



September 27, 2010

Ministerie van Justitie
Directie Wetgeving, Sector Privaatrecht
T.a.v. mw. mr. E.D.G. Kiersch
Postbus 20301
2500 EH Den Haag

Re: Voorontwerp auteurscontractenrecht

Dear Ms. Kiersch,

we would like to respond to the recent author contract law proposal ("Voorontwerp Auteurscontractenrecht") and the consultation document ("Consultatiedocument Voorontwerp Auteurscontractenrecht") dated the first of June 2010.

Reed Elsevier is a world leading provider of professional information solutions in the Science, Medical, Legal, Risk and Business sectors. The Elsevier division, which is head quartered in Amsterdam with 1200 staff based in The Netherlands alone, is a world leading Scientific, Technology and Medical ("STM") publisher, producing over 200,000 new research articles in some 1,100 journals every year, with ScienceDirect, its flagship electronic product, accessed by over 11 million users. The Health Sciences division of Elsevier publishes over 700 journals and 2,000 books and clinical reference works annually and offers an extensive portfolio of online tools in medical education, practitioner reference works and point of care guidelines.

STM journal publishers exist to provide essential services to STM researchers, notably the registration, quality assurance, dissemination, and archiving of primary research findings via the internationally recognized and respected system of independent peer review. Worldwide there are around 2,000 STM publishers competing intensively via some 23,000 journals to offer a broad range of brands, services, technologies and business models to researchers. STM publishers process 3 million research article submissions annually via highly specialized networks of 2.5 million referees, 125,000 editors and 350,000 editorial board members. STM journal publishers worldwide have invested over €2.4 billion since 2000 to digitize their industry, delivering massive access and efficiency benefits to universities and researchers.

STM publishers play an essential role in the communication of research results by:

- Identifying and supporting new areas of research by establishing new journals and developing communities around such journals.
- Establishing and developing the editorial perspective and scope for each of the existing 23,000 journals and creating the reputation and brand to attract author's manuscript submissions to the "right" journal in highly focused fields of research.
- Managing the appointment of journal editors and the ongoing development of

journal editorial boards to ensure the proper editorial perspective, authority and responsibility to the scientific discipline and readers.

- Establishing and maintaining sophisticated systems to manage the processing of some 2-3 million manuscripts submitted from researchers around the world annually ("preprints").
- Organizing, managing, and financially and technologically supporting the peer review of submitted pre-prints, a labor-intensive globally-dispersed process that results in some 1-2 million "accepted author manuscripts" annually, and that is the primary mechanism to ensure the veracity and to improve accounts of new research. Peer review, the process of subjecting an author's scholarly manuscript to the scrutiny of highly qualified experts in the same field prior to publication in a journal, is widely supported by the academic community. In a recent study, 85% of researchers agreed that peer review greatly helps scientific communication and 90% said that it improves the quality of the published paper¹.
- Managing the communication of peer review results with several million globally dispersed authors annually.
- Soliciting, editing and preparing for production some 1-2 million manuscripts that are accepted for publication by copyediting, proofing, formatting, branding, paginating, adding metadata and identifiers, checking and enhancing artwork quality, converting files, data and artwork to XML, and adding links to ensure interoperability using industry standards like CrossRef².
- Producing some 1.5 million final "published journal articles" each year, and disseminating them globally both in print journals and online electronic journal platforms to tens of millions of researchers and members of the public.
- Archiving journal volumes and promoting their use in perpetuity, "future-proofing" against developments such as electronic document file format changes through arrangements with partners such as national libraries and Portico³.
- Ensuring the integrity of the published scientific record against plagiarism, distortion, and mutilation. For example, publishers regularly add errata or notices to articles and (on rare occasions) remove articles from the scientific record. CrossCheck, a system developed by the STM publishing industry, has also been developed to detect and address plagiarism of manuscripts.

