The Open Access provision in Dutch copyright contract law

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On 1 July 2015 the Dutch Copyright Contract Act entered into force[1] , including the new Art. 25fa of the Dutch Copyright Act that relates to open access.[2] This contribution discusses the background to the open access provision and what its introduction means.

Open access: of gold and green

According to the explanatory memorandum, the new Art. 25fa of the Copyright Act that has been added by amendment meets 'the growing need to make scientific work available in the form of open access'. Open access means, put briefly, that scientific works are made available online free of charge. In open access a distinction can be made between Golden Road open access and Green Road open access. With Golden open access the publisher directly puts the work online for users free of charge. In doing so, the publisher usually requests compensation from the author, his research institute or grant provider.[3] With Green open access a work is first published in the traditional manner in a paper and/or online journal, with the work only being available to subscribers for a fee, before the work is placed in a repository or otherwise put online by the author or his research institution.

Art. 25fa of the Copyright Act is aimed at faciliating Green open access, which does not mean that it obstructs Golden open access in any way. On the contrary, the provision may lead publishers to move increasingly towards Golden open access as there is no discussion about the period of time within which the work is made available in Golden open access and the publisher is free to attach any financial conditions he may wish.

The substance of the provision

The open access provision of Art. 25fa of the Copyright Act reads as follows:

> "The maker of a short scientific work, the research for which has been paid for in whole or in part by Dutch public funds, shall be entitled to make that work available to the public for no consideration following a reasonable period of time after the work was first made public, provided that clear reference is made to the source of the first making public of the work".

In what follows, the different constituents of the provision will be discussed in more detail, starting with the nature of the provision.

The nature of the provision

The open access provision does not restrict copyright. If it did, it would be necessary to review whether the exhaustive list of restrictions in the Copyright Directive would permit it. It only restricts the assignability of copyright and the freedom to waive it. The provision is part of the new chapter Ia entitled 'The exploitation agreement'. The final provision of this new chapter in the Copyright Act provides in Art. 25 h(1): "The maker may not waive the provisions of this chapter", which also means that the right in question may not be assigned. If the other conditions of Art. 25fa are met, the author possesses and retains the right to place his work in open access, subject to the restrictions of that provision. A publisher may not restrict that right by contract. Significantly, this applies solely where Dutch copyright law or copyright contract law applies to the contract. This is detailed below.

Inclusion in this chapter also means that the provision cannot be classified as employer's copyright within the meaning of Art. 7 Copyright Act. Applying employer's copyright to scientific work has traditionally been a controversial issue. In this context, the observation suffices that the owner of employer's copyright, usually a university or research institute, must be considered to have a sufficiently strong negotiating position with publishers and will thus not require the support of this open access provision.

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1 Law of 30 June 2015 containing amendments to the Copyright Act and the Related Rights Act to strengthen the position of the author and the performer in contracts relating to copyright and related rights (Copyright Contract Act), *Stb.* 2015, 257 (parliamentary file 33 308).

2 Parliamentary Documents II 2014/15, 333308, no. 11, originally no. 8.

3 The prices that publishers charge for open access publications of scientific articles can vary widely, from 40 dollars (American Arachnological Society) to 5,000 dollars (e.g. Elsevier) per article. (Source: <http://www.sherpa.ac.uk/romeo/PaidOA.php>). These costs are also referred to as "APCs" (article processing charge).

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Given that the provision merely restricts the assignability of copyright, the author does not have to place his short scientific work in open access at any time. According to the explanatory memorandum,

> 'it seems logical for public authorities or the recipient of public funding for specific scientific research to agree in certain cases or to attach as a condition for the funding that the research it finances is made available online, free of charge, immediately or shortly after a reasonable period of time'.

Universities will no doubt exert considerable pressure on their employees to place their work in open access. For that matter, most university staff members are staunch supporters of open access.

Background to and reason for the provision

that the reason for the amendment is that work resulting from research funded by Dutch public resources should be made available online to the entire Dutch public free of charge. The provision is in part inspired by Art. 38(4) of the German Copyright Act, but there are important differences and the Dutch provision is clearly broader. A brief comparison with the German provision is made below.

The reason why a reasonable period of time must be observed is the justified interest of the publishers that publish journals and organise peer reviews. The investments required to do so must in some cases be recouped by payment of a subscription or access fees before the work is made available to everyone free of charge following the lapse of a reasonable period of time' according to the explanatory memorandum.

