



‘Copyright Contract Law: Towards a Statutory Regulation?’

*Study conducted on commission for the
Department of Scientific Research and
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Summary

In order to exploit the fruit of their intellectual labour, authors and performing artists must usually turn to specialised undertakings: publishers, broadcasting organisations, film producers, phonogram producers, etc. Partly as a consequence of the high level of concentration in the media sector, authors and performing artists find themselves in a structurally weaker bargaining position. This easily leads in practice to the use of unilateral standard form exploitation contracts, in which too little consideration is given to their interests. The call for the legal protection of authors and performing artists has been heard louder and louder over the last few years, with a view to arming authors and performing artists against such practices. Contrary to the situation that prevails in neighbouring countries, the Dutch legislation in the field of copyright and neighbouring rights devotes hardly any attention to exploitation contracts. This study, which was conducted by Professor P.B. Hugenholtz and Dr. L. Guibault of the Institute for Information Law of the University of Amsterdam on commission for the department of Scientific Research and Documentation Centre (WODC) of the Dutch Ministry of Justice, aims at identifying the needs for specific legal measures in the Netherlands.

The report is divided into four parts. First, chapter 2 draws a picture of the law applicable in the Netherlands with regard to authors' contracts, including of the general rules on contract law. On the basis of interviews conducted with experts in the field and on the basis of actual standard form contracts, chapter 3 follows with an account of the contractual practices which characterise the six following media sectors: literary publishing, scientific/educational publishing, journalism, graphic design, music and film/television. Chapter 4 makes an in depth analysis of the law as it exists in three neighbouring countries where authors' contracts are the subject of extensive legal regulation: Germany, France, and Belgium. Finally, chapter 5 draws the contours of a possible statutory regulation in this area, including suggestions for "supporting" measures. Throughout the study, the emphasis lies on the most important aspects of the exploitation contract, from a copyright and neighbouring rights perspective: the requirements of form, the scope and interpretation of transfers of rights, the right to remuneration, the effect on third parties of the transfer and the possibility to revise and terminate the contract.

The findings of the research can be summarised as follows. As chapter 2 shows, the general rules on contract law can, in some circumstances, give authors and performing artists a helping hand. The Dutch Civil Code (BW) contains in this respect a number of corrective instruments, more specifically the principle of fairness and equity (art. 6:2 and 6:248 BW), the possibility to revise a contract in the case of unforeseen circumstances (art. 6:258 BW) and the prohibition on the use of unreasonably burdensome terms in standard form contracts (art. 6:214 BW). We observe that the so-called "Haviltex-criterion", which was inspired by the principle of fairness and equity, plays an important role in the case law regarding exploitation contracts. Vague and unclear licence terms are, with reference to this rule, generally interpreted in favour of authors. There is however, no relevant case law to be found in which the general rules on contract law have been applied to set aside clearly formulated but manifestly unfair terms.

More generally, we note that authors and performing artists rarely find their way to the courts to complain about an allegedly onerous term in a standard form contract. This should come as no surprise: the general rules on contract law are not designed for the specific contractual relationship between authors and their producer, and do not provide the normative framework

for it. Similarly, the general rules on private law do not offer the legal certainty that the parties, including the producer, would need in practice. The terms in which the general rules on contract law are formulated are simply too general to give the parties any concrete basis for the construction or interpretation of an exploitation contract. Chapter 2 also reveals that the scarce statutory rules on exploitation contracts that are currently included in the Dutch Copyright Act 1912 (Aw) and the Neighbouring Rights Act (WNR) do not offer much legal certainty. Almost a century after the adoption of article 2 of the Copyright Act 1912, discussions persist unabated over its correct interpretation (purpose-of-transfer-rule or not?). The provisions on film law (art. 45a Aw et seq.) also remain obscure in their essential aspects. It is still unclear whether the right to equitable remuneration is a mandatory or a default rule, and whether this remuneration can be paid off inside a buy-out contract.