The E-revolution in STM publishing

Within the last decade, the STM industry has undergone a dramatic digital revolution because it invested heavily to drive a format shift of published research from being fully print only to being one in which the majority of customers receive their content either only electronically ("E-only") or in addition to print ("Electronic plus Print.") For example, in 1999, 100% of Elsevier's journal revenue came from print sales. Today, less than 20% of Elsevier's journal revenues are

1 Publishing Research Consortium (2007) "Peer Review in Scholarly Journals: perspective of the scholarly community. An international study."

2 CrossRef was founded in 2000 and is a collaboration of scholarly publishers including more than 2,600 participating publishers, 700 member publishers and 1,500 library affiliate members (see <http://www.crossref.org>). It has developed a journal reference linking service that functions as a digital switchboard for access to bibliographic data on over 33 million journal articles. The CrossRef database contains essential article metadata supplied by participating publishers which allows researchers to search and link articles through a digital mechanism (CrossRef Digital Object Identifiers or "DOIs") that identifies and connects each individual article.

3 Journals preserve the scientific record for future generations of researchers to build on. Professional publishers and libraries create and archive over one million peer reviewed journal articles every year. Over the last hundred years they have digitized and archived over 35 million articles, and these continue to be available for use today. At current growth rates a further 50 million articles will be added in the next 25 years. Publishers have organized and licensed well-established organizations such as the Koninklijke Bibliotheek (the Royal Library of the Netherlands, The Hague) and Portico to provide digital archival support for researchers and library customers.

from print sales, while more than 80% are from "E-only" and "Electronic plus Print" sales.

This digital revolution is continuing to deliver the following massive benefits to STM communities:

- i. Since 1999, there has been a dramatic increase in access levels for both researchers and the public.
 - STM researchers now have extremely widespread access to journals: a recent study showed that 94% of university and college-based respondents found access to information "very easy" or "fairly easy", and access to journals is 14th on their list of concerns (lack of funding is number one; too much paperwork is number five)⁴.
 - ScienceDirect, Elsevier's online journal platform, is used by around 14 million researchers globally. It hosts 10 million articles dating back to the 1820s and now has close to 600 million full text article downloads per year, approaching 2 million article downloads globally per day.
 - Researchers now have access to significantly more content than they did in the print-only era: researchers now read from 25% more journals than in the mid-1990s and university faculty are reading 34% more articles⁵.
 - Public access has also expanded dramatically due to initiatives that STM publishers have led in collaboration with others to broaden access for researchers in developing countries, patients, the public and disabled persons. For example:
 - Research4Life is a public-private United Nations initiative that makes thousands of STM journals available to over 5,000 institutions in over 100 developing countries at no or low cost. In 2009, Elsevier alone had more than 2.5 million articles downloaded as part of Research4Life initiatives.
 - Publishers, including Elsevier, have created PatientINFORM in partnership with key medical associations including the American Cancer Society, the American Heart Association, and the American Diabetes Association. PatientINFORM is a public health literacy project that provides patients and caregivers with a free online resource of interpreted, packaged, and up-to-date research about specific diseases that is based upon recently published journal articles.
 - Elsevier has also created Patient Research, which gives patients and their family members desktop access to articles in 100 medical journals for a processing fee of less than \$5 per article.
 - Elsevier's "walk-in" clause enables libraries licensing ScienceDirect to give any member of the public free electronic on-site access to any journal article licensed by a library. Other publishers have similar programs.
 - Access for visually impaired persons (VIP) has also been increased as publishers have voluntarily implemented "read aloud" software for online sites.
- ii. Since 1999, researchers' productivity has increased dramatically.
 - Cross-publisher initiatives enable researchers to click seamlessly from one article to another, for example by clicking on cited references.
 - Publishers have taken major steps to ensure that their published articles are accessible from "one stop shop" starting points such as third party search engines. For example millions of Elsevier articles, including all newly published articles, are "deeply indexed" and accessible by Google, i.e. their full text has been indexed by the search engine to enhance their discoverability globally.
 - Other initiatives have also improved productivity, such as the ability to link directly to

4 Ware, Mark. "Access by UK small and medium-sized enterprises to professional and academic information," Mark Ware Consulting Ltd for Publishers Research Consortium (April 2009)

5 Dr. Carol Tenopir, "How Electronic Journals are Changing Reading Patterns", April 2007.

- an article's associated experimental data set.
- As a result of such developments one key study showed that between 2001 and 2005 scientists and engineers were the only professional group whose productivity actually increased because they spent less time gathering information and more time analyzing it⁶. In all other fields, knowledge worker productivity declined.

