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A. Copyright Contract Act 2015

1. On 1 July 2015, the Dutch Copyright Contract Act (DCCA) came into force, as a new chapter IA in the Dutch Copyright Act (DCA), giving authors and performers[1] the right to contractually agreed 'fair compensation' for any exploitation of their work, rights to additional fair compensation if their work becomes a bestseller or when previously unknown modes of exploitation are used, a right to recover transferred copyrights if the operator does not sufficiently exploit them ('non-usus') and a prohibition on unreasonable clauses.[2] It also gave certain *film* authors a right to *proportionate* fair compensation for most kinds of communication to the public, but notably *excluding* on-demand exploitation, which can only be exercised through collecting societies. According to the Dutch legislator, these copyright contract law provisions are all 'special mandatory law' provisions, meaning that they cannot be waived or derogated from contractually, even by choosing foreign

* The author thanks Paul Kreijger for his comments on an earlier version. This contribution is partly based on and contains adaptations of excerpts from the report Evaluation of Copyright Contracts Act: Stef (S.J.) van Gompel, Bernt (P.B.) Hugenholtz, Joris (J.P.) Poort, Luna (L.D.) Schumacher and Dirk (D.J.G.) Visser, 'Evaluation of Copyright Contracts Act: Final Report', Research commissioned by the Scientific Research and Documentation Centre (WODC), Ministry of Justice & Security (Institute for Information Law/University of Leiden 1 September 2020), https://www.ivir.nl/publicaties/download/evaluatie_wet_auteurscontractenrecht_2020.pdf [hereinafter: CCA 2020 Evaluation Report]. This contribution is the sole responsibility of its author. This contribution is also based on an earlier publication in *NJB* 04-06-2021, 1807-1914. Stef van Gompel wrote in *Auteursrecht* on the "legal and practical measures to make it easier for creators to enforce their remuneration claims from exploitation agreements": *Auteursrecht* 2021-1, 3-9.

1 Authors and performers are also hereafter referred to collectively as 'authors', although that is the term reserved for authors in the Copyright Act.

2 Act of 30 June 2015 amending the Copyright Act and the Neighbouring Rights Act in connection with strengthening the position of the author and the performer in copyright and neighbouring rights agreements, *Stb.* 2015, 257. On this, see the evaluation report mentioned in the previous note and Chapter 9 (in particular section E) of J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, 4th ed. (Law and Practice, IE2) (Wolters Kluwer 2019).

law.[3] Prior to 2015 there was no specific copyright contract law in the Netherlands and authors thus had to turn to general civil contract law principles such as unforeseen circumstances and breach of contract. The Copyright Act contained the rule that an assignment of copyright can only be realised through a deed (i.e. a written document signed by the author) and that such an assignment only comprises the rights that are stated in the deed or that necessarily derive from the nature or purpose of the deed.[4]

B. Case law

2. Since its introduction in 2015, the renewed copyright legislation has been put to the test in a few court cases.

Regarding fair remuneration, the Dutch courts had to decide a case concerning two freelancers, a journalist and a photographer. They were awarded substantially higher royalties by the Amsterdam District Court for the use of their texts and their photos by a large newspaper publisher.[5]

In a case concerning the bestseller clause, the screenwriter and director of the film *Soof 2* were given substantially higher royalties.[6]

Another case concerned alleged unreasonable conditions. Whether an option to extend DJ Martin Garrix's contract with a limited royalty increase was reasonable had to be assessed on the basis of the circumstances at the moment of signing.[7] In another case, a book that, some time after its publication, was kept available only via print-on-demand was still deemed to be 'in print' and thus to be sufficiently exploited by the publisher.[8] Note that the provisions of copyright contract law were applied in anticipation by the Supreme Court, which had to rule

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3 See Section 10.7 Civil Code and Section 25h (2) DCA. However, the 'particularly mandatory character' is open to discussion in the light of Articles 3 and 9 of the Rome I Regulation ((EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations). On this, see AMI 2015-3, 72 and *T&C IE* commentary on Section 25 h DCA.

4 Section 2.3 DCA prior to 1 June 2015: "The delivery required for whole or partial assignment shall be effected by a deed. The assignment shall comprise only such rights as are named in the deed or as necessarily derive from the nature or purpose of the title."

