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What does the new Dutch Copyright Contract Law have to offer?

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The Dutch Copyright Contract Law entered into force on July 1st 2015. According to the legislator it aims to strengthen the position of the author and performer in exploitation agreements (see Explanatory Memorandum under 1, 1st paragraph), and will ideally lead to them receiving a fairer share of the profit from their work (see Memorandum under 1, 5th paragraph). It remains to be seen, however, whether the changes will have the desired effect. This article discusses the main changes to the Dutch Copyright Act.

The penniless author in need of support is an image that comes to mind when discussing why copyright exists. We think of images such as that depicted in Adriaen van Ostade's self portrait or Spitzweg's *Der Arme Poet*. It is the penniless author whose livelihood completely depends on the exploitation of his work, and without copyright he would be unable to keep on creating. This notion of why copyright protection exists is equally as romantic as it is out of touch with reality. Even though the author (or maker) is the central figure in copyright law, and it is he who initially owns all the rights to the work, in practice the rights are generally transferred or licensed to other parties who exploit the works. Copyright serves many more players than just the penniless author.

A common complaint is that most of the profit made from the exploitation of works ends up in the pocket of the exploiter rather than the author. This is deemed unfair. The amount of remuneration is dependent on the outcome of negotiations, and research has shown that authors and performers structurally find themselves in a weak contractual bargaining position, leading to unfair contracts (see *Hugenholtz and Guibault*). Moreover, because of increasingly complex supply chains and payment flows, it is difficult for the author to gain any insight into the fairness of the level of remuneration they receive. A lack of transparency in these matters was one of the key findings in a recent study on the remuneration of authors.

The new copyright contract law aims to balance the scales by ensuring certain rights for the author in exploitation contracts. In short, the changes are the following: the conditions for exclusive licensing have changed, a new chapter has been added concerning the exploitation agreement (which is also applicable to the neighbouring rights of performers) and amendments have been made to the provision concerning copyright in film (article 45d). Hereafter the main changes will be discussed.

Article 2 deals with the transfer, licensing and succession of copyright. It is now explicitly stated

that copyright can be licensed. Furthermore, the article has been amended to include a formal requirement for a written document for exclusive licences, previously only required for a transfer of copyright. The scope of the transfer or licence must be determined by a strict interpretation of this document. This rule serves to protect the author from hastily signing away more rights than he realises. As an exclusive licence has the same effect as a transfer in practice, it is only apt that this protection now also applies to this legal instrument. An earlier drastic suggestion in the 2010 preproposal was to completely exclude the possibility of the transfer of copyright and to make exclusive licences terminable by the licensor every five years, but this did not make the cut.

The new chapter in the Copyright Act provides a mandatory law for exploitation agreements, i.e. agreements that are aimed primarily at the exploitation of works. It includes provisions on the right to equitable remuneration, disproportionality (the so-called “bestseller provision”), non-use and unfair contract terms. The author cannot waive the rights granted to him under these provisions, and they apply irrespective of the law governing the agreement, where the agreement would have otherwise been governed by Dutch law, or whenever the exploitation is taking place wholly or predominantly in the Netherlands (art. 25h).

Article 25c(1) gives the author a right to equitable remuneration for granting exploitation rights. Furthermore, under article 25c(6) the author can claim additional remuneration when the method of exploitation was unforeseen at the time of concluding the agreement. The question to which everyone wants the answer, is when the remuneration is to be regarded as equitable. In response to concerns about possible legal uncertainty resulting from this provision, the State Secretary said that there is no reason to fear that the courts will not be able to decide “what is fair in a fair manner”. This may be doubtful however. Sentfleben (here, ref. 8) has pointed out that in Germany, where a similar system has already existed for ten years, no use is made of it. Only time will tell whether the Dutch provision will prove more successful.

Article 25d is the so-called ‘bestseller provision’. In the case of serious inequality between the remuneration received by the author and the profit made from the exploitation, the author can claim additional remuneration. There is no guidance on when there is serious inequality. Sentfleben suggested in 2010 (here, ref. 8) that the legislator could make the provision clearer by indicating that a certain percentage of the equitable remuneration would suggest serious inequality. In Germany they work with the criterion ‘conspicuous inequality’ which would be fulfilled where the author only received 50% of the equitable remuneration. The Dutch do not currently have such guidelines, but for the sake of authors and performers this would be desirable, although here again the problem is that it is not clear what an ‘equitable’ remuneration is.

Article 25e gives the author a right to reclaim his rights in the case where they are not properly exploited. For the music industry this rule is now codified, as a similar rule was already applied by the Dutch courts based on general contract law (art. 6:265 BW). Article 25f declares certain terms in exploitation contracts unfair. Voidable are: terms that grant rights over future works for a long or unclear period; and terms that are unreasonably burdensome on the author. It is also not possible for the exploiter to have a unilateral termination right; the author will always have the same right under the same conditions.

To conclude, the new Copyright Contract Law will give authors and performers support in their contractual negotiations with exploiters. There are however some open norms, especially ‘equitable remuneration’, that need further interpretation in order to be able to provide actual support in practice. It remains to be seen whether this potential will be realised.

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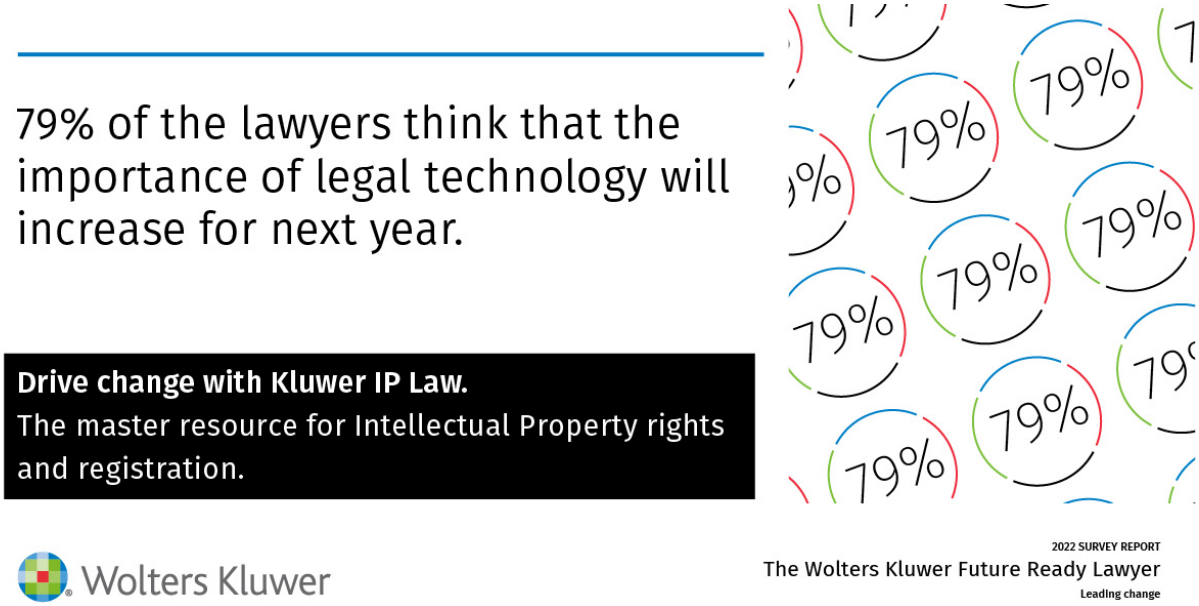

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