Meanwhile, a contractual practice has developed independently despite the absence of unequivocal statutory rules. As chapter 3 demonstrates, each media sector has developed its own specific practices, but there is a noticeable tendency in all sectors towards the use of detailed standard form exploitation contracts. Mostly because of the emergence of new digital modes of exploitation, the producers in all sectors are much keener than before to obtain the broadest transfer of rights possible. In markets where the competition on the demand side is limited because of concentration, as is the case in most media sectors, and where there is no equality of bargaining power to speak of between the parties, this situation can lead to inequitable and even to outright unfair (standard) contracts. On the basis of the findings in chapter 3, we observe that this is regularly the case in several media sectors: scientific (journal) publishing, newspaper publishing, general distribution magazine publishing, phonographic industry, i.e. music publishing, and the audiovisual sector, more specifically public broadcasting.

In a few sectors, where authors possess a relatively strong power in the market, the authors or their interest groups have succeeded in exercising substantial influence on the content of standard form contracts. Particularly in the sector of literary publishing, this has led to the adoption of bilaterally supported model contracts, in which the respective rights and obligations of authors and publishers are clearly set out. These model contracts can be very instructive in the search for the norms that should lie at the basis of any statutory regulation of exploitation contracts. All and all, we can conclude from chapter 3 that the freedom of contract, which has governed the field of authors' contracts in the Netherlands, in combination with a structural economic imbalance of the parties, has to a large extent resulted in unjust contractual practices.

In other areas of society, it has long been recognised, and indeed been generally accepted, that it is justifiable to offer some legal protection to the structurally weaker individual against the structurally stronger party. This conception has led to the adoption in our country of specific rules in the field of landlord and tenant law, labour law, and consumer law. Elsewhere in Europe, in our neighbouring countries, Germany, France, and Belgium, this same view has been at the root of the very extensive statutory regulation of authors' contracts, as chapter 4 describes in detail. In our opinion, the Netherlands can no longer stay behind in this development.

On the basis of the comparative legal analysis made in chapter 4, we draw in chapter 5 the contours of a possible statutory regulation. Such a regulation should in our opinion meet with the following basic assumptions:

- Proportionality: there should be no further intervention in the freedom of contract than necessary;
- Social justice: protection should be aimed at the structurally weaker party;
- Protection of creation: a regulation must reflect the cultural justifications of copyright and neighbouring rights;
- Legal certainty and transparency: all parties in the market should have optimal information about their respective rights and obligations;
- Efficiency: transaction costs associated with the conclusion of contracts should remain limited;
- Technical neutrality: the statutory regulation should in principle be equally applicable to all media;
- Pragmatic: a regulation should correspond as much as possible to the customs and needs of the practice.

On the basis of these assumptions, we come to the following recommendations for a statutory regulation.

(A) Limited scope of application

As in the neighbouring countries, the statutory regulation of authors' contracts should only be applicable to the relationship between authors and performing artists, on the one side, and producers, on the other side. The statutory regulation should not automatically be applied to the exploitation contracts concluded between authors and performing artists, on the one side, and collective administration societies, on the other side.

(B) In dubio pro autore

Considering the justifications of copyright law, a transfer of right (either through assignment or licence) should, in case of doubt and within the bounds of reasonability, be interpreted in favour of the author.

(C) Obligation of specification

Following the example of the French and Belgian legislation, the breadth of the transfer of rights should be specified in precise terms – and in writing. An exploitation contract, in which exclusive rights are transferred, should indicate expressly the scope and the purpose, the duration, the geographical scope of the transfer, as well as the amount of remuneration. This obligation of specification should however not render impossible the transfer of rights with respect to future modes of exploitation, for which there is a definite need in practice. Since parties are not always in a position to estimate the economic value of a future mode of exploitation, authors and performing artists should have the right to receive an equitable remuneration with respect to future modes of exploitation.

(D) Abrogation of the “Purpose-of-transfer” rule

Article 2, paragraph 2 of the Copyright Act 1912 and the corresponding article 9 of the Neighbouring Rights Act have, in their current wording, no longer grounds for existence next to an obligation of specification and a statutory rule prescribing the restrictive interpretation of contracts.