5 District Court Amsterdam 17 May 2019 (ECLI:NL:RBAMS:2019:3565) and 1 November 2019 (ECLI:NL:RBAMS:2019:8099) (*Freelance photographer/DPG*); District Court Amsterdam 17 May 2019 (ECLI:NL:RBAMS:2019:3566) and 1 November 2019 (ECLI:NL:RBAMS:2019:8119) (*Freelance journalist/DPG*), there was an appeal in both cases, but both cases were subsequently settled. The author represented publisher DPG in both cases.

6 CCA Disputes Committee 18 April 2018, No. 113417 (*Director Soof 2*), IER 2018/43, note J. Poort and D.J.G. Visser and No. 113462 (*Screenwriter Soof 2*), AMI 2018/15, cf. Bernt Hugenholtz, also available at www.degeschillencommissie.nl.

7 Arnhem-Leeuwarden Court of Appeal 24 December 2019, ECLI:NL:GHARL:2019:11117 (*Spinnin Records and MusicAllStars Management/Martin Garrix*), partly nullified by the Supreme Court on 19 December 2021, which referred the matter to the Den Bosch Court of Appeal to settle the remaining issues. The author was involved in these proceedings as counsel for Spinnin Records and MusicAllStars Management.

8 Amsterdam Court of Appeal 15 December 2020, ECLI:NL:GHAMS:2020:3481 (*Geldof/Overamstel*).

on a claim by the band members of Golden Earring that their music publisher had insufficiently exploited their copyrights over many years before 2015. Whilst the claims thus concerned (alleged) non-usus prior to the enactment of the copyright contract law and its specific non-usus rule, in applying general civil law to the facts of the case the Supreme Court specifically took the new legislation into account.[9]

C. DSM Directive

3. In 2019, the EU Directive on copyright in the 'digital single market' was adopted.[10] That Directive contains a number of articles on copyright contract law, which were implemented in the Dutch Copyright Act as of 7 June 2021.[11] The resulting amendments to the Copyright Act are discussed below. It should be borne in mind that this EU Directive concerns *minimum harmonisation* with regard to copyright contract law. The Netherlands may therefore offer more protection, but not less.

D. Scope of application

4. The first amendment concerns the scope of copyright contract law.[12] Until 2021, the provisions (and protection) of copyright contract law was limited to contracts "which have as their *principal purpose* the grant of exploitation rights in respect of the creator's copyright to an opposing party" (emphasis added). It was generally held that where certain works, such as texts, logos, images, tunes, jingles, etc., were commissioned that were not meant to be exploited in their own right with reference to the author but as part of, for example, advertising the principal, the underlying contract was not considered to have exploitation of the work as its "principal purpose" (thus ensuring that advertising agencies, copywriters or jingle composers, who are usually paid a lump sum, cannot challenge the agreed terms under copyright contract law). The prefixing of 'purpose' with 'principal' has now been dropped, as a reference to a "principal purpose" of the exploitation

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9 Dutch Supreme Court 7 July 2017, ECLI:NL:HR:2017:1270, NJ 2017/344 with case comment of Prof. emeritus D.W.F. Verkade (*Nanada/Golden Earring*).

10 Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.

11 Act of 16 December 2020 amending the Copyright Act, the Neighbouring Rights Act, the Databases Act and the Act on Supervision and Dispute Resolution Collective Management Organisations Copyright and Neighbouring Rights Act in connection with the implementation of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC (Copyright Directive Implementation Act in the Digital Single Market), Stb. 2020, 558. In force as of 7 June 2021 (of most provisions) appears from *Stb.* 2020, 559. Article 25ca DCA entered into force until 7 June 2022. Article 3 DCA entered into force on 1 January 2021.

12 Largely enshrined in Section 25b DCA.

contract for it to qualify does not appear in the DSM Directive. Whether this will actually lead to a broader scope of application cannot be said, as there was no case law on the exact meaning of the principal purpose criterion. Article 18(1) DSM Directive formulates the right for creators to fair compensation in such a way that the entitlement applies "where authors and performers license or transfer their exclusive rights to exploit their works or other subject-matter", i.e. irrespective of whether the agreement in which this is done has such a transfer or licence as its principal purpose. The second paragraph makes it clear that Member States are required to consider "the principle of contractual freedom and a fair balance of rights and interests", which leaves room for some nuance. The latter phrase seems anyway to point to some freedom of implementation for EU Member States.

