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Intellectual Property - Netherlands

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Copyright Contract Law comes into force

Contributed by **AKD**

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On July 1 2015 the Copyright Contract Law was inserted into the Copyright Act 1912. The amendment aims to strengthen the position of authors, particularly in relation to parties which exploit their works (eg, publishers, film producers and record companies).

Copyright Contract Law

The amendments are relevant to all parties that deal with Dutch authors. The law has introduced the following changes.

Exclusive licences require signed deed

Until recently, under Article 2 of the Copyright Act, a signed deed was required to transfer copyright validly. Following the amendment, a signed deed is also required in relation to exclusive licences (Article 2(3)). According to the Code of Civil Procedure, a short, written, signed statement from the author stating that he or she grants an exclusive licence to the other party will suffice. Thus, a tacit or oral agreement regarding an exclusive licence will not suffice and may be subject to nullification. The practice for non-exclusive licences remains unchanged (ie, a signed deed is not required).

In regard to the exclusive licence, Article 2(3) now states that a licence shall grant only those powers which are set out in the deed or which necessarily follow from the nature and scope of the licence. This restrictive interpretation of an exclusive licence is intended to protect the author, as the weaker party. If there is any doubt regarding the interpretation of the exclusive licence contract, the starting point is that the interpretation which favours the author prevails.

New chapter on exploitation contracts

The new law has introduced a section on exploitation contracts to the Copyright Act (Articles 25b to 25h). The new section applies only to agreements whose primary objective is the grant of the author's exploitation rights. The section does not apply to other agreements (eg, agreements where the other party obtains only a right to use the copyright-protected work by means of a transfer or licence). The scope of the section is further limited to copyright holders who are natural persons.

The new section provides as follows:

- The author is entitled to fair remuneration, as stipulated in the contract, in return for granting exploitation rights (Article 25c(1)). It is not yet clear what constitutes 'fair remuneration'. The new chapter provides that the minister of education, culture and science may determine the fair remuneration in a particular industry (Article 25c(2)).
- The author may claim additional fair remuneration if the contracting party exploits the copyright in a manner that was unknown at the time when the parties concluded the exploitation agreement (Article 25c(6)). The author may claim this additional fair remuneration not only from the contracting party, but also from a third party to which the contracting party has transferred the exploitation rights (Article 25c(6)).
- The author is entitled to additional fair remuneration if it later appears that there is a "gross inequality" between the remuneration and the returns on the exploitation (Article 25d(1) – the

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so-called 'bestseller' clause). If such a situation occurs, the author may also claim additional fair remuneration from a third party which, at that time, acquired the copyright of the contracting party of the author (Article 25d(2)).

- The author may (partially) dissolve the agreement if and when the contracting party does not, within a reasonable period after concluding the agreement, exploit the copyright "to a sufficient extent", or fails to do so after an initial period of exploitation (Article 25e(1)). The author may also enforce its rights following dissolution of the agreement against the third party which acquired the copyright of the contracting party of the author (Article 25e(6)).
- If subject to an unreasonably long or undefined period, contractual clauses regarding future work exploitation can be nullified (Article 25f(1)).
- The author may terminate the agreement early if the counterparty has stipulated that it may terminate early (Article 25f(3)).
- The author of a short scientific work which was wholly or partly funded by the Dutch government can make the work freely available to the public after a reasonable time following first publication (Article 25fa – the so-called 'open access' clause).

Overriding mandatory provisions

According to the legislature, the new chapter's provisions on exploitation contracts must be regarded as overriding mandatory provisions. This implies that they will apply irrespective of the choice of law governing the agreement.

However, in the accompanying literature doubts are expressed as to whether the provisions can qualify as "overriding mandatory provisions" as set out in Article 9 of the EU Rome I Regulation (593/2008):

"Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

Exploitation of cinematographic works and neighbouring rights

Authors of cinematographic works are also entitled to fair remuneration (Article 45d(1)). Further, any party which makes the cinematographic work available to the public owes proportional fair remuneration to the principal director and screenwriter (Article 45d(2)). It is not possible for these authors to waive their entitlement to proportional fair remuneration (Articles 45d(1) and (2)).

The Neighbouring Rights Act has also been amended in order for the new section to apply to performing artists.

Retroactivity

The amendments do not apply retroactively to existing agreements. However, certain exceptions apply, including:

- the right of the author to partially dissolve an agreement if and when the contracting party does not, within a reasonable period after concluding the agreement, exploit the copyright to a sufficient extent (Article 25e(1)); and
- the option to nullify contractual clauses regarding future work exploitation if they are subject to an unreasonably long or undefined period (Article 25f(1)).

Comment

Although the most important changes following the amendment are set out here, much is still unknown – for example, what will be considered to be fair remuneration. These open issues will be shaped in practice.

The aim of the legislature is to strengthen the position of authors against intermediaries that exploit their copyrights. However, the amendment has been criticised on the grounds that, despite these good intentions, it will not improve authors' rights because the burdensome provisions will make it less attractive for foreign parties to do business with Dutch authors, when other countries have more lenient regulations.

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Comment or question for author

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