Kluwer Copyright Blog

Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 1)

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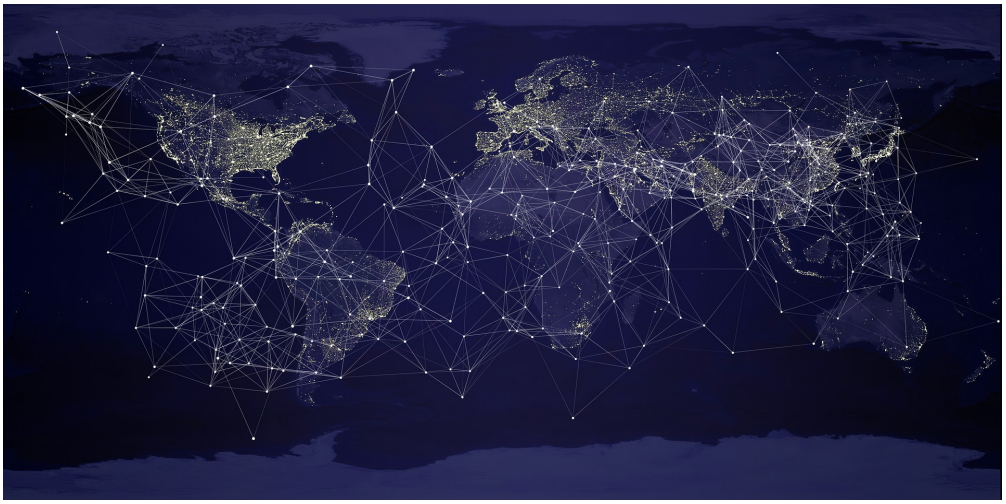

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The online exploitation of content protected by copyright inherently entails cross-border aspects. Thus, the digital context of copyright exploitation contracts leads to questions of applicable law. Business-to-business contracting parties enjoy significant freedom in determining the law applicable to their contractual relationship. It makes commercial sense for parties to leverage their relative bargaining position to impose choice of

law clauses that affect their position in a favourable way. This set of two blog posts analyses the primary limitations to parties' freedom of contract in this context, from the perspective of EU law. Part 1 discusses the relevant context, the scope of choice of law clauses, the consequences of artificially created extraneity and the potential relevance of public policy considerations, while Part 2 will turn to the concept of overriding mandatory provisions and the regimes foreseen for employment and consumer contracts.

Introduction

Traditionally, many copyright exploitation contracts between artists and corporate partners such as publishers and record companies have been contracts of adhesion with a 'take it or leave it' nature. The oversupply of artists with low bargaining power who seek success may in practice lead to artists being forced to accept disadvantageous contract terms.

There are three types of measures that curtail parties' freedom of contract with the objective of countering the difference in bargaining power between artists and their corporate counterparties. All three types are present in the national laws of Belgium, Germany, France and the Netherlands.

- First, there may be formal requirements, such as the need for a written document for purposes of proof (see e.g. Article XI.167(1) Belgian Code on Economic Law) or validity (see e.g. Article 2(3) Dutch Copyright Act).
- Second, the law may prohibit clauses deemed unfair or excessive. By way of example, the scope of rights transferred may be limited, such as by the principle of strict interpretation, the need for a proper specification of the scope and terms of the transferred/licensed right(s) and restrictions to the transfer or licensing of certain rights, such as to future works or methods of exploitation (see e.g. Articles L 122-7, 131-1, 131-3 and 131-6 French IP Code). Other rules may limit contract transfers, sub-licensing or excessive contract duration, or prohibit other contract terms and trade practices deemed unfair (see e.g. Article 25f(2) Dutch Copyright Act).
- Third, the legal framework may impose certain substantive obligations on one (or more) of the contracting parties, in favour of the weaker contract party (or parties). Such measures seek to level the contractual playing field and include exploitation obligations, remuneration requirements and minimum benchmarks as to transparency (see e.g. Sections 32-36d and 40a-41 German Copyright Act). A partial harmonisation of rules belonging to this third category has taken place at the EU level, most notably by Articles 18 through 23 Copyright in the Digital Single Market (CDSM) Directive.

The substantive analysis of these provisions should go hand in hand with a study of their application in practice. The inherently cross-border context of many copyright exploitation contracts invites us to review relevant provisions of private international law. This international dimension is especially relevant in the digital age, where the online use of protected content constitutes an almost inevitable pillar of exploitation, and is consolidated by the prevalence of international media conglomerates in the present-day entertainment industry. The persisting substantive differences between the relevant legal framework in Member States, as well as between Member States' regimes and national laws outside of Europe, render issues of applicable law particularly important.

