Kluwer Copyright Blog

Three Cheers for the DSM Directive's Rules on Author's Contracts – and a Cautionary Note from the Netherlands

Bernt Hugenholtz (Institute for Information Law (IViR)) · Monday, June 14th, 2021

On June 7th, two years after its adoption, the deadline for implementing the DSM Directive finally expired. While academics and stakeholders have been critically dissecting its controversial provisions on platform liability, news aggregation and text & data mining, the Directive's Chapter 3 ('Fair remuneration in exploitation contracts of authors and performers') has gone almost unnoticed, save for a positive opinion of the European Copyright Society.

The DSM Directive's new rules on author's contracts are indeed something to celebrate. For too long the EU legislature's harmonization machinery was geared towards codifying copyright's economic rights, without questioning who really benefited from these prerogatives. In practice, of course, the "high level of protection for rightholders" that, according to the oft-repeated words in the preambles, the directives sought to achieve, favoured the copyright industries rather than the authors and performing artists.

By including rules on author's contracts and fair remuneration in the acquis, the EU has finally accepted that decent copyright policies are not simply the product of a two-dimensional lobbying game between "rightholders" and "users". Good copyright laws should, first and foremost, promote creativity by protecting actual creators.

The DSM Directive provides for a set of four contract adjustment measures, to the benefit of authors and performers:

- a right to appropriate (fair) remuneration (art. 18);
- a right to additional fair remuneration, in case the agreed payment turns out to be "disproportionately low" (art. 20);
- access to voluntary alternative dispute resolution (art. 21); and

- a right of revocation of licenses or transfers where there is "lack of exploitation" (art. 22).

Provisions of this kind have been in existence in several Member States for many years, and it is important that these are now available to authors and performers across the entire Union. As from June 7th, 2021, in Europe "freedom of contract" no longer implies a freedom to mistreat creators.

But are provisions of this kind enough to improve the negotiating position of creators and increase revenue streams? Judging from a recent evaluation of Dutch author's contracts law, which was conducted for the Dutch Government by researchers at the Institute for Information Law (Stef van Gompel, Joost Poort and myself) together with Dirk Visser of Leiden University, there are reasons not to be too optimistic.

In 2015, variants of the four contract-adjustment provisions prescribed by the DSM Directive were introduced into the Dutch Copyright Act. But the study we conducted, which was largely 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 losing future commissions or even of being 'blacklisted'.

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

The Dutch evaluation study is especially critical of the voluntary alternative dispute mechanism that has so far remained an empty shell. Since authors and performers are reluctant to initiate individual disputes, and exploiters prefer not to commit to dispute resolution, only a few cases have been brought before the Dutch dispute committee.

Although the Dutch law on author's contracts is still young and the study's findings may be premature, a few 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 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 mechanisms that allow anonymous and/or collective complaints on behalf of authors and performers.

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

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