Scientific work

The provision is confined to 'short scientific works'. The restriction to 'scientific work' raises the question of how broad or limited this is. It seems likely that it includes all articles that are published in 'recognised' scientific journals. But how about publication in professional magazines? What is the distinction? It should in any event involve 'research' that is 'funded wholly or in part by Dutch public resources'. According to the explanatory memorandum this means that 'work of persons employed by a university or another research institution funded by public authorities is deemed to have been financed wholly or in part by public resources'. It thus seems likely that all 'serious' publications by university staff members intended for peers must be classified as 'scientific works' within the meaning of that provision. Presumably, it does not cover popularising publications. It seems less likely that publications that are regarded as 'professional publications' in university assessments should not come within the scope of the provision for that reason. Nor does it seem likely that the provision covers contributions to highly commercial reference works aimed solely at practitioners which are part of a larger publication.

Short scientific work

The term 'short scientific works'means that it relates to articles rather than books. The term is derived from Art. 16(2) of the Copyright Act. It may also include short contributions to (conference) volumes, according to the explanatory memorandum. The reference to Art. 16(2) of the Copyright Act suggests that the criteria determining the scope that were developed for the applicability of that provision apply. This means that contributions of fewer than 8,000 words must in any event be classified as 'short work'.[4] It seems likely that it must relate to independent short works rather than chapters of a book. Separate contributions to (conference) volumes or other collective editions such as farewell and anniversary editions, clearly do come within its scope. This usually involves a large degree of 'pre-financing' as well and at present separate contributions are often put online shortly, if not immediately, after publication.

Funded by Dutch public resources

'Work of persons employed by a university or another research institution funded by public authorities is deemed to have been financed wholly or in part by public resources'. The explanatory memorandum is emphatic in that respect and the Dutch provision clearly differs from the German provision in that regard. Publications by persons who only have a part-time contract with a university, or publications by a group of authors of whom only a few are university staff members may also come within its scope. The degree of 'public funding' may affect the 'reasonable period of time':

> 'In general, it can be said that the reasonable period of time and the share of public/non-public funding provided for the publication may be regarded as communicating vessels. This

4 8,000 words is, for example, traditionally the limit for a short work in the reader rules.

> means that the larger the share of public funding in the publication, the shorter the period of time will be after which the maker is entitled to make the publication available to the public for no consideration'.

Work by persons who operate in the private sector and who only publish scientific articles in their spare time do not come within the scope of this provision.

The explanatory memoradum moreover states that

> 'If the share of public funding is clearly negligible in the face of the share of non-public funding, the publication might not come within the scope of this amendment.'

For that matter, it remains to be seen whether it is useful for scientific publishers to distinguish between different kinds of authors. One policy per journal seems just as practical. The idea is no doubt to create a publication culture in which *all* scientific work will be available in open access at some point, but that internvention is only justified in the case of publicly funded research. This makes sense. It would be rather odd if commercial researchers employed by the private sector were entitled to make their work available in open access against the will of the company. For that matter, employer's copyright often applies in such cases.

The restriction to scientific work funded by *Dutch* public resources was added at a late stage. Presumably, the idea was that the responsibility of the Dutch legislature to regulate this is restricted to situations involving Dutch public resources. The result is however that the provision does not extend to research carried out exclusively with European public resources. The European Commission, too, is a fervent advocate of open access for scientific research results. Horizon 2020, the 'research and innovation programme 2014–2020' of the EU also attaches requirements regarding open access to the provision of grants.

To make available to the public for no consideration

The term 'making available to the public' refers to the making public of material to members of the public either by wire or wirelessly in a manner that allows them to access it at a time and place individually chose by them. According to the explanatory memorandum, this is the internationally customary description of making material available online. The fact that the material has to be made public 'for no consideration', i.e. free of charge, is an essential part of the open access idea. The author should not be granted the right to ask for money for making material available online after having assigned his exploitation right to a publisher.

Following a reasonable period of time after the work is first made public

This is likely to be the most fiercely debated part of the open access provision. What is a reasonable period of time? The German legislature has opted for a period of time fixed at 12 months. The person introducing the amendment may have regarded that period as too long and too inflexible.