Recital 72 of the DSM Directive reads as follows:

> "Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law. That need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts."

It could possibly be inferred from the last sentence of recital 72 that it still matters whether exploitation is the (principal) purpose. This is not clear. It thus remains plausible that contracts for commissioned texts and images meant to be used on websites, packaging, logos and advertising are not necessarily subject to copyright contract law.[13]

5. The second amendment to the scope of application concerns the deletion of the phrase "unless Article 3.28 of the Benelux Convention on Intellectual Property applies". This phrase referred to the rule that where designs are made to order, the copyright is granted to the person who ordered the design or to the owner of the design right, rather than the de facto designer. Copyright contract law will now also apply to those situations. It is not clear whether this will have far-reaching consequences, because this type of work often also falls under the "legal entities copyright" of Section 8 DCA, which does remain exempt from the effect of the copyright contract law: in the case of lawful publication without attribution (e.g. an advertising campaign under the name of the advertiser which, as agreed with the agency that designed it, does not mention the agency as the author), the legal entity

[13] See explanatory memorandum 33.308, No. 3, 12.

making the publication is considered the original author, which automatically excludes others (even where they are the de facto creator) from claiming equitable remuneration or any other right that copyright contract law grants to authors. Whether this purely national aspect of Dutch copyright law is tenable under EU law is not yet settled, but it seems plausible.[14] Thus, where it is commercially possible to omit the designer's name, use of the 'route' of Section 8 DCA remains an option to avoid the applicability of copyright contract law. If the designer's name is important, it is obviously not an option. In such cases, the designer has now clearly gained a stronger position.

Furthermore, the law now explicitly states that copyright contract law (subject to Section 25f, on unreasonably onerous clauses) does not apply to agreements with collective management organisations.[15] These have their own supervisory regime in the Supervision Act, which implements the CMO Directive.[16]

Finally, agreements on computer software are now completely excluded from the scope of copyright contract law.[17]

E. Fair compensation

"Appropriate and proportionate"?

6. The concept of 'equitable remuneration' in Section 25c(1) DCA has been harmonised at the EU level with the CJEU having the final say in the interpretation of this concept. This follows from Article 18(1) DSM Directive that "Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive *appropriate and proportionate remuneration*" (emphasis added). This has not resulted in any amendment to the wording of the Section 25c(1) DCA, which is sufficiently flexible to allow for "fair compensation" as prescribed by Section 25c(1) DCA to henceforth be read as 'appropriate and proportionate remuneration' within the meaning of the said provision of the Directive. It is not likely that 'proportionate' has the same meaning as 'proportional' in the "proportional fair compensation" of Section 45d(2)DCA, which must be in proportion to use or results, and cannot be calculated as a lump sum. Recital 73 of the DSM Directive, discussed below,

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14 The reference to "certain employment contracts" in recital 72 to the DSM Directive seems to suppose that such rules are deemed acceptable.

15 See Section 25b(3) DCA.

16 Copyright and Neighbouring Rights Collective Management Organisations Supervision and Dispute Resolution Act (WTGCB).

17 This is reflected in the amendment to Section 45n DCA and is the consequence of Article 23(2) of the DSM Directive.

however shows that fair compensation can under certain circumstances still be paid as a lump sum:

> "The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work."

The recital continues: "A lump sum payment can also constitute proportionate remuneration but it should not be the rule." Again, this phrase offers little guidance, but does make clear that royalty arrangements are the preferred and in any case the most 'secure' method as compared to a lump-sum payment.

Member States have the freedom "to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests".[18] The Netherlands has not made use of that possibility and retains its 'one size is supposed to fit all' approach. But it is plausible that in certain sectors and/or for certain types of exploitation, flat-rate fees and even lump-sum transfer payments will remain possible. On the other hand, in sectors where royalty payments are common, the application of lump-sum payments without the possibility of additional remuneration may well run the risk of coming into conflict with the new copyright contract law.

By introducing proportional equitable remuneration for *all filmmakers* for the *retransmission* of films in Section 45d(2) DCA, the Dutch legislator wanted to give substance to this new European obligation in Article 18 DSM Directive for that category of creators.