(E) Right to remuneration

Regarding the introduction in Dutch law of a general right to 'fair' or 'equitable' remuneration with respect to all modes of exploitation, as it has recently been introduced in Germany, we believe that the time is not ripe. The adoption of a general *iustum pretium*-rule in copyright law would bring about a far-reaching intervention in the freedom of contract. Moreover, we expect that the package of statutory measures proposed in this study will offer sufficient guarantees for the emergence of practice that allows for an equitable remuneration.

(F) Principle of disproportionality

Following on the legislation of Germany, France and Belgium, the Dutch act should also contain a rule according to which the author and performing artist have the right to request the revision of the exploitation contract in situations where there is a disproportion under the contract between the obligations of the author or performing artist and those of the producer. When the situation concerns a disproportion arising under a standard contract or arrangement to which numerous authors and performing artists are bound, the right to request the revision of the contract should also be open to associations of authors or performing artists.

(G) Clarification of article 45d AW

The current provisions on film law should be clarified in such a manner that they would set out for which mode of exploitation a separate remuneration is required and that such remuneration cannot be paid off in a buy-out contract.

(H) Obligation of the producer to render account

In order for a right to remuneration and for a claim based on the principle of disproportionality to materialise, the author or the performing artist should have the right to receive at least once a year a statement from the producer indicating the gross/net revenues generated from the exploitation of the work.

(I) Termination of the licence in case of bankruptcy

Authors and performing artists should have a statutory right to terminate an exclusive licence in case of bankruptcy or suspension of payment by the producer.

(J) Right to recover rights in case of non-use

Following the example of the legislation in force in our neighbouring countries, the Dutch Copyright Act should provide for the right of authors and performing artists to recover their assigned right in case of non-use by the producer. A statutory right of recovery should not, in our opinion, be subject to a specific period of non-use. It would be sufficient to lay down in the legislation that the right of recovery arises as soon as the producer has not or no longer will exploit the work within a reasonable period of time after the conclusion of the contract or since the last exploitation of the work or other subject matter.

(K) Precedence of bilateral standard arrangements

In order to as much as possible stimulate the creation of bilaterally supported standard arrangements and to emphasise the subsidiary character of the statutory measures, the mandatory rules described above should not receive application with respect to standard contracts or arrangements that are adopted at the close of fair negotiations between the representative organisations of all interested parties.

(L) International private law

To avoid that the mandatory rules on authors' contracts be circumvented through a foreign choice of law clause, the possibility should be considered to introduce a special rule of international private law – following the example of the special rules of international private law protecting consumers and employees.

(M) Broadening of the producer's power to enforce the rights

Producers wish to be able to act rapidly and efficiently against piracy, and would therefore prefer not to be dependent on the co-operation of authors and performing artists. In our opinion, the articles 27a and 28 Aw, and the corresponding articles 16 and 17 WNR, should be modified. If the producer were ensured of an *a priori* legal right to enforce the exploitation rights, there would be less need for him to obtain an assignment of these rights and a licence would in practice often be sufficient.

(N) Supporting measures

Besides and in addition to the statutory measures proposed above, we give below four “supporting” measures for consideration.

From the interviews conducted with experts from the sector, it appears that there is a need for a *settlement of disputes* mechanism, which would facilitate the adoption of bilaterally supported standard arrangements or collective agreements, and which would give substance to the statutory right to equitable remuneration.

In order to as much as possible stimulate the creation of collective arrangements between authors or performing artists and their producers, consideration should be given to the grant for this purpose of a *generic exemption* from the provisions of the Competition Act.

The *conditions attached to the grant of a subsidy* to publicly funded cultural institutions should, following the example of the “Promotion fund”, always include provisions whereby producers are encouraged to conclude fair contracts with authors and performing artists.

Finally, an important “supporting” measure designed to restore the balance consists in making reliable information available on authors' contract law. The provision, in an understandable and accessible way, of information on the law and practice relating to authors' contracts could substantially improve the awareness, and thereby also the bargaining position, of authors and performing artists. Producers would also benefit from a good and independent source of information on authors' contract law.