> 'The reason why a reasonable period of time must be observed is the justified interest of the publishers that publish journals and organise peer reviews. The investments required to do so must in some cases be recouped by payment of a subscription or access fees before the work is made available to everyone free of charge following the lapse of a reasonable period of time. The length of such period will differ per publication form. The reasonable period of time may also be nil in cases where it is reasonable and non-onerous to publish the work immediately online free of charge, possibly in a layout that differs from the formal publication. The parties are free to make further arrangements in that regard, but it is ultimately for the court to determine whether a period of time is reasonable, in the light of all circumstances of the individual case. In general, it could be said that the reasonable period of time and the share of public/non-public funding spent on the publication may be regarded as communicating vessels. This means that the larger the share of public funding in the publication, the shorter the period of time will be after which the maker is entitled to make the publication available to the public for no consideration'.

It is noteworthy that the explanatory memorandum to an earlier amendment, under document no. 8, included the following two sentences:

> 'For a publication in a weekly journal a period of one month may be reasonable. For a monthly publication a period of some months may be reasonable'.

In the final explanatory memorandum this comment was replaced by the section on the share of public/non-public funding. The person introducing the bill evidently found it worthwhile to emphasise this last aspect, but it does not alter the fact that the original sentences still offer an indication as to what can be a reasonable period of time: a month in the case of a weekly journal and some months in the case of a monthly journal. This seems in any event plausible for articles for which the underlying research was, for the most part, financed by Dutch public resources.

In the discussion of the German provision, the explanatory memorandum to the amendment comments:

> 'In many cases scientific articles are and may be placed online free of charge much sooner – and without harming

the publishers' financial interests – than after a twelve-month period'.

12 months, accordingly, appears to be the longest possible reasonable period in most cases in the Dutch legislature's view.

Which version may be placed in open access?

Those involved frequently ask which version may be placed in open access; the final PDF or a pre-print version, manuscript or final draft. The Dutch Copyright Act and the provision, however, do not make this distinction. It involves the work of the author. That work, including in its final version, may be placed in open access by or with the consent of the author following a reasonable period of time. While this may therefore also be the final PDF version, the publisher is not under any obligation to make such a PDF available to the author. But if the author has this PDF at his disposal, he may, once again following a reasonable period of time, place it in open access. As the explanatory memorandum suggests, the form in which the work will be placed in open access could affect the period of time that should be observed. This too may be a case of communicating vessels.

Reference to the original publication is compulsory

In line with the German provision, the publication in open access must include a reference to the source of the original publication. This is no more than reasonable and will not lead to many questions or problems.

Which periods of time are customary at present?

Scientific publishers currently use widely varying embargo periods for making works public in open access (green road).

According to the data gathered by Sherpa,[5] a British organisation, 705 scientific publishers worldwide allow authors to deposit the publisher version or PDF of their article without additional costs or embargo in a repository of their institution and to place it in open access (green road). These are, however, almost without exception smaller, often tiny and unknown publishers or publishing firms that are specifically geared towards open access publications. A total of 97 scientific publishers apply an embargo period ranging from a month to five years. 23 publishers require the publisher's consent for depositing an article. Another five publishers request compensation, in addition to an embargo period, for open access depositing of a publisher version.

Boom Uitgevers in the Netherlands applies a six-month period after which the PDF as published by the author may be placed in open access in an institutional repository.[6] With international publishers a period of between six and 12 months is customary, with the exception of the humanitaties where sometimes a period of twenty four months is applied.[7]

Is a legal choice of another law possible?

The explanatory memorandum states that

> "Irrespective of the law governing the agreement, the provisions of this chapter apply if: *a.* the agreement is governed by Dutch law in the absence of a governing law clause, *or*: b. the exploitation acts take place or must take place in the Netherlands either wholly or for the most part".

This raises some questions.

When is a publishing agreement relating to a publication in a scientific journal governed by Dutch law in the absence of a governing law clause?

De Boer concludes[8] that 'in the absence of a governing law clause a licensing agreement is governed by the law of the country in which the licensor is based'. This means that the open access provision would apply to any scientific author based in the Netherlands. In addition, the open access provision would, under Art. 25 h(2)(b) Copyright Act, apply to all situations in which the journal is wholly or mainly published in the Netherlands. The latter presumably applies to most Dutch language scientific journals of Dutch publishers.

The question then arises whether international regulations allow such a restriction of the choice of law. The Rome I Regulation on the law applicable to contractual obligations[9] is of particular relevance in that regard. The basic premise is that parties are free to choose the governing law.[10] There are, however, exceptions to this. Two are relevant here.

