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# Towards Author's Paradise: The new Dutch Act on Authors' Contracts

*P. Bernt Hugenholtz**

## 1. Introduction

On July 1, 2015 the new Dutch law on author's contracts entered into force.[1] The new act introduces a variety of new provisions all aimed at protecting authors and performing artists against unfair contractual practices in their dealings with 'exploiters', such as publishers, record producers, broadcasters, distributors and film producers.

The new law fills a gaping void in the Dutch Copyright Act. Unlike the laws on copyright and neighboring rights of many other continental-European countries,[2] such as Belgium, France, Germany and Spain, the Dutch law until recently provided very little legal comfort to authors or performers in their relations with – usually much stronger – contractual counterparts.

This article is dedicated to Jan Rosén, who as a prominent ALAI member has been a champion of authors' rights in Europe, and in

* Professor of Copyright Law, Institute for Information Law, University of Amsterdam, Email: hugenholtz@uva.nl.

1 Act of 30 June 2015, Staatsblad 2015, 257.

2 See P.B. Hugenholtz and L. Guibault, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union', study commissioned by the European Commission (May 2002), available at *http://www.ivir.nl/publicaties/download/334*.

his role of special commissioner was charged by the Swedish Government to propose amendments to the Swedish Copyright Act in order to improve (inter alia) the law on authors' contracts.[3] The article will describe the genesis of a new body of authors' contracts law in the Netherlands, and highlight its main provisions.

## 2. Background of the new Act

The Dutch Copyright Act (DCA)[4] is one of the oldest 'living' copyright laws in the world. It was adopted in 1912, the year the Netherlands adhered to the Berne Convention.[5] The Act has since been amended many times, in particular in response to the harmonization directives from Brussels, but it was never thoroughly revised. Although its structure and modernity have been lauded,[6] the law's almost complete lack of legal provisions on author's contracts has come under intense scrutiny in recent decades.[7]

Until the adoption of the new law on author's contracts, the Dutch Copyright Act contained only very few provisions relating to copyright contracts. The most important of these was the 'purpose of transfer' rule that was already part of the original 1912 Act and has survived (albeit in amended form) until this day.[8] According to

3 See Jan Rosén, 'A proposal for a new Copyright Act and a total revision of rules on transfer of Copyright and Copyright Contracts', ALAI EXCO meeting Paris 2011-02-19, available at *http://www.alai.org/assets/files/infos-nationales/sweden-2011.pdf*. The text of the Commissioner's proposal is available (only in Swedish) at *http://www.regeringen.se/contentassets/40e3fe02d2a54b9c9ee153f533008e72/avtalad-upphovsratt-sou-201024*.

4 Act of 23 September 1912, Staatsblad 308.

5 The Netherlands has ratified the Paris Act of the Berne Convention; Act of 30 May 1985, Staatsblad 1985, 306.

6 See Bernt Hugenholtz, Antoon Quaedvlieg, Dirk Visser (eds.), *A century of Dutch copyright law: Auteurswet 1912–2012*, Amsterdam: DeLex 2012.

7 See P.B. Hugenholtz, 'Chronicle of the Netherlands.Dutch copyright law, 2001–2010', Revue Internationale du Droit d'Auteur (RIDA), No. 226, Octobre 2010, p. 280–349. Id., 'Sleeping with the enemy', inaugural lecture University of Amsterdam, Amsterdam: AUP 2000, abridged and revised English version available at *http://www.ivir.nl/publicaties/download/1073*.

8 Article 2(2)(2nd sentence) of the DCA reads: 'The assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title'.

this provision, a full or partial assignment of copyright is to be narrowly construed in favour of the assigning author, in light of the underlying contract's purpose.

The need for more far-reaching author-protective measures became particularly urgent at the end of the past millennium, when the digital revolution began to make its impact on the creative industries, and publishers, broadcasters and other intermediaries increasingly imposed standard-form 'all rights' contracts on freelance authors, giving them no alternative than to sign away their copyrights, often for meagre payment.[9]

In 2004 the Institute for Information Law (IViR) published an extensive report on the topic, which was commissioned by the Dutch Ministry of Justice.[10] The report reviewed existing law and case law on authors' contracts, which until then was mostly based on general provisions of the Dutch Civil Code, and examined contractual practices prevailing in the main sectors of creative production, such as literary publishing, scientific and educational publishing, journalism, graphic design, music, film and television. While each sector apparently had developed its own contractual practices, the report observed that in all sectors there was a noticeable shift towards the use of detailed – and generally one-sided – standard-form exploitation contracts. Moreover, publishers and producers in all sectors appeared to be much keener than before on obtaining the broadest transfer of rights possible from authors and performing artists.