As you will note below, we are very concerned about this legislative proposal which does not take into account the contributions and significant investments Elsevier and other STM publishers make and the role they play in the communication of the research results. The STM publishing characteristics are not addressed in the legislative proposal nor does it foresee in an exception for the STM publishing industry. In summary it means that it will be impossible for Elsevier to continue with its current publishing models and overall the greatest negative impact of this scheme might be that it does not meet the needs of our customers and authors.

Articles 2 and 25(b)

Our main concern is the proposed copyright license vs. a copyright transfer. For each journal and book publication Elsevier currently requires a written transfer of copyright in order to disseminate the publication in print and electronic format but also to create full text and abstract databases, compilations, author profiles, citation reports, funding tools, text mining tools, bibliometric databases and other information solution tools to be developed in the future based upon the published content.

The direct economic impact of a license limited in time would be that it will be impossible to continue with the Elsevier online journal and ebook collections. A license limited in time will significantly decrease the value of the offering as it will reduce the long term archive possibility for our customers. International publishers may therefore instead use non-Dutch authors and publish instead through non-Dutch subsidiaries whenever possible. The total number of employees (which fall under the collective labor agreement) employed by publishers that are represented by the Dutch publisher association "NUV" is 22.000. The total number of freelancers are approximately 50,000 and the total turnover for the members of the NUV, who represents 90% of the publishers in the Netherlands, is around €3,7 billion.

A study on the basis of the WIPO-Guide research report commissioned by the Dutch Ministry of Economic Affairs called "The economic size of copyright in the Netherlands"⁷ showed that the added value in the Netherlands for the copyright relevant sectors was Euros 30.5 billion (5.9% of the GDP). The related employment position was 567.215 FTE (8.8% of the total employment in The Netherlands), and the trade surplus was Euros 2.4 billion (6.9% of the total trade surplus in The Netherlands).

Our customers want to have a perpetual, chronic, online library collection. In practice this will mean that the online post termination archival rights for journals and perpetual ebook licenses as currently granted cannot be guaranteed to libraries for a period of more than 5 years. As the Lancet has been published since 1823, and as it is further not unusual that 17th century physics and mathematics journal articles are still cited, 5 years is a very short time frame in the STM world.

Elsevier provides subscriptions to perpetual journal back file subscriptions that would not remain perpetual anymore as it will mean that we need to remove a significant part of the

⁶ Outsell I-Market Hot Topics, vol 1, May 6, 2005: "2001 vs 2005, Research study reveals dramatic changes among information consumers"

⁷ (SEO-rapport nr. 2008-60 ISBN 978-90-6733-465-5) dated the 3rd of December 2008 as presented to the chairman of the Dutch parliament in The Netherlands on the 12th of December 2008.

content after 5 years when Elsevier loses its rights to publish, which will without doubt lead to claims of customers or at least significantly decrease the value of the offering as we cannot guarantee perpetual access to the scientific record and the library collection.

A similar issue we have with our third party ebook distribution agreements, we agree with Amazon, Apple, Google and other ebook distributors that they can store a master copy in case a user loses its laptop or purchases a new different device, e.g. Kindle. For Elsevier BV authors we would not be able grant such a perpetual right anymore and basically it would mean that we cannot launch ebooks for Elsevier BV authors on these new ebook platforms as these parties will clearly not change their business model to correspond with the laws of the Netherlands.