5 <http://www.sherpa.ac.uk/romeo/PDFandIR.php?la=en>, most recent update 19 March 2015.

6 <http://www.boomlemma.nl/open_access>.

7 Source: Wim van der Stelt, Executive Vice President Corporate Strategy at Springer and president of the section Media for profession and science of the Dutch publishers association.

8 See Th.M. de Boer, "Auteurscontracten en internationaal privaatrecht", [in Dutch] AMI 2011, 3–9.

9 Regulation 593/2008 on the law applicable to contractual obligations (Rome I).

10 Art. 3(1) and (2) Rome I Regulation.

First of all, Art. 3(3) of the Rome I Regulation, which reads as follows:

> 'Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement'.

In other words, "for contracts that do not have an international character, the choice for a foreign law cannot lead to the non-application of mandatory provisions of the law of the country with which the contract is exclusively connected. Accordingly, while a governing law clause in non-international agreements is not prohibited, its effects are cut down to a substantive governing law clause (only the regulatory law of the actually applicable legal system is replaced by the chosen legal system, while the mandatory law of the actually applicable legal system is not set aside by the governing law clause)."[11]

There is no doubt that Art. 25fa of the Copyright Act and the other provisions of the new chapter Ia of the Copyright Act are mandatory law. When applied to the specific situation in copyright contract law, this means that if a *Dutch* publisher concludes an agreement with a Dutch author, the open access provision and the other provisions of copyright contract law apply no matter what and cannot be set aside by way of a clause designating a foreign law as the law governing the agreement.

If there are elements connecting the agreement with other EU countries, e.g. because the publisher is based in another EU country, the parties may not only choose the law of that other country as the law governing the agreement, but the Dutch mandatory provisions will not automatically apply.

This is only different when it involves '*overriding* mandatory provisions'. According to Art. 9 of the Rome I Regulation, the second provision that is relevant here, they are provisions

> 'the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'.

In the Memorandum following the Report, the following was noted in that regard:

> 'This may be monetary legislation, cartel legislation, but also (semi-)public law provisions for the protection of socially or economically weaker parties. The latter is envisaged in the copyright contract law. It is true that it is ultimately for the EU Court of Justice to determine whether the provision is indeed an overriding mandatory provision. In that regard it is noted that the German legislation has included a similar private international law provision since 2002.'[12]

De Boer doubts whether the rules of the new Dutch copyright contract law are such provisions. On the one hand, it could be argued that this is a national review 'for which the objective of the legislature that has enacted the statutory provision in question is normative'. In contrast, it has been argued that Art. 9(1) Rome I Regulation requires that

> the priority rules in question seek to serve fundamental public interests the protection of which is so important *in concreto* that it justifies setting aside the law applicable to the contract.'[13]

And it would seem that the following then applies: 'In private law rules of contract law this is unlikely to be the case'.[14]

If copyright contract law and the open access provision cannot be classified as overriding mandatory provisions, a foreign publisher may effectively choose another law and the open access will not apply in that case. Whether that is indeed the case must ultimately be determined by the Court of Justice of the European Union (CJEU).

For the time being, Dutch scientific authors (and their employers, the universities) can rightly adopt the position, in line with the minister's position, that the open access provision is an overriding mandatory provision and does therefore nevertheless apply by being a priority rule, if a publishing agreement with a foreign publishing firm is governed by foreign law. Accordingly a Dutch scientific author may, even when he has concluded a publishing agreement with a foreign publisher, place his short scientific work in open access following a reasonable period of time.

If a foreign publisher chooses the jurisdiction of a foreign court, in addition to choosing foreign law, it

11 Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* [in Dutch], Deventer: Kluwer 2015, p. 175.

12 Parliamentary Documents II 2012/13, 33308, no. 6 p. 26.

13 Cf. CJEU, 17 October 2013, C-184/12, ECLI:EU:C:2013:663 – *Unamar*: "Thus, to give full effect to the principle of the freedom of contract of the parties to a contract, which is the cornerstone of the Rome Convention, reiterated in the Rome I Regulation, it must be ensured that the choice freely made by the parties as regards the law applicable to their contractual relationship is respected in accordance with Art. 3(1) of the Rome Convention, so that the plea relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned, as referred to in Art. 7(2) of that convention, must be interpreted strictly." (para. 49).