The report noted that in sectors where competition on the demand side is limited because of concentration, no equality of bargaining power exists between authors or performers on the one side, and media or entertainment companies on the other. According to the report this situation of structural imbalance easily leads to inequitable and often outright unfair (standard) contracts, particularly in the fields of scientific publishing, newspaper publishing, general

9 See P.B. Hugenholtz, 'Sleeping with the enemy' (note 7).

10 P.B. Hugenholtz & L. Guibault 'Auteurscontractenrecht: naar een wettelijke regeling?' (Copyright contract law: towards statutory regulation?), Study conducted for the Scientific Research and Documentation Centre (WODC) of the Dutch Ministry of Justice, August 2004, available at *http://www.ivir.nl/publicaties/download/328*, summary in English available at *http://www.ivir.nl/publicaties/download/329*.

distribution magazine publishing, music publishing and recording, and the audiovisual sector, including public broadcasting.

The IViR report also observed that in sectors where authors do possess (some) negotiating power, such as literary publishing, authors' organizations had successfully negotiated model contracts in which the rights and obligations of authors and publishers were fairly and evenly distributed.

The IViR report concluded that freedom of contract combined with a structural economic imbalance between the contracting parties, had led to unfair contractual practices occurring on a large scale in the creative sectors. The report proposed a package of legislative measures, including an obligation to precisely specify a transfer of rights, a right of equitable remuneration for future uses, a 'best seller clause', a right to recover assigned rights in case of non-use and a mechanism of dispute resolution.

Following publication of the IViR report in 2004, the Ministry of Justice organized a consultation into the need for legal measures as proposed by IViR. Also, the Copyright Committee, an advisory body to the Ministry, was consulted. The responses to the consultation and the Committee's report eventually led to a draft bill that was circulated for public discussion by the Ministry of Justice in the course of 2010.[11]

The draft bill reiterated the main findings of the IViR study, and incorporated several of its recommendations. Remarkably, the draft bill went considerably further than the IViR report had recommended by proposing an outright prohibition to assign copyrights during the lifetime of the author, and a mandatory right of termination of exclusive licenses after five years. Not surprisingly, the draft bill encountered fierce criticism, not only from stakeholders such as publishers and film producers, but also from academics and legal practitioners.[12] As a consequence, the draft bill was never formally introduced in Parliament.

Undeterred by this set-back, the Ministry went back to the drawing board and came up with a bill that more closely reflected IViR's

[11] Ministry of Justice, Draft Bill, 1 June 2010, available at *http://www.internetconsultatie.nl/auteurscontractenrecht*.

[12] See e.g. Dick van Engelen, Nederlands Juristenblad 27 August 2010, No. 28, p. 1827.

original recommendations, without however incorporating a rule of specification of transfers, which the Ministry deemed unnecessary. In another aspect, however, the bill went further than the IViR report, by proposing a general right to equitable remuneration for grants of exploitation rights, similar to the rule of fair compensation that was introduced in Germany as part of the overhaul of the law of authors' contracts in 2002.[13]

The new bill was introduced into the Second Chamber of the Dutch Parliament in June 2012. After a slow but sure trajectory through the legislative labyrinth, and following a last-minute amendment introduced by the Government, the bill was adopted by the Second Chamber in February 2015, and sent to the First Chamber (the Dutch Senate) for final approval. The Bill was finally enacted on June 30, and went into force the very next day, on July 1, 2015.[14]

## 3. Main Features of the new Act

The 2015 Act adds a new chapter on 'exploitation agreements' to the Dutch Copyright Act, containing eight brand-new provisions aimed at protecting authors in their contractual dealings with 'exploiters'. These provisions are mandatory law and unwaivable, and apply mutatis mutandis to performing artists protected under the Dutch Neighbouring Rights Act. In addition to this new chapter, the new Act amends several existing provisions of Dutch copyright law.

### *New rules on 'exploitation agreements'*

The rules of the new chapter are applicable only to contracts "the main purpose of which is to grant to another party the right to exploit the author's copyright". According to the Explanatory Memorandum[15] they do not, for example, apply to commissioned works that are primarily intended for use by the commissioning party, such

[13] Art. 32 German Copyright Act.

[14] An unofficial English translation of the Act is available at *http://www.ipmc.nl/en/topics/new-copyright-contract-law-netherlands*.

[15] The complete legislative record of the bill is available (in Dutch only) at *https://www.eerstekamer.nl/wetsvoorstel/33308_wet_auteurscontractenrecht*.

as corporate logo's or architectural designs. Industrial designs are also generally excluded from the scope of the chapter. In line with the Act's aim of protecting structurally weaker authors, the chapter's provisions protect only natural persons – not, for example, corporate right holders – in their dealings with 'exploiters'.