For a journal or book subscription database model such as the leading platform ScienceDirect, we would need to check on an annual basis which book titles or per journal which journal article would expire, making it impossible to sell collections in a multi year subscription as there will always be book titles or journal articles that expire during the subscription term. As stated above such a legislative change would significantly decrease the value of the offering as it will reduce the long term archive possibility for our customers. With more than 200,000 articles to be published on an annual basis this would in practice impossible to maintain. Please note that many of our titles are published through multiple editions- take Gray's Anatomy for example. Those book authors/editors who work on and revise new editions are effectively "caretakers" or temporary stewards of the book which we would really see as an ongoing work, that is our property. There may also be dozens of different contributors to an individual title such as a major reference work. Elsevier would in many cases have to reinitiate highly impractical and time-consuming negotiations with the licensor of the content to obtain the right to use the licensed content for any purpose that was not envisaged at the time of entering into the license. Many scientific and medical books have shelf lives longer than 5 years and margins could be seriously affected if we were unable to sell the print stock or the ebook version beyond this time line.

From an enforcement perspective, in order to enforce our rights around the world in a situation of piracy we would need to have the full rights and a license would not be sufficient. Many jurisdictions will require the active participation of the copyright owner in copyright litigation cases, which will make large-scale enforcement efforts very difficult to coordinate. In addition, the required rights to develop and commercialize such products may not always be included in the license grant of the license agreement between Elsevier and its respective licensors. We further would like to refer to the http://www.stm-assoc.org/2007_10_01_Copyright_Assignment_Benefits.pdf that describes why from an enforcement perspective a transfer of copyright is required and a license would not suffice.

Regarding the use of model contracts for the STM publishing industry, we would like to highlight that as The Netherlands is only one of the countries in which Elsevier operates it would be practically impossible to negotiate a standard set of terms as we operate on a global basis and customers and authors expect consistent global terms and conditions. Elsevier does not object to setting up model contracts that serve as a reference point and for that reason Elsevier submitted examples of its templates that are posted on the NUV web site <http://www.nuv.nl/web/ejz/auteursrechtindepraktijk/auteuruitgeverij/Pages/default.aspx>. From a competition law perspective we do believe that there should be a freedom to contract between the author and the publisher and a concerted practice amongst publishers and authors does not have our preference from a competition law perspective either. STM authors exert significant influence over their publishing partners and there is significant competition among publishers for the best papers and authors.

Article 25(c)

Regarding the reasonable remuneration of authors proposal, book authors receive a royalty on all revenue generated by the publisher as agreed upon in the book author agreement and the author may determine which publisher may publish their manuscript. For book contributors who submit a single chapter or a part thereof, we often don't pay remuneration for contributed content.

Our journal article authors are full time employees of corporations or research institutes and are not professional writers who depend upon, or expect, to be paid remuneration. Our authors often choose to write for non-monetary reasons such as scientific credit, disseminating knowledge and reputation. Further, note that STM publishers are dealing with very different market dynamics and the primary motivation of such authors is visibility and exposure. We have further a more fundamental objection against a statutory obligation to pay authors. Journal articles are also multi-authored works (not unusual to have >10 co-authors and we publish in excess of 200,000 journal articles per year). Given that revenues are generally received in relation to the journal as a whole rather than for individual articles, how would we calculate what proportion would be due to the authors of a particular article? Note that Elsevier publishes journals in most of the European countries, but also the United States, Brazil and the Far East none of the governments have requested a statutory obligation to remunerate the journal author.

Article 25(d)

Regarding the disproportionality principle as introduced in section 25(d) we would like to note that for book authors, in most agreements a royalty is paid, some are paid grants or other flat fees depending on the circumstances. For book authors it will be hard to specify, as it depends on a number of factors, generally, 10-15% of 'standard sales' but varying other percentages for other types of distribution (e.g. 50% for translation rights). Some also are paid grants or other flat fees depending on the circumstances. We also have some product types where one time fees are paid in lieu of royalties. Regarding the suggested best seller clause, it is difficult to determine with an author what constitutes a best seller; in one field this could be 500 copies and in another several (hundred) thousands. The parties are in the best position to decide this in their particular situation, rather than having this dictated by law. It is industry standard practice for the publisher/author to negotiate 'escalated royalties' for higher sales in cases where that makes sense. Those escalations depend entirely on the particular circumstances—the economies of scale in terms of production and marketing for the particular title, the non-revenue goals for the title, etc.