14 Asser 10-III Internationaal vermogensrecht, 935 Tweeledige inhoudelijke toetsing? [in Dutch] (X.E. Kramer/H.L.E. Verhagen) with reference to Reithmann & Martiny, *Internationales Vertragsrecht 2010*, nos. 511–512.

remains to be seen whether that foreign court will also find that the Dutch open access provision is an 'overriding mandatory provision' that prevails.

If there are elements connecting the agreement with countries outside the EU, e.g. because the publisher is based in the US, and American law has been chosen as the governing law and jurisdiction has been conferred on American courts, Dutch law and the open access clause do in any event not apply.

Once more, it seems quite unlikely that a foreign publisher would issue proceedings against a Dutch scientific author or a Dutch university because an article has wrongly been placed in open access, though this possibility cannot be ruled out.

The German provision

As stated in the explanatory memorandum, the provision is in part based on Art. 38(4) of the German Copyright Act as it read on 1 January 2014:

> "The author of a scientific paper produced as part of research activities, at least half of the funding for which comes from public resources, and published in a regular collection appearing at least twice a year, may make the paper publicly available in the accepted manuscript version once twelve months have elapsed since first publication, provided that this is not for commercial purposes. This applies even if the author has granted the publisher or editor an exclusive licence. The source of the first publication must be indicated. Any other arrangement to the detriment of the author is invalid."[15]

The German provision fixes the share of public financing at at least 50% and the reasonable period of time at twelve months. The German provision also fixes the minimum publication frequency. What is more, under the German version only 'he accepted manuscript version' may be placed in open access, not the published version. The Dutch provision has none of these restrictions, which are subject to quite some criticism in Germany.[16]

Transitional provisions

The transitional provisions, i.e. Art. III, state that this provision for open access also applies to agreements that were concluded before it came into force. The provision accordingly has full retroactive effect and also covers existing agreements and all scientific publications that were published in the past. This means that all scientific authors may place their old short scientific work in open access without consent, even if they had assigned all their rights at the time.

Deed required for exclusivity

There is however a catch. The new copyright contract law also provides that a deed (a signed, written document) is now required for an exclusive licence. This means that if a scientific author has not guaranteed exclusivity to the publisher by deed, he may directly place his work in open access and does not even have to observe a reasonable period of time. This may sound odd, but it is the inevitable conclusion of the amendment to Art. 2: no exclusivity without a deed. An author acting in good faith might not immediately do this, but without a signed document the publisher cannot object on legal grounds. This new rule does not have retroactive effect and does not apply to existing agreements.

Still in full swing

The open access provision may give an important stimulus to the publication in open access of scientific articles based on research carried out by Dutch scientists employed, in particular, by universities.

Dutch publishers will not be able to sideline the open access provision by designating a foreign law as the governing law. Nor can foreign publishers do so according to the Dutch legislature, because it is an overriding mandatory provision. The CJEU or a foreign court may however find otherwise.

International scientific publishers can opt to have their journals henceforth published solely by non-Dutch subsidiaries with a governing law clause designating, for example, English law and a jurisdiction clause designating an English court. In that case the Dutch open access provision may be sidelined. That is not certain, but it is conceivable that the CJEU will find accordingly. That is not a disqualification of the amendment. It is a possible consequence of the fact that we in the Netherlands cannot all at once amend the entire international copyright contract legal order. Many countries are sympathetic to open

15 German Act on the use of orphan and out-of-print works and further amendment to the Copyright Act (Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes) of 1 October 2013, Bundesgesetzblatt I S. 3728 (Nr. 59); effective as of 1 January 2014. For a list of German parliamentary documents see: <http://dipbt.bundestag.de/extrakt/ba/WP17/524/52444.html>.

16 See, for example, *C. Bruch/T. Pflüger*, „Das Zweitveröffentlichungsrecht des § 38 Abs. 4 UrhG – Möglichkeiten und Grenzen bei der Anwendung in der Praxis", *Zeitschrift für Urheber- und Medienrecht* [in German], 2014, 58 (5), pp. 389–394.

access, so other countries may well follow the the Dutch and German examples.

Ideally, practice will clearly establish a 'reasonable period of time' that is socially and scientifically desirable and that takes sufficient account of the interests of the scientific publishing firm. This can also mean that it will head in the direction of the Golden Road open access whereby work is immediately placed in open access but subject to payment of a fee. The discussion on what is preferable, i.e. Green or Golden open access, is however still in full swing.

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