

# Evaluatie Wet Auteurscontractenrecht

## Summary and conclusions



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auteurs.

## Summary and conclusions

The Dutch Copyright Contract Act, which entered into force on 1 July 2015, aims to strengthen the contractual position of authors and performers vis-à-vis the exploiters of their works. A secondary objective, which is mainly reflected in the statutory rights to a fair remuneration, is to strengthen the earning possibilities of independent authors and performers when works are successfully exploited. During the parliamentary debate on the proposed law, the government made a commitment to evaluate the law five years after its entry into force.

This study presents the results of this evaluation, for which a combination of research methods has been applied. Apart from conducting interviews with practitioners (authors and exploiters from the most relevant sectors, lawyers and other expert stakeholders), the relevant legislative history, jurisprudence, (grey) literature, policy documents, parliamentary papers and position papers of stakeholders have been analysed. Furthermore, an inventory and analysis was made of the complaints handled and submitted to the dispute resolution committee to date, and of the case law known to the researchers in which the Copyright Contract Act played a role. Finally, available model and standard contracts and contracts used in practice were examined.

Five years after the entry into force of the law, it is too early to answer the question of whether it has already achieved its objectives. Still, it is possible at this stage to describe the effects of the introduction of the Copyright Contract Act on contractual practice, to identify practical ambiguities and points for attention and to suggest possible solutions. This, in brief, is what the present study aims to achieve.

The Copyright Contract Act consists of three separate parts. The first part amends Article 2 of the Copyright Act: henceforth, the requirement of a 'deed' applies not only to assignments (transfers), but also to exclusive licences. With regard to this requirement of a deed – that is, that the document be in writing and signed by the author – it is noted that law and practice differ widely. Transfer and licensing often take place electronically, through documents exchanged by email. The impression is that in no copyright sector it is fully understood that the law imposes requirements on the form of such documents, with the result that assignments and exclusive licences in many cases do not meet the requirement of Article 2(3) of the Copyright Act and are therefore voidable or possibly even null and void.

An important source of legal uncertainty relates to electronic signatures; it is unclear which form of electronic signature is sufficient in this regard. It would therefore be in the interest of legal certainty to stipulate by law that any electronic document, including an email, which clearly indicates the purpose of the assignment or exclusive licence and which is accompanied by a simple electronic signature, may be regarded as a deed within the meaning of Article 2(3) of the Copyright Act. An alternative solution would be to replace the requirement of a deed by a requirement to cast assignments and exclusive licences in writing. However, a copyright assignment or exclusive licence should never be 'hidden' in the general terms and conditions of an exploitation agreement. The legislator should protect authors and copyright holders against this, e.g. by applying the instruments of the Consumer Rights Directive on this point.

The second and most important part of the Copyright Contract Act concerns the new Chapter Ia on 'The exploitation agreement'. Article 25b of the Copyright Act defines its scope. This provision seems to raise few problems in practice. The deletion of the exception for designs

covered by art. 3.28 of the Benelux Convention on Intellectual Property (commissioned designs), as proposed in the bill implementing the DSM Directive, is not expected to change much in the position of designers. After all, because of the provision on fictitious authorship of Article 8 of the Copyright Act, most designers will still hardly be able to benefit, if at all, from the protection afforded by the Copyright Contract Act. Furthermore, the scope of the law could be clarified by explicitly extending it to author-companies, on which the legislator already anticipated in the explanatory memorandum to the law and which the DSM Directive also seems to prescribe.

One of the most striking provisions is Article 25c of the Copyright Act, which provides for a “right to a contractually stipulated fair remuneration for the grant of exploitation rights”. The study shows that this right is scarcely exercised in practice. Since most authors, out of fear of loss of contracts or blacklisting, do not dare to invoke or enforce their right to fair remuneration against exploiters, case law has scarcely developed. Nor has there yet been any evidence of a clear positive effect on exploitation income. New contracts and certain new forms of exploitation, including subscription models, appear to show an increase rather than a decrease in flat-rate (lump sum) remunerations as opposed to royalties or separate fees for re-use. A practical problem is that it is difficult to determine whether the remuneration for the grant of exploitation rights is ‘fair’ in cases where contracts do not differentiate between the maker’s fee and the remuneration for the grant of exploitation rights. A solution to this problem could be to require that the parties to an exploitation contract (where applicable) make a transparent distinction between the two types of remuneration.

The procedure for approval of a remuneration arrangement for a specific sector, as regulated in Article 25c(2) et seq. of the Copyright Act, is still hardly used. The parties involved perceive the procedure as complicated. A clear ‘incentive’ for exploiters to make collective remuneration agreements is also lacking. Consideration could be given to extending Article 25c(2) of the Copyright Act to include the possibility of a unilateral request if a bona fide attempt to reach a bilateral agreement has failed. The government could also oblige publicly funded or subsidised exploiters, such as public broadcasters and (many) film producers, to respect the right to fair remuneration. The government could further encourage these parties to reach collective agreements on fair remuneration.

Another core provision of the Copyright Contract Act, the ‘bestseller provision’ of Article 25d of the Copyright Act, is also rarely being invoked in practice. Here too, the fear of blacklisting seems to play a major role. Still, Article 25d of the Copyright Act does seem to have a positive effect in the music sector, since existing agreements are being renegotiated more frequently. One solution would be to develop at sector level ‘best practices’ regarding the remuneration of authors in the event of exploitation success. This would reduce the chance of blacklisting. It would also make it possible to give concrete form to the vague standard of Article 25d of the Copyright Act. Depending on the sector, branch organisations or funding bodies, such as the Netherlands Film Fund, may have a role to play here, by laying down ‘best practices’ in collective agreements or funding conditions.