F. Duty of transparency

7. One of the most important substantive changes to copyright contract law concerns the introduction of a general transparency obligation in Section 25ca DCA, which implements Article 19 DSM Directive. This new transparency obligation entered into force on 7 June 2022 and immediately applied to all contracts that existed at that time.

Until 7 June 2022, only Section 25e(4) DCA contained a transparency obligation, which was limited to situations in which the creator wanted to invoke 'non-exploitation or inadequate exploitation'. In such a case, the author must first grant his contractual counterpart a reasonable period of time to sufficiently exploit

[18] Article 18(2) DSM Directive.

(Section 25c(3) DCA) and can then request a written statement of the extent of exploitation within that reasonable period. Although this provision already meant de facto that operators were obliged to keep records showing the extent of exploitation, it did not impose a general and unsolicited administration and reporting obligation.

I. Main rule

8. The new main rule is that the operator must provide the author with an annual overview of the exploitation in its entirety, "in particular with regard to the modes of exploitation, the revenues generated by that exploitation and the compensation due. The information should be up to date, relevant and comprehensive".[19]

Such an obligation was (of course) already common in situations and sectors where the author is entitled to a periodically payable *royalty* related to exploitation income (e.g. in the music and book publishing industries). However, in all situations where the author receives only a one-off lump-sum payment, such an obligation is *not at all* common. One of the big questions is whether in cases involving lump-sum payments operators should (nevertheless) start informing their authors periodically (e.g. annually), on their own initiative or only on request, about the results of the ongoing exploitation. On the one hand, this is presumably the intention of the legislator, as the author should be able to check whether the lump sum received by him or her is (still) proportional to the result of the exploitation achieved by the operator. On the other hand, it seems like a very burdensome and often disproportionate administrative obligation to have to periodically report on ongoing exploitation, even to those authors that do not receive running royalties but have been paid a one-off lump sum a long time ago – and who even may consider this a recurring reminder of the possibility of making a claim for additional remuneration.

II. Legal successors and licensees

9. In the case of (further) transfer of copyright by, for example, the publisher or producer, the transparency obligation under the law passes to the legal successor of the publisher or producer.[20] Even more radically, the transparency obligation also covers all exploitation by licensees and sub-licensees. In principle, the producer or publisher must report on the exploitation in the entire value chain, and if he is unable to do so, the law gives the author the right to claim information

[19] Section 25ca(1) DCA.
[20] Section 25ca(1) and (2) DCA.

directly from those licensees and sub-licensees. The actual enforcement of this entitlement would appear potentially problematic, in particular as regards licensees outside the EU, such as in the US or the UK.[21] Will a foreign sub-licensee, having itself contracted under foreign law with a licensee, be subject to Dutch law? Many operators 'in the chain' consider their entire operating results to be business-sensitive information. But by the letter of this provision, they will have to inform all or most authors about it annually.

It appears from recital 75 of the DSM Directive that income from merchandising is also included in operating income.[22] This raises tricky questions, as not all merchandising relates to the exploitation of copyright or neighbouring rights. Much merchandising relates to trademarks, portraits or distinctive signs to which the producer or publisher itself is entitled. However, such exploitation could be seen as a spin-off of the exploitation of copyrights or neighbouring rights. The case law will have to develop criteria on a case-by-case basis, with legal certainty only gradually developing over time.

Recital 74 of the DSM Directive states

> "Authors and performers need information to assess the economic value of rights of theirs that are harmonised under Union law. This is especially the case where natural persons grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration. That need does not arise where the exploitation has ceased, or where the author or performer has granted a licence to the general public without remuneration."

The last phrase presumably refers to *Creative Commons licences* and other forms of making content available free of charge on the internet, where no income is earned. It is indeed obvious that in all cases where no remuneration is due, there is also no transparency obligation. The main problem will be with substantial (extensive or frequent) contributions, for which lump-sum payments are the common method of remuneration, but an adjustment for more extensive or profitable use would be desirable and reasonable in the eyes of the author.

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21 President District Court Amsterdam 10 September 2020, ECLI:NL:RBAMS:2020:4618 (*Plaintiffs/Sony Music NL*). That case concerned the *contractual* obligation to provide information about foreign sublicensees, among others, but Section 25ca DCA creates a legal basis for this.

