Kluwer Copyright Blog

The Next Great Copyright Act: Remember the Authors!

Jane Ginsburg (Columbia University School of Law) · Monday, April 13th, 2015

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In a previous column for the Media Institute (Feb. 17, 2015), I urged that any copyright reform legislation that emerges from the preparations for "the next great copyright act" should ensure both authors' attribution and economic interests. The earlier column addressed attribution; this column will consider remuneration, a matter that has lately been the subject of copyright reform in the Netherlands and France as well.

The Anglo-American legal tradition, not generally known for solicitude toward the weaker party in contract negotiations, in fact has long recognized that authors may sell their rights for a pittance, then gaze forlornly on the fortune the work reaps for the author's co-contractant. Indeed, in the very first copyright act, the 1710 Statute of Anne, Parliament acceded to authors' demands to profit from the success of their works by providing, were the author alive at the expiration of the 14-year copyright term, that "the sole right shall return to the Author" for another 14-year period of exclusive rights (Section 11). Congress modeled much of the first U.S. copyright act, of 1790, on the Statute of Anne, including the author's reversion right. That right, now in the guise of an inalienable right to terminate contracts 35 years after the grant, has survived many U.S. copyright reforms, and constitutes probably the most significantly author-centric component of the U.S. Copyright Act. Unfortunately, in practice, the termination right has often proved difficult to exercise effectively, so for many authors, its promise may too often be illusory. (Earlier columns for the Media Institute have explored the past and present of authors' termination rights, here and here.)

A copyright-reforming Congress might modify the termination right to remove some of the practical impediments to its implementation, including the loophole that allows the parties to rescind the original agreement and to enter into a new one, a gambit that has the effect of starting the 35-year clock running anew, without necessarily substantially improving the original deal. Better still, however, would be to ensure that the original deals provide a fair return to the authors. The United States might follow the lead of several EU countries in requiring that contracts provide proportional remuneration (royalties, instead of a lump sum) or equitable

remuneration for each mode of exploitation of the work. Where the work is "for hire" or is subject to compulsory licensing, Congress might build on its own examples in the 1995 Digital Performance Right in Sound Recordings Act (as modified in 1998), and in the 1992 Digital Audio Recording Act, and set aside at least 1/2 to 2/3 of the statutory royalties for authors and performers (including certain employee performers).

The remainder of this column will describe the recent Dutch and French legislation, as possible models for U.S. initiatives.

Dutch Copyright Contract Act[1]

Under Dutch law, like U.S. law, employers are the copyright owners of employee-created works. But the Dutch version of works made for hire does not extend to works by freelance creators. As to non-employee authors, the new copyright law announces a principle of strict interpretation of the scope of contracts: The grant "shall comprise only the rights that are stated in the deed or that necessarily derive from the nature and purpose of the title or the grant of the license."[2] This provision confirms prior caselaw narrowly interpreting the scope of grants in the context of modes of exploitation developed after the conclusion of the contract. In the United States, courts treat the scope of copyright licenses as a question of state law (and then reach differing conclusions[3]); were the next U.S. copyright act to federalize that issue and install a similar principle of strict interpretation, the outcomes of "old license/new media" controversies in some federal circuits could substantially change in favor of authors. For example, the Second Circuit's approach, endorsing an interpretation "that the licensee may properly pursue any uses that *may reasonably be said* to fall within the medium as described in the license," would no longer be permissible were the U.S. copyright law to adopt a standard limiting the scope of the grant to "only the rights that are stated in the deed or that *necessarily derive* from the nature and purpose of the title or the grant of the license."

The Dutch law contains several nonwaivable[4] provisions assuring authors "fair compensation." As a general rule, contracts are to stipulate fair compensation for grants of rights of exploitation, and the Minister of Education, Culture and Science is to "determine the amount of fair compensation for a specific sector and for a certain period of time" upon the "joint request of an association of makers existing in the relevant sector and a commercial user or an association of commercial users. This request shall contain jointly agreed advice regarding fair compensation and a clear definition of the sector to which the request relates."[5] The law's "bestseller clause" provides for additional compensation when "the agreed compensation is seriously disproportionate to the proceeds from the exploitation of the work," although the law does not define "seriously disproportionate."[6] (The German copyright law has long had such a clause, so caselaw under that provision may provide some guidance.) The law provides a further source of remuneration when the contract explicitly covers uses unknown at the time of contracting: The original grantee or its successor(s) must provide additional compensation for those new uses.[7]

The law reverts rights to the author upon notifying the grantee, "if the other party to the contract does not sufficiently exploit the copyright to 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."[8] While the reversion right may not be waived, the law does not define these terms. Perhaps the dispute resolution committees the law establishes[9] will resolve these and other issues that the law leaves open.