Incidentally, almost all sectors complain about a lack of transparency of the exploitation income received, which makes it difficult for authors to substantiate a bestseller claim. The obligation of transparency prescribed by the DSM Directive is expected to mitigate this problem.

A legal difficulty in the application of the non-usus provision of Article 25e of the Copyright Act is the correlation with general contract law, in particular the relationship between dissolution (*ontbinding*) pursuant to Article 25e of the Copyright Act and the regular possibility of

dissolution (*ontbinding*) on grounds of breach of contract pursuant to Article 6:265 of the Dutch Civil Code. As a result, it is not clear exactly what the added value of the non-usus rule is. This problem could perhaps be solved by clarifying that 'non-usus' is separate from the contractual exploitation obligation. After all, there is no need to demonstrate a breach of contract when invoking the non-usus rule, while in the event of dissolution on the ground of breach of contract (Article 6:265 of the Dutch Civil Code) it is not necessary to offer the exploiter a second 'chance'.

In addition, a recurring problem in the application and interpretation of Article 25e of dissolution the Copyright Act is that it is not clear what 'sufficient exploitation' means. As a result of digitisation, a work can be made available online indefinitely, almost at no cost. And in book publishing, the advance of printing-on-demand means that the traditional criterion 'in print' no longer suffices. In the interpretation of the concept of usus, the (permanent) findability and the (permanent) promotion of works via current platforms should also play a role. This could be clarified either by law or by further rules in an Order in Council, or by sector-specific agreements.

Article 25f of the Copyright Act on unreasonably onerous clauses, and the generally formulated second paragraph in particular, do play an important role in contract practice. Especially in the music industry this provision is regularly invoked. Unfortunately, unreasonable clauses still occur frequently in practice. Hence, there appears to be no reason to amend Article 25f of the Copyright Act.

The open access provision of Article 25fa of the Copyright Act increasingly acts as a safety net for authors to publish works in open access after a reasonable period of time, when alternative routes of Gold Open Access, which are preferred by many, are not viable or are not chosen by authors for other reasons. Authors and universities take a positive view of this, and the pilot '*You share, we take care*' shows that the provision can make a substantial contribution to realizing the ambition to make available in open access as much scholarly work as possible.

On the other hand, the dispute resolution committee set up pursuant to Article 25g of the Copyright Act has by no means fulfilled its expectations. Due to restraint on the part of authors and exploiters, the number of disputes submitted to the committee has remained minimal to date. On the part of the authors, this is related to the previously identified fear of blacklisting. On the exploiters' side, scepticism already prevailed in advance, which has been further fuelled by the negative perception of the two rulings that the dispute resolution committee has produced so far. Only one trade organisation and a handful of individual exploiters have adhered to the committee. The obvious conclusion, therefore, is that Article 25g of the Copyright Act in its current form hardly contributes, if at all, to the realisation of the objective of the Copyright Contract Act.

In the light of these experiences, and in line with the intention of Article 21 of the DSM Directive, consideration should be given to reducing the lack of commitment on the part of exploiters, by making participation in the dispute resolution committee compulsory as far as possible, if the author so chooses. In addition, funding bodies in the creative sectors should, where possible, include participation in the dispute resolution committee as part of their funding conditions. In addition, organisations of authors should make more use of the possibility to collectively (and thus anonymously for authors) complain about, for example, general terms and conditions or model contracts of exploiters.

The third part of the Copyright Contract Act concerns an amendment to the law on film contracts. The proportional fair remuneration of Article 45d(2) of the Copyright Act, which replaced the old cable remuneration, has pacified the audiovisual sector and is viewed positively by most of the parties involved. Still, authors do call for the right to remuneration to be extended to *all* filmmakers, including cameramen, graphic designers, subtitlers, set designers and so on. The objection that this would lead to too many collective management organisations (CMOs) or payment addresses could be removed by introducing a one-stop-shop, either through voluntary cooperation or by means of an Order in Council or pursuant to Article 21 of the Act on the Supervision of CMOs.

The voluntary arrangement for a proportional remuneration for video-on-demand (VOD) has proved to work poorly in practice. The system of perpetual clauses (*kettingbedingen*) is administratively very complex and burdensome, the coverage is incomplete and compliance is very problematic, with major exploiters not having submitted to the system so far. One solution could be to statutorily regulate the remuneration, for example by extending Article 45d(2) of the Copyright Act to VOD. As a result of the prohibition of discrimination under EU law, it is inevitable that part of the remuneration will then accrue to authors and actors elsewhere in Europe. However, it is by no means certain that this will also apply to non-European (particularly US) authors and performers.

Since the introduction of the Copyright Contract Act, a number of collective agreements have been established in the creative sector. While clear progress has been made in this area in the music sector, collective bargaining in other sectors is still slow to get off the ground. A positive aspect is the new ant-trust (cartel) policy of the Netherlands Authority for Consumers and Markets (ACM) with regard to freelancers, which offers more room than before for the establishment of collective (remuneration) agreements with freelancers in the cultural domain. It is expected that this will reduce the fear of competition law sanctions, which has discouraged collective bargaining. Another positive development is the establishment of the *Fair Practice Code*, a code of conduct aimed at improving the labour market situation in the cultural and creative sectors. The Code shows that connecting sector agreements to conditions for public funding in the cultural sector may be an effective means of improving the position of authors.