ECS Conference 21 May 2021

Copyright Contract Law – Harmonization and the Dutch Experience

P. Bernt Hugenholtz

As you can read on our website, the European Copyright Society was founded "with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy". This mission statement is sometimes misunderstood. Some believe that the word "critical" suggests that our society or its members are sceptical of the raison d'être of copyright. Some even imagine that the ECS is "anti-copyright".

Nothing could be further from the truth.

Yes, the ECS is a critical commentator of how copyright law is sometimes shaped at the European level, as a product of two-dimensional stakeholder lobbying.

And yes, the ECS has on multiple occasions - in a series of carefully crafted opinions - voiced dissatisfaction with certain legislative initiatives and Court interpretations that upset the delicate balance between protecting copyright and safeguarding basic user freedoms.

But what unites the members of our society is a firm belief in the principal rationale of copyright law in the EU, which is to promote authorship and creativity, and to fairly remunerate authors and performers.

This belief is expressed in the Society's comments on the implementation of the provisions on author's contracts (Articles 18 to 22) of the DSM Directive:

"The European Copyright Society (ECS) welcomes the protection that Articles 18 to 22 of the Directive on copyright in the digital single market offer to authors and performers in their contractual dealings with economic actors to whom they transfer or license their rights. The ECS advises the Member States to give full force and efficiency to this part of the Directive."

Indeed, the DSM Directive's new rules on author's contracts are something to celebrate. For too long the EU legislature's harmonization machinery was geared towards codifying economic rights, without questioning who really benefited from these prerogatives. By including rules on author's contracts and remuneration in the acquis, EU copyright law has now entered a more mature stage, recognizing that good copyright laws mediate the interests of three - not two – distinct categories of stakeholders: copyright holders, users and (first and foremost) authors.

The DSM Directive concretely mandates a set of four contract adjustment measures:

- a right to appropriate (fair) remuneration
- a right to additional remuneration, in case the initial payment turns out to be disproportionately low

- access to alternative dispute resolution; and
- a right of revocation of transfers where there is "lack of exploitation".

Provisions of this kind have been in existence in several Member States for many years, and it is great that these are now available to authors and performers across the entire EU, and that in Europe "freedom of contract" does not imply a freedom to mistreat authors.

But let's not get carried away and remain 'critical'.

Do provisions of this kind really work in practice – and improve the negotiating position of authors and increase author revenue?

Judging from a recent evaluation of Dutch copyright contracts law, which was conducted for the Dutch Government by researchers at IVIR (Stef van Gompel, Joost Poort and myself) together with Dirk Visser of Leiden University, there are reasons not to be overly optimistic.

In 2015 versions of the four substantive measures now prescribed by the DSM Directive were introduced into the Dutch Copyright Act. But the study we conducted, which was based on interviews with experts and stakeholders, raises questions about their effectiveness.

Both the right to fair remuneration and the right to additional remuneration seem to be rarely invoked in practice. Authors and performers generally prefer to keep their peace with broadcasters, publishers, producers, and other contractual counterparts – for fear of loss of future work or of being 'blacklisted'.

As to the right of revocation, there is general uncertainty about what constitutes a "lack of exploitation" that triggers the right to revoke a grant or transfer. This is of course problematic in the digital environment that allows works to be permanently in commerce at near-zero cost.

The Dutch evaluation study is especially critical of the alternative dispute mechanism that has so far remained an empty shell. Since authors and performers are hesitant to initiate individual disputes, and exploiters are reluctant to voluntarily commit to dispute resolution, only a few cases have been brought before the dispute committees.

Although the Dutch law on author's contract is still young and the study's findings may be premature, a couple of preliminary conclusions can be drawn.

Measures of the kind mandated by the DSM Directive are an important first step, but by no means sufficient to secure fair remuneration for authors and performing artists.

The efficacy of author's contract law should not depend on the courage and resilience of authors and performers to enforce their rights against contractual counterparts that can make or break their livelihood.

Rules of this type must therefore be complemented by enforcement procedures or mechanisms that allow anonymous and/or collective complaints on behalf of authors and performers. There might also be a future role for public oversight bodies (like consumer protection or data protection authorities).

Most importantly, mandatory provisions of copyright contract law should be supplemented by non-waivable, collectively managed rights of remuneration, such as those that are emerging in an increasing number of EU Member States. As the Dutch evaluation study also demonstrates, it is this kind of right that really brings home the bacon.

-