

ALAI

June 18th 2021

“Copyright Contract Law: Transparency – Right to Remuneration – Non-Use”

- A snap shot from Denmark
(Scandinavia)

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The issues

- Right to reasonable remuneration,
 - transparency, and
 - non-use
-
- Proposal to implement DSM Directive Chapter 3 in DK is expected to be put forward in the fall (the other parts are before parliament now)

Copyright contracts: Starting points in DK law

- General rules/principles of contract law
 - Freedom of contract
 - Danish Contract Code (CC) § 36 (the so-called “general clause”): courts may modify or set aside a contract in whole or in part, “if it would be unreasonable or at variance with the principles of good faith to enforce it”
 - *In dubio contra proferentem*, “good faith and fair dealing” (loyalty) *etc.*
- Danish Copyright Act (CA)
 - Droit moral only transferable for “limited and specific purposes”
 - Chapter 3 on “Assignment of Copyright”
 - § 53(3): Interpretation (“*In dubio pro autorem*”)
 - also § 53(2): The transfer of copies shall not include an assignment of the copyright
 - § 54 (and § 66a): Non-use
 - § 57: Settlement and control

Right to fair remuneration

- No specific rule
- First tier: Interpretation in favour of authors limits extend of transfer
 - CA § 53
 - (1) Subject to the limitations following from sections 3 and 38 the copyright holder may wholly or partially assign his rights under this Act.
 - (2) The transfer of copies shall not include an assignment of the copyright.
 - (3) Where a right to exploit the work in a specific manner or through specific means has been assigned, the assignment does not give the assignee the right to exploit the work in any other manners or through any other means.**
 - ...
- Second tier: Modification via contract law of unfair contracts
 - CC § 36
 - courts may modify or set aside a contract in whole or in part, "if it would be unreasonable or at variance with the principles of good faith to enforce it"
- Case law
 - Very scarce. Limited reliance on protection via CA § 53. Limited application of CC § 36 in contracts with "commercial" ("non-weak") authors (no "best-seller rule")

Norway

- § 69. Right to reasonable remuneration for assignment of copyright

When an author outside of consumer contracts has assigned in full or in part the right to use a copyright protected work, the author is entitled to receive reasonable remuneration from the assignor.

[Når en opphaver utenfor forbrukerforhold helt eller delvis overdrar rett til å råde over et åndsverk, har opphaveren krav på rimelig vederlag fra erververen.]

...

The author cannot waive their rights under this paragraph.

Transparency:

- § 57
 - (1) If the author's remuneration depends on the assignee's turnover, sales figures, etc., **the author may demand that settlement is made at least once a year.** The author may likewise demand that the settlement be **accompanied by satisfactory information** on the circumstances forming the basis of the calculation of the remuneration.
 - (2) The author may demand that the accounts, bookkeeping and inventory together with certifications by the party who has exploited the work in connection with the annual settlement according to subsection (1) be made available to a state-authorized public accountant or registered accountant appointed by the author. The accountant shall inform the author of the correctness of the settlement and of irregularities, if any. The accountant shall otherwise observe secrecy about all other matters that become known to him in connection with his review.
 - (3) The provisions of subsections (1) and (2) shall not be deviated from to the detriment of the author.

Non-use

- CA § 54
 - (1) **The assignee shall be under an obligation to exploit the assigned rights.** The author may **cancel the agreement with 6 months notice**, if the assignee has **not exploited the rights within 3 years** after the time where the agreement has been fulfilled on the part of the author. This does not apply when the exploitation is initiated before the expiration of the notice.
 - (2) The provisions of subsection (1) **cannot be derogated from, unless it is a mere change of the outlined time limits.**
- CA § 66 a (“use it or loose it”) (Term Directive)
 - (1) **A performing artist** may terminate the agreement pursuant to which the performing artist has transferred or assigned his rights to the sound recording of his performance to a producer of sound recordings when 50 years have passed after the publication of the sound recording or, in the absence of publication, when 50 years have passed after the sound recording was communicated to the public, if the producer does not
 - (i) offer copies of the sound recording for sale to a sufficient extent and
 - (ii) make the sound recording available in such a way that the public acquires access to it at an individually chosen place and time, cf. section 2(4) (i).
 - (2) If the performing artist wishes to terminate the agreement, cf. subsection (1), he shall do so by giving one (1) year's notice. ...

Summing up

- Protection of authors against unfair contracts is found in a combination of general principles of contract law and specific provisions in the Copyright Act
- Case law is scarce but a rather strong starting point of freedom of contract prevails at least for commercial authors
- However some level of “indirect” author’s protection:
 - Tradition for standard contracts (agreed documents)
 - Institutional protection via trade unions etc.
- For long a pressure from authors associations for amendments of the CA *ad modum* the German developments but so far without success