French law limitations on the scope of authors' contracts

The French Code of Intellectual Property safeguards authors against leonine transfers in a variety of ways. In addition to mandating that publishing contracts, performance rights contracts, and audiovisual production contracts be in writing,[10] the law further requires that each right granted be distinctly specified in the contract, and that the scope of the grant be defined with respect to its purpose, its geographic extent, and its duration.[11] As a general rule, authors are to receive royalties, rather than a lump-sum payment.[12] Amendments to the statutory provisions on publishing contracts, introduced at the end of 2014, further detail authors' rights in print and digital editions of literary works. These modifications seek to ensure that publishers will in fact exercise the rights that authors grant them, and will fairly account to authors for the fruits of those exploitations. Failure to publish the work within a certain time, or to pursue the exploitation of the rights in a consistent manner ("exploitation permanente et suivie"), or to reissue a book that has gone out of print, will result in reversion of print or electronic rights to the author.[13]

The new provisions require the grant to distinguish print from digital editions, and impose additional author protections with respect to the latter. Notably, the contract must guarantee authors just and fair remuneration for all the revenues deriving from the commercialization and dissemination of digital editions.[14] In addition, contracts granting electronic rights must include a clause providing for periodic review of the economic conditions of the grant;[15] an accord between associations of authors and of publishers will determine the frequency of the reviews and will provide guidelines for dispute resolution.[16] The law also promotes the development of digital editions because a grantee who fails to disseminate a digital edition within the time set out in an accord between associations of authors and of publishers will lose those rights back to the author. [17] Moreover, as to contracts concluded before the law's effective date, the law empowers authors two years thereafter to demand that the publisher produce a digital edition; the publisher's failure to do so within three months following proper notification results in reversion of the digital rights to the author.[18]

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1. Bill No. 33 308. Adopted by the Dutch House of Representatives on Feb. 12, 2015. According to Prof. Dirk Visser, it is expected that the Dutch Senate will adopt the bill in the spring of 2015 and that the changes to copyright contract law will enter into

force on July 1, 2015. Thanks to the law firm of Visser Schaap & Kreijger for the English translation of the Act. Available at http://www.ipmc.nl/en/topics/new-copyright-contract-law-netherlands. And many thanks to Prof. Dirk Visser for responding to my questions regarding the new Dutch law.

2. Art. 1A, modifying Art. 2 of the Dutch copyright law.

3. Compare *Cohen v. Paramount Pictures*, 845 F.2d 851 (9th Cir. 1988) with *Boosey & Hawkes v. Disney*, 145 F.3d 481 (2d Cir. 1998) (both interpreting the scope of synchronization licenses and reaching different conclusions as to the extension of the licenses to cover distribution of videocassettes to the public).

4. Dutch law on authors' contracts, Art. 25h(1).

5. *Id*., Art. 25c.

6. *Id*., Art. 25d.

7. *Id*., Art. 25c(6).

8. *Id*., Art. 25e.

9. *Id*., Art. 25g.

10. France, Code of Intellectual Property, Art. L131-2. U.S. copyright law requires that the grant of any exclusive right must be in writing and signed by the grantor, 17 U.S.C. Sec. 204(a).

11. *Id*., Art. L131-3. The author may grant rights for future modes of exploitation unknown at the time of the contract, but such a grant must be explicit, and must provide for a share in the profits of the new form of exploitation. *Id*., Art. L131-6.

12. *Id*., Art. L131-4.

13. *Id*., Art. 132-17-1-5 (*see* http://www.legifrance.gouv.fr/affichCode.do;jsessionid=2D013356C523C269C96912FA8B0AE456.tpdjo04v_3?idSectionTA=LEGISCTA000029759371&cidTexte=LEGITEXT000006069414&dateTexte=20150208).

14. *Id*., Art. 132-17-6.

15. *Id*., Art. L.132-17-7.

16. *Id*., Art. L. 132-17-8(8).

17. *Id*., Art. L. 132-17-5.

18. Ordonnance n° 2014-1348 of Nov. 2, 2014, transitional provisions, Art. 9. Arts. 11 and 12 provide for application of other author protections to contracts concluded before the law's effective date.

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