22 "Such information must be up-to-date to provide access to recent data, it must be relevant to the exploitation of the work or performance and it must be comprehensive in the sense that it covers all sources of income relevant to the case, including, where appropriate, income from merchandising" (Recital 75).

III. Exception

10. "The obligation to provide information does not apply when the contribution of the author is not significant having regard to the overall work",[23] unless the creator demonstrates that he needs the information in order to invoke the bestseller provision of Section 25d DCA. This means that the publisher or producer must provide an exploitation statement to creators whose contribution is 'not significant', at least not annually, but only upon request. Of course, the meaning of 'not significant' is open to debate. Incidentally, it could also be argued that a contribution that is 'not significant' 'in the creation of the entire work' could never lead to a bestseller claim. After all, it is not plausible that the exorbitant success that might give rise to a bestseller claim could be due to a non-significant contribution. An exception might be if a 'whole work' (e.g. an encyclopaedia) consists solely of a collection of non-significant contributions that collectively nevertheless lead to 'significant' success, as a result of which the originally agreed remuneration becomes disproportionate when compared to the exploitation results.

Section 25ca(4)DCA states: "If the administrative burden resulting from the provision of information becomes demonstrably disproportionate in the light of the revenues generated by the exploitation of the work, the obligation is limited to the information that can reasonably be expected in such cases". Such a hardship clause is always useful, but offers little legal certainty.

IV. Practical approach

11. A practical approach seems to be to assume that authors who generally receive royalty payments are presumably significant contributors and entitled to annual exploitation reports, and that authors, where it is customary that they are remunerated with a lump sum, will only receive such a report if requested, which still means that such an exploitation report must be available. In the case of non-significant contributions, e.g. photographs or small illustrations that are included in many different publications or products, this is another special, new area. Recognition software and metadata may be able to do their job here.

G. Bestseller

12. The implementation sees the removal of the qualifier 'serious' from "*serious* disproportionality" in the original 'bestseller provision' of Section 25d DCA, because the corresponding provision in the DSM Directive also does not contain the qualifier 'serious'. At the same time, recital 78 of the DSM Directive states that

[23] Section 25ca(3) DCA.

the provision seeks to address '*clearly*' disproportionate situations. Consequently, whether this means a material change or a 'lower threshold' we will never know, because the former Dutch criterion has not led to any case law. In the Netherlands, so far, only the weakly reasoned and strongly criticised *Soof 2* rulings of the Copyright Contract Disputes Committee exist.[24] In its ruling concerning a claim brought by the writer of the screenplay and the director of the very successful Dutch-language movie *Soof 2*, this Committee compared the royalty percentages of the writer of the screenplay and the director with the royalty received by the producer, without taking into account, on the one hand, the substantial lump-sum payments they already had received and, on the other hand, the revenues of the distributor and the cinemas, for lack of information (as they were not party to the dispute and could not be compelled to provide it). The decisions to double the royalties in question are generally considered to be highly questionable.

According to the amended text of the law, the creator is now entitled to "additional fair compensation", "if the agreed remuneration is disproportionate in relation to the proceeds from the exploitation of the work", given the mutual performance of the parties. Officially, the (un)foreseeability of success is not a criterion in this respect, but it seems almost inevitable that this aspect will play a role. After all, if a certain degree of success was foreseen, there is a greater chance that the agreed remuneration has already taken this into account, and a correspondingly smaller chance that the remuneration is nevertheless later held to be 'disproportionate' as compared to the actual proceeds.

Completely new and important is the possibility of a bestseller claim *directly* against *(sub-)licensees*:

> "If the disproportion between the author's compensation and the proceeds from the work's exploitation arises after the other party to the contract with the author assigns or licenses the copyright to a third party, the author may issue the claim as referred to in the first subsection against that third party, insofar as the latter is entitled to the proceeds from the exploitation of the work."[25]

As such, it is reasonable that a bestseller claim should be brought directly against the party who has made the allegedly disproportionate profit rather than the producers, simply because he is the direct contractual counterparty of the authors, even though he has not himself made the additional profit (but who under the 'old system' could get that claim?).

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[24] Copyright Contract Law Disputes Committee 18 April 2018, No. 113417 (*Director Soof 2*), IER 2018/43, note Poort and Visser and No. 113462 (*Screenwriter Soof 2*), AMI 2018/15; cf. Hugenholtz, also available at www.degeschillencommissie.nl (in Dutch).