Article 25(e)

A non-usus clause is not necessarily a problem for a publisher as long as it is the publisher who decides not to publish. Before a contract is entered into with the author, a huge amount of time, money and effort is invested into the (proposal review) process. What is difficult for us to determine is when a publisher does not sufficiently commercially exploit the work, will the legislator determine for the publisher when a work has not been sufficiently exploited e.g. would it be imperative for the publisher to publish an electronic version of the work or is a print version sufficient for commercial exploitation? Does a work need to be exploited globally or is the Netherlands or the EU sufficient? What would be the level of marketing costs that need to be spent on a book to call it sufficiently commercial exploitation? So long as we have a reasonable time to publish (as is specified in our author contract template) we believe this is not a material issue. Does the rule only apply to first-time publication? Also what does 'publish' mean—could publishers simply give it to Amazon for printing on demand and therefore the work is considered as "published"?

Article 25(f)

With respect to section 25(f), for journal articles we believe this is not an issue as the author will not create a new version of the article as we do require a warranty of originality to avoid double submission of the same journal article, although the author retains the right to create a book out of the journal article or to create a thesis. For books we sometimes retain the right to create future editions of a book and the author has the right to participate if he/she chooses. There are rare instances when we ask for the first option on future works. Again, the market and competition works most effectively here, to the benefit of authors, consumers, and society.

Article 25(g)

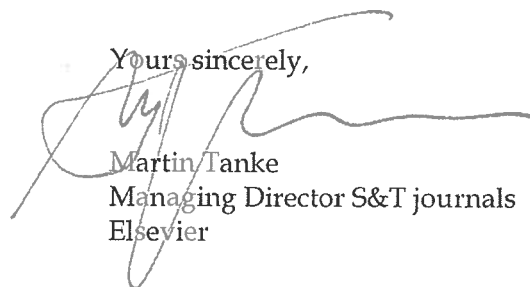
With respect to the proposed introduction of a dispute resolution body "Geschillencommissie" to determine if remuneration is fair and reasonable, it is not clear to us who is in this case qualified and objective enough to determine how reasonable the projected profit and loss (P&L) is of an individual book? The importance is the word "projected" as every book we produce is an investment risk for the publisher involved. Will the author be obliged to participate in the loss of a publication or to refund a first installment if there is no demand for such publication? Further we apply portfolio management, not all publications are profitable, some journals or books become a success others will never become profitable. We believe that there are too many non-quantifiable circumstance dependent variables for this to be practical or fair to the parties. In some cases a book might be more valuable to one publisher than it might be to another (e.g. to fill a spot on that publisher's list). Other variables that aren't really subject to calculation by independent judges: the risk of taking on an unknown author, the risk of exploring new fields of publishing, the reputations/competitive reach of both the publisher and the author; whether the author is known to be difficult to work with; whether the publisher will need to provide one author more support than another author (e.g. copyediting). The 'author fee' is something that is best quantified and agreed by the parties to the contract based on their own assessments of their individual circumstances for that particular book. It is not possible to quantify as such what the financial impact would be of this as each book publication has its own set of financial criteria which is determined by a number of factors, such as print run, expected market penetration, market dynamics, price, type of book, etc.

Article 25(h)

With respect to governing law "Toepasselijk recht" (Section 25h), books published in the Netherlands by Elsevier BV are governed by Dutch law, some journals of Elsevier are owned by Elsevier BV (other journals are owned by Elsevier Inc. or Elsevier GmbH or Elsevier Ltd. or Elsevier Spa etc.). All of the online database subscriptions for online journals and books are governed under Dutch law and are managed out of the Netherlands and for that reason a Dutch copyright law change would have indirectly have a huge impact on the Elsevier business making it for Elsevier virtually impossible to continue with its current online publishing models.

We remain very concerned about this legislative proposal which does not take into account the STM publishing characteristics nor foresees in an exception for the STM publishing industry.

Yours sincerely,



Martin Tanke
Managing Director S&T journals
Elsevier