The most far-reaching provision of the chapter is surely art. 25c that introduces a general right to equitable remuneration for authors granting rights to exploitation to a work, be it in the form of an assignment, an exclusive or a non-exclusive license. This provision breaks with the general principle of Dutch contract law that parties to a contract are free to negotiate the price of a good or service.

While codifying a general rule of equitable remuneration is commendable, and represents an important improvement of the legal status of the author in the Netherlands, the new law provides few clues as to how to calculate the right amount of remuneration. The law leaves this assessment to the court or the dispute settlement body charged with deciding an individual case. The court or dispute body will have to look at the fairness of the remuneration *ex tunc*. Claims for additional remuneration that arise from unexpected market successes will be assessed under the 'bestseller' rule of art. 25d (discussed below). According to the parliamentary acts the amount of the remuneration will depend on the circumstances of the case. Relevant factors might be the nature and scope of the rights granted, market conditions and the exploitation risks of the transferee. The requisite fair remuneration may be included in, for example, the screen writer's or actor's fee. In case of open content, the amount of the equitable remuneration may be set at zero. Although market practices may be indicative of what is equitable, this will not always be true, given the structural imbalance in negotiation powers between authors and exploiters.

One of the points of contention during the legislative process was how to deal with collectively negotiated remuneration standards. According to the Dutch competition authority, such collective agreements would infringe Dutch and EU competition law. Still, the Dutch legislature did recognize the social value of such collectively agreed standards, and therefore came up with a somewhat complicated mechanism of government approval of collectively agreed remuneration schemes. According to art. 25c, the Dutch Minister of Education, Culture and Science shall determine the equitable remu-

neration at the joint request of an association of creators in the relevant sector and a commercial user or an association of commercial users. The remuneration "shall be determined with due regard to the importance of preserving cultural diversity, the accessibility of culture, social policy and the interests of consumers". According to the Explanatory Memorandum this mechanism of collective rate setting is supposedly 'competition law proof'.

Furthermore, Art. 25c (6) provides for additional equitable remuneration in case the author has granted rights for exploitation in a manner that was unknown on conclusion of the contract, to be claimed at the time the unforeseen use actually occurs. This new rule implies that assignments or exclusive licenses may actually extend to unknown and unforeseeable future uses – an issue that was highly contentious under the old law. The new rule, again inspired by German copyright law,[16] will apply only when the new use qualifies as a – technically and economically – independent use, not a mere technical improvement. For example, digital broadcasting probably does not qualify as a new use, as compared to traditional broadcasting, whereas Internet streaming most likely will.

Art. 25d introduces yet another right to equitable remuneration in case of 'serious' (gross) disproportionality between the agreed compensation and the actual proceeds from exploitation for its exploiter. This so-called 'bestseller clause', another provision inspired by German law,[17] may be invoked by authors and performers in all cases when a work becomes a market success, and generates revenues to its publisher or other 'exploiter' in a measure disproportionate to the remuneration contractually agreed. Disproportionality is an objective criterion; the market success need not be unforeseen. In practice, the 'bestseller clause' will play a role mostly in cases where authors or performers are remunerated on a lump-sum basis. Royalty agreements, by contrast, will usually generate authors' income proportionate to the proceeds of the 'exploiter'.

The disproportionality rule of art. 25d may be invoked only by authors or performers, and does not apply in reverse. A publisher can therefore not (partially) recoup a payment to the author in case

[16] Art. 32c of the German Copyright Act.
[17] Art. 32a of the German Copyright Act.

of a publishing 'flop'. A claim for additional compensation under art. 25d may be brought not only against the author's contractual counterpart, but also against third parties that have acquired the right to exploit the work.

Art. 25e establishes the right to dissolve an exploitation contract in case of *non-usus*. This 'use-it-or-lose-it' provision allows authors to terminate an agreement if the 'exploiter' of his work fails to "sufficiently exploit the copyright in the work within a reasonable period after having concluded the contract, or does not sufficiently exploit the copyright after having initially performed acts of exploitation." The Explanatory Memorandum accompanying the bill offers an interesting economic argument for this legislative intervention. By allowing authors to recover rights not properly exploited, unused catalogs of rights will be revived and competition between intermediaries will be enhanced.

A termination of transfer does not require judicial intervention; a written notice to the author's counterpart will suffice. The assignee will thereafter have the burden of proving that he has sufficiently exploited the work. Upon termination, the assignee is obliged to transfer the right back to the author. Authors may also invoke the right of termination and reversion against third party rightholders.