[25] Section 25d(2) DCA.

Who does end up with the claim?

13. It would be reasonable if those bestseller claims now indeed only ended up with the parties who made disproportionate profits, and not, for instance through transfer of liability clauses, with other parties with weaker bargaining power in the distribution chain. It is sometimes forgotten that small publishers and producers are often weak in negotiations with large distributors. On the one hand, it is unreasonable for smaller parties to have to indemnify large buyers for bestseller claims. On the other hand, the risk of such claims is partly determined by contractual terms that those small publishers and producers agree with their authors and performers. Those large buyers have no knowledge of or influence on these contractual terms. It becomes even more difficult if a Dutch producer or publisher contracts under foreign law with a foreign buyer, a fortiori if it is located outside the EU. The latter will not accept claims under Dutch law and will want guarantees under its own foreign law that a Dutch producer or publisher cannot actually give. So it is better to always contract under Dutch law with foreign buyers, but this will often not be acceptable to buyers.

H. Non-usus

14. The non-usus provision is the provision under which authors can reclaim their rights if their work is not at all (or no longer) or only insufficiently exploited, and is included in Section 25e DCA. The only visible change in the law is the deletion of the phrase "or if the other party has such a compelling interest in maintaining the agreement that by the standards of reasonableness and fairness the author's interest must give way". Article 22 DSM Directive has no such exception. According to the Explanatory Memorandum, the operator's 'weighty interest' in this respect "applies as a colouring and specification of the provisions in the light of Section 3:13 of the Civil Code on the basis of which the person entitled to a power cannot invoke it insofar as he abuses it".[26] If this is the purport, not much will change, as 'abuse of right' will remain a defence that the operator will be able to invoke.[27] Furthermore, importantly, this non-use regime is now also harmonised by EU law, which defines a certain minimum level of exploitation, with the CJEU having the final say on its interpretation.

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[26] *Parliamentary Papers II* 2019/20, 35454, 3, p. 20.

[27] See *Parliamentary Papers II* 2019/20, 35454, 3, p. 20: "The removal of the phrase does not, however, alter the fact that under circumstances invoking the provision under 3:13 of the Civil Code may amount to an abuse of rights."

As the Evaluation of the Copyright Contracts Act found, a major practical problem is that with the shift from offline to online, it is no longer that clear where the boundary between sufficient and insufficient exploitation actually lies:

> "With distribution channels becoming digital (iTunes, Spotify, Netflix, Kobo) and the disappearance of physical carriers (CD, DVD), the concept of ('sufficient') 'exploitation' has become increasingly problematic. Nowadays, online availability is a basic requirement, but as such it is certainly not sufficient. It arguably also encompasses ensuring that the work remains findable and is brought to the attention of the pubic in all ways that are and become reasonably possible. This problem plays out in all industries."[28]

It is generally agreed that operators have an ongoing duty of effort to exploit. However, exactly what that duty consists of varies greatly from one industry to another. In book publishing, it used to mean that the book had to be 'in print': a stock of printed copies still had to be available. If not, either a reprint had to be commissioned or the rights had to be returned. However, with the advent of print-on-demand, 'in print' is often no longer a good starting point. For example, the Amsterdam District Court ruled, and the Amsterdam Court of Appeal confirmed, that a publisher that ensured 30 copies were always in stock at the *Centraal Boekhuis*, the central storage facility for all Dutch bookshops, and arranged that if necessary copies could be reprinted via print-on-demand, sufficiently exploited the publishing rights granted to it.[29] This means that the 'in print' criterion is no longer suitable for determining 'normal exploitation'. This is because it is very easy and virtually free for a publisher to keep works available *in perpetuity* via print-on-demand, without further investing in their exploitation in any way. Effectively, there will thus hardly ever be any question of non-usus. If this is not considered acceptable, other parameters to define adequate exploitation must be developed.[30] In a recent standard agreement for the literary publishing sector, the floor for sufficient exploitation of individual literary book titles is set at a minimum annual revenue of €200.[31]

The question also remains whether, and to what extent, marketing and promotion (how, when and for how long) are necessary to ensure sufficient 'usus'. The extent to which they are will vary by industry. "The publisher of a novel will be bound to invest in publicity around its publication, but he does not have to do so indefinitely. However, the novel should be included on all platforms and subscription models where there is demand. The publisher of an academic journal should ensure that an article becomes and remains available online, but also that

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28 CCA 2020 Evaluation Report, 48.

