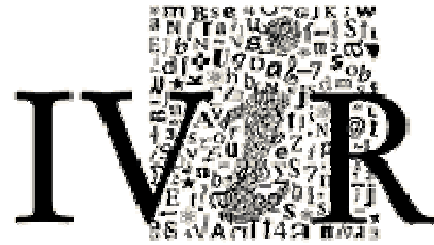


Digitization and Authors' Contracts

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Outline

- How digitization affects authors' contracts
 - Some related factors
- Law of copyright contracts
- Other author-protective legal measures
- Strategic measures
- Flanking measures
- A bit of advice

‘Chain of Exploitation’ of Novel

- One-time periodical
- Serial
- Hard cover
- Book club
- Paperback, pocket
- Condensation
- Comic book/illustrated
- Educational version
- Spoken book
- Play, film
- Video game
- Merchandising
- Reprography
- Translation
- E-book
- Digital archive

Authors' Contracts under Pressure

- Media convergence
 - Integration of formally distinct media (e.g. press, broadcasting, online)
- Media concentration
 - ‘Horizontal’: merger of publishers/media companies
 - ‘Vertical’: integration of primary/secondary channels
- Globalization of media companies
 - U.S. legal (lawyer’s) culture becomes dominant

Authors' Contracts under Pressure (2)

- Demise of the 'gentleman publisher'
 - Media companies become 'profit centres', authors' rights are 'assets' on balance sheet
- Divestiture of non-essential publishing functions (editing, typesetting, printing, distribution)
 - "We're in the right business now" (cf. music publishing)
- Expansion of remit (mandate) of public broadcasters: more channels, web, etc.
 - But no extra public funding

Impact on Authors' Contracts

- Standard-form contracts
 - No/little room for negotiation
- Broad/total transfers of rights (buy-outs)
 - ‘For all media now known or later to be developed’
 - Including derivative uses, repackaging, intra-company uses, etc.
- Unfair remuneration

Law of copyright contracts (1)

Scope of transfer

- Purpose of transfer rule (Ger, NL)
- Specification of grant (Fr, Bel)
- Unknown/new uses excluded (Bel, It, Sp)
- Termination of transfers (USA)
- Termination in case of non-use (Sp)
- Sector-specific rules:
 - Publishing, advertising, film, broadcasting

Law of copyright contracts (2)

Remuneration

- ‘Proportional’ remuneration (Fr, Sp)
- ‘Adequate’ remuneration (Ger)
 - rates presumed adequate if collective agreement exists
- ‘Best-seller’ provision (Bel, Ger)
 - revise contract if lump-sum proves disproportional

European Copyright Directive

- Recital 30: ‘rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licenses, without prejudice to the relevant national legislation on copyright and related rights’.
- Art. 9: ‘This Directive shall be without prejudice to [...] the law of contract’.

Other Legal Remedies

- Civil law:
 - Unreasonable standards terms (but not core provisions of contract)
 - Sanoma case (NL)
 - Unconscionability
 - Unforeseen circumstances
- Competition law:
 - Abuse of dominant position

Strategic Measures

- Model contracts
 - ‘normative’, evidence of fair practice, but not binding
 - Collective bargaining agreements
 - employed authors in film industry (USA)
 - ‘residuals’, credits
 - freelance authors need antitrust exemption
 - Collective administration of rights
 - online, other secondary uses (cable)
-

Flanking Measures

- Exempt model contracts and collective bargaining from anti-trust (cartel) provisions
- Control/restrict media concentration
 - Competition authorities
 - Media authorities
 - Regulatory oversight of public broadcasting should include ‘fair contracting’ with authors

A Bit of Advice

- Unite!
- Make noise
- Do not sign
- Do not (always) run with the ‘right holders’!
 - Social legitimacy of © depends on authors



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Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union

P. Bernt Hugenholtz & Lucie M.C.R. Guibault

(assisted by [M.A.R. Vermunt](#) & [M. Berghuis](#))

The cross-border exploitation of copyrighted works or performances has increased dramatically in recent years. This development is evident in respect of such 'borderless' media such as broadcasting and information services provided online. However, more traditional sectors of the information and entertainment industries, such as book publishing and film production, are also undergoing a process of rapid internationalisation, particularly within the European Union. As a consequence, contractual relationships between authors or performers on the one hand, and publishers, broadcasters or producers on the other hand, are increasingly taking on an international dimension. In view of the differences that presently exist at the national level regarding the law applicable to copyright contracts, this process of internationalisation has, inevitably, prompted the question whether some form of harmonisation at the European level is called for. This is the central question of this study.

[The study is available in pdf format.](#)

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IViR Study on Copyright Contract Law

Main Findings & Recommendations

- Disparities in EU Law
- Too early for harmonisation
 - Copyright ownership not harmonised
 - Moral rights not harmonised
 - General contract law not harmonised
- Promote model contracts at EU level
- Special author-protective conflicts rule in Rome Convention 1980