Choice of law clauses

Under EU law, the law applicable to a contractual relationship may be determined by the contracting parties, through a choice of law clause (Article 3(1) Rome I Regulation). The choice must be express and/or clearly deducible from the contract's terms or circumstances (Article 3(2) Rome I Regulation). This allows parties to limit the legal uncertainty resulting from divergences between national legal frameworks.

Business-to-business contracting parties outside an employment context enjoy significant freedom as to choice of law clauses. This may lead to freelance artists in particular being confronted with foreign laws that are less favourable to them. The party with the strongest bargaining power is likely to be able to impose a choice of law clause in favour of a jurisdiction that is familiar to them and that, at least to a certain extent, caters to their interests. It makes perfect and legitimate commercial sense for them to do so. Since a significant proportion of relevant corporate partners in the entertainment industry have an Anglo-American background, this brings a legal tradition into

the equation that is markedly different from continental European jurisdictions. The Anglo-American legal tradition strongly emphasises the freedom of contract and hesitates to accept measures that seek to protect a contracting party deemed to have a weaker bargaining position. Consequently, choice of law clauses in favour of common law jurisdictions may affect the level of protection accorded to artists.

The law of the country selected in a choice of law clause (indicated as the *lex contractus*) governs issues of contract interpretation, performance and (consequences of) termination (Article 12 Rome I Regulation). At first sight, this risks side-lining many of the three types of protective measures described above. However, this finding does not ring true for all protective provisions.

Exceptions to choice of law

The *lex contractus* as determined under the Rome I Regulation has no bearing on the issue of initial ownership or the question whether and how the initial rights owner(s) is/are allowed *by law* to transfer their rights or grant licences to exploit. Indeed, the Rome I Regulation only applies to contractual obligations and is silent on proprietary aspects. As a result, the general conflict of laws rule for IP rights applies. This leads to the application of the law of the country where legal protection for the copyright is claimed (indicated as the *lex loci protectionis*) (Article 5(2) Berne Convention). Therefore, limitations on the transferability of rights that do not form part of the *lex contractus* may be held to apply to a specific dispute if protection is sought in a jurisdiction that recognises them.

The effects of choice of law clauses are also limited through certain express provisions of EU law.

First, if a choice is made for the law of a country that has no link with the dispute at hand at the time of this choice, provisions of mandatory law of the country with all such relevant links remain applicable, in addition to the chosen law (Article 3(3) Rome I Regulation). This rule only applies if the contract focuses on a single country. In the context of online exploitation of protected content, such a focus will rarely occur, in view of the inherently cross-border nature of such exploitation. Consequently, the application of this rule to contracts envisaging digital exploitation is limited at best.

An analogue rule applies to mandatory provisions of EU law, including as implemented into Member State law. If the parties have chosen the law of a non-Member State, such as the United States of America, but the contractual relationship only has links with one or several Member States at the time of the choice of law, mandatory EU law applies (Article 3(4) Rome I Regulation). Relevant factors include the domicile of the parties, the place of creation of the content and the intended place of exploitation—if this is already clear at the time of the choice of law. Mandatory EU rules include the provisions of the CDSM Directive concerning active reporting obligations, the contract adjustment mechanism and the potential recourse to alternative dispute resolution (see Articles 19, 20 and 21 in conjunction with 23(1) CDSM Directive). As is the case for Article 3(3) Rome I Regulation, this rule seeks to counter situations of artificially created extraneity. Given the inherently international nature of online exploitation contracts and thus the arguable presence of the requisite ‘links’ across the globe, it is difficult to envisage a situation where recourse to this rule may be had in the context of copyright exploitation contracts in the digital era. Its scope of application in practice is therefore, again, limited.

Further, once the law of a country has been declared applicable, the application of a provision of such law may be refused if this would be manifestly incompatible with the public policy of the forum (Art 21 Rome I Regulation). This concept leads to the *dis*application of certain rules and does not lead to the application of positive obligations, either in terms of the exploitation of protected content or the remuneration therefor. It is thus highly unlikely to have a palpable impact on the substantive position of artists. A contrary conclusion may only be reached in case of an applicable law that accepts a brazen disregard for moral rights and/or an elimination of artists' freedom to create, but only in fact-specific situations that border on the extreme.

Contracting parties' freedom to choose the law applicable to their contractual copyright exploitation relationship is also limited on other fronts. These limitations are treated in Part 2 of this blog post.

This post discusses part of the presentation on copyright contracts and private international law given by the author at the Copyright Contracts Tomorrow conference in Ghent on 23 September 2022. It relates to the author's doctoral thesis, which focuses on the substantive legal framework surrounding contractual dynamics in the digitised music industry in Belgium, France, Germany and the Netherlands, as well as the application thereof in practice.

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