29 Amsterdam Court of Appeal 15 December 2020, ECLI:NL:GHAMS:2020:3481 (*Geldof/Overamstel*).

30 CCA 2020 Evaluation Report, 48.

31 https://auteursbond.nl/kennisbank/modelcontract-oorspronkelijk-nederlands-literair-werk/.

it remains findable through all current search engines", says the Evaluation of the Copyright Contracts Act.[32]

Sometimes, the obligation to exploit is explicitly formulated in the contract, but absent such explicit formulation it is still possible to construct this as an implied obligation. In *Nanada v Golden Earring*, the Court of Appeal considered that, pursuant to the agreements it had concluded with the band Golden Earring, the music publisher Nanada had and implied continuous obligations to undertake adequate efforts to promote and exploit (and provide the related administrative services for) the musical works that Golden Earring had entrusted to Nanada.[33]

The Evaluation of the Copyright Contracts Act also noted that the statutory non-use regime that requires the author to allow the operator *two* reasonable time limits to remedy insufficient use before recission is possible is stricter than the general regime of breach of contract contained in Article 6:265 of the Civil Code. The Reports notes that "[t]his is because under the latter, in principle recission is possible following any non-performance after the debtor is in default. And if adequate exploitation has not taken place within a (first) reasonable period, one could assume that the operator is already in default and therefore recission would already be possible."[34]

The Copyright Contracts Act Evaluation states that this is not necessarily contradictory: "it is possible that dissolution on the grounds of breach of contract is possible earlier than on the grounds of non-usus. If an operator did nothing about marketing from the beginning for a long time, when it could be expected to do so, there may be a breach of contract and recission on that ground is then immediately possible. Recission on the grounds of non-usus is only possible if the work is still not or no longer offered through the usual channels after the second reasonable period."[35]

Multiple authors and multiple rights non-usus

15. Where there are several authors who are party to an exploitation contract, recission for non-use at the request of only one of them is only possible through the courts, as the interests of other authors must then be taken into account (Section 25e(2) DCA).

According to the legislative history, it is "conceivable" that the regulation could also be applied in cases where there is not so much a common copyright but rather a cumulation of different rights on a work, e.g. copyright and a database right, or copyright of a publisher and a neighbouring right of the producer. Just as where there are multiple holders of the same type of right, the situation may occur where

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32 CCA 2020 Evaluation Report, 49.

33 HR 7 July 2017, ECLI:NL:HR:2017:1270, NJ 2017/344, cf. Verkade (*Nanada/Golden Earring*).

34 CCA 2020 Evaluation Report, 48.

35 CCA 2020 Evaluation Report, 48.

one or more of these right holders prevent 'usus' and the other right holders are disadvantaged as a result. Again, "holding on to one's own right purely to prevent another party from successfully exploiting it [...] may, under circumstances, contravene the principles of reasonableness and fairness to be observed towards each other in society and thus amount to an abuse of rights".[36]

This is an important issue because there will often be cumulation of different rights, e.g. copyright (of the author) and the database right (of the publisher), or copyright and the neighbouring right of the performer on the one hand and the neighbouring right of the phonogram producer on the other. It is unlikely that resolving such conflicts will require, for example, the publisher or producer to relinquish its right, but it is likely that it will result in a restriction of the exercise of that right in a way that makes exploitation by the author impossible. In a dispute between symphonic rock band Epica and its label Centertainment that lead to recission of the record deal, the court correctly ruled that, whilst the label did not have to relinquish its rights as (phonogram) producer (the masters owner) to the band (who held the performer's rights in the same masters) as a consequence of the rescission, it did have to tolerate the ongoing exploitation of the masters, and was not allowed to use its phonogram producer's right to thwart it.[37]

I. Unreasonable clauses

16. The provision on unreasonable clauses, Section 25f DCA, remains unaffected by European harmonisation. Given that this provision is not only rather broad but also applies a lower threshold for 'unreasonableness' than general civil law (which only allows contractual provisions to be set aside if their enforcement is *unacceptable* under standards of reasonableness and fairness), it is often invoked in disputes, also because, unlike the other provisions of the current copyright contract law, it also applies to contracts concluded before 1 July 2015. The best-known case so far is the ongoing case of *Martin Garrix v Spinnin Records*, which the Supreme Court referred to the Court of Appeal at Den Bosch in December 2021.[38]

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[36] *Parliamentary Papers II* 2013/14, 33308, 9, p. 7.

