by the cultural heritage institution. The actual or expected use by the end-user of these works is not (yet) taken into account in the fee, but this will likely change in the foreseeable future.