Supplementing the other provisions of the new chapter, art. 25f voids grants of rights in future works (i.e. option clauses) "for an unreasonably long or insufficiently determinate period", and more generally prohibits unfair clauses in exploitation agreements.

Art. 25g introduces a mechanism of alternative dispute resolution. The new dispute resolution committee, which is yet to be appointed by the Minister of Justice, will be competent to hear cases concerning the right to equitable remuneration, the 'best seller clause', the non-usus rule and the rule on unfair clauses in exploitation agreements. A decision by the dispute resolution committee will become binding upon the parties if the case is not brought before a civil court within three months of the decision.

Art. 25h provides that the provisions of the chapter on exploitation agreements are mandatory law, and that the rights thereunder granted to authors and performers cannot be waived. To prevent any further circumvention of these rules, art. 25h (2) additionally provides for a special rule of conflicts law: "Regardless of the law that governs the contract, the provisions of this chapter shall apply if: a.

the contract would have been governed by Dutch law if no applicable law had been chosen, or; b. the acts of exploitation take place or should take place wholly or predominantly in the Netherlands." Once more, this is a provision inspired by, albeit not identical to, German law.[18]

Remarkably, the new chapter on exploitation agreements also includes a rule on open access that was added by parliamentary amendment. According to art. 25fa, "the author of a short scientific work, the research for which has been paid for in whole or in part by Dutch public funds, shall be entitled to make that work available to the public for no consideration following a reasonable period of time after the work was first published, provided that clear reference is made to the source of the first publication of the work." The provision – yet again inspired by German law[19] – allows scientists employed by universities or otherwise publicly funded, to post their articles on personal websites or institutional repositories, within a 'reasonable period' after first publication in a scientific journal or volume. The new provision does not clarify how long this window of exclusivity must last. The legislative history of the provision suggests this may vary from one to several months depending on the publication frequency of the journal of first publication.[20]

### *Other amendments to the Act*

The new Act also revises several existing provisions of Dutch copyright law. Importantly, the 'purpose-of-transfer' rule of art. 2 DCA is amended to apply not only to partial or complete assignments, but also to exclusive licenses. Accordingly, exclusive licenses are now also to be granted in writing, and to narrowly construed – in favor of the author – in light of the underlying purpose of the grant.

The Act also amends the rules on film production contracts of art. 45d Aw. Under this rule film authors are legally presumed to have assigned their main rights of exploitation to the film producer, unless agreed otherwise in writing. Under the old provision, film authors were already entitled to equitable remuneration by the film

[18] Art. 32b of the German Copyright Act.
[19] Art. 38(4) of the German Copyright Act.
[20] See Dirk Visser, 'The Open Access provision in Dutch copyright contract law', GRUR Int. 2015, p. 534.

producer, but this right was difficult to enforce, since the law did not prohibit 'buy-outs' against a lump-sum payment, and it was also uncertain whether the right to equitable remuneration was waivable. In addition, 'creative bookkeeping' practices on the part of the producers, and a tendency for film production companies to declare bankruptcy following an unsuccessful release, had practically reduced the right to equitable remuneration to a dead letter.

The revised art. 45d reflects a difficult, and rather subtle, compromise between the demands of the film industry for (near) complete transfers of rights (in order to ensure film financing and to facilitate distribution agreements) and the calls of the film authors for an effective and enforceable remuneration right. Under the amended provision, the film authors' right to equitable remuneration is declared unwaivable. Furthermore, the film's main authors (screenwriter and principal director) and lead actors are granted a right to *proportional* equitable remuneration against anyone broadcasting or otherwise communicating the film to the public by wired or wireless means, with the exception of on-demand services. This provision is meant to effectively guarantee a royalty payment to the film authors for acts of broadcasting, cable(re)transmission and linear streaming. The right to proportional equitable remuneration is to be exercised by a collecting society.

Finally, the Act provides for transitional rules. Contracts entered into before the entry into force of the new rules (i.e. July 1, 2015) are generally not affected. However, the 'bestseller clause', the *non-usus* rule and the prohibition on unfair clauses take immediate effect, as does the new right to proportional equitable remuneration of the main creators of a film.

## 4. Conclusion

The new Dutch law on authors' contracts is a giant step forward towards effective protection of authors and performers in a world increasingly dominated by contract. Whether this will result in a true *Author's Paradise* in the Netherlands, is however too early to tell. Although skeptical commentators have predicted that the new act will not do much to improve the financial predicament of authors

and performers,[21] early signs following the act's entry force are encouraging. Judging from the large number of lawyer seminars devoted to the provisions of the new act, authors' contracts in the Netherlands are being rewritten on a massive scale.

[21] Dirk Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht', Nederlands Juristenblad 2015(19), p. 1289–1296.