[37] President District Court Amsterdam 9 March 2021, ECLI:NL:RBAMS:2021:1041 (*Epica v Centertainment*).

[38] Arnhem-Leeuwarden Court of Appeal 24 December 2019, ECLI:NL:GHARL:2019:11117 (*Spinnin Records and MusicAllStars Management/Martin Garrix*), largely upheld by the Supreme Court in its judgment of 17 December 2021, ECLI:NL:HR:2021:1923, with referral to the Court of Appeal Den Bosch for settlement of the remaining points in dispute. The author represented Spinnin Records and MusicAllStars Management in this case).

J. Film copyright law

17. In the field of film copyright law, the most important change is that all filmmakers – i.e. not only screenwriters, directors and lead actors, but also all other actors, writers and dubbing artists, cameramen, cartoonists and all kinds of editors and designers – will be entitled to proportionate equitable remuneration for any form of 'retransmission' and direct injection into cable networks. That change is mainly due to the implementation of the EU Online Broadcasting Directive.[39] The implications and background of that change are not discussed here.[40]

K. Application in time

18. As there is no specific transitional law, it is likely that the recent amendments to the author's contract law apply with immediate effect and therefore also apply to existing contracts, at least to contracts concluded after 1 July 2015. The preparatory works in the Netherlands give no guidance on this. Applicability to older contracts applies insofar as the existing provisions of the author's contract law also apply to contracts concluded before 1 July 2015. Broadly speaking, the 'equitable remuneration' and 'bestseller' clauses do not apply to pre-1 July 2015 contracts, but 'non-usus' and 'unreasonable' clauses do. As has been mentioned, the new transparency obligation of Section 25ca DCA came into force on 7 June 2022, and applies immediately to all contracts existing at that time.

L. Perceived risk of blacklisting and legal certainty for operators

19. The main 2020 Evaluation of the Copyright Contracts Act noted that authors often mention the fear of being 'blacklisted' for further work as the reason for being reluctant to invoke the various provisions of copyright contract law that are meant to protect authors.[41] On the other hand, operators who engage authors, such as publishers and (film and music) producers, fear the risk of contracts with creative contributors being retroactively challenged. It seems inevitable for both

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[39] Amendment to the Copyright Act and the Neighbouring Rights Act in connection with the implementation of Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and neighbouring rights applicable to certain online broadcasts by broadcasting organisations and retransmission of television and radio programmes and amending Council Directive 93/83/EEC (Online Broadcasting Services Directive Implementation Act), bill 35.597.

[40] For that, please refer to the article 'Broadcasting royalties' in the journal *Auteursrecht* 2021-2.

[41] "Authors stress, moreover, that even with compulsory affiliation for operators, or the inclusion of a compulsory go to the dispute resolution committee in model contracts, the fear of blacklisting will continue to be a very significant barrier to their willingness to complain", CCA 2020 Evaluation Report, 64.

sides that the legal uncertainty introduced by copyright contract law that has been further increased by EU harmonisation will continue for some time.

M. Future amendments

20. In 2022 a draft proposal for legislative amendments to implement the conclusions of the 2020 Evaluation was submitted for public consultation.[42] The most prominent element of the proposal is the extension of the statutory right for contributors to films to proportionate fair compensation (to be collected via collecting societies) for video-on-demand exploitation. This met with considerable resistance from producers, broadcasters and cable distributors. The 'risk of leakage' – meaning the risk that foreign, especially US, right holders would be able to claim the vast majority of this statutory compensation, given that video-on-demand services currently on offer predominantly carry US repertoire – was considered to be the main obstacle. However, any attempt to reduce or exclude US authors' statutory entitlement would run the risk of contravening the Berne Convention's equal treatment rules. Whether the Berne Convention actually applies to statutory entitlements of this type is however a matter of dispute between experts. As of early 2023 it is not yet clear which elements of the consultation proposal will be formalised in a legislative proposal and, ultimately, the law.

[42] https://www.internetconsultatie.nl/acr2/b1.