

THE RENEWED BESTSELLER CLAUSE OF THE COPYRIGHT ACT

ANIKÓ GRAD-GYENGE

associate professor, habil.

Faculty of Social and Economic Sciences, Budapest University of Technology and
Economics, Hungary

grad-gyenge.aniko@gtk.bme.hu

<https://orcid.org/0000-0001-9184-0870>

Abstract: The bestseller clause of the Copyright Act is an older legal institution of Hungarian copyright law. The rule was taken over by Hungarian law from the German Copyright Act. The bestseller clause provides protection for a creator in a weaker contractual position than the user. It provides effective assistance for the subsequent consideration of unforeseen circumstances at the time of the conclusion of the contract. Its primary purpose is to remedy the post-contractual shift in value using the special means of judicial amendment of the contract.

The legal institution of the bestseller clause is a special regulatory solution compared to the provisions of the Civil Code on invalidity. It is a special provision compared to invalidity in the event of a significant difference in value, however, it provides a strong limitation on the legal consequences of invalidity.

It only provides an opportunity for the court to amend the contract and eliminate the striking difference in value.

The rule has very poor judicial practice, both in Hungary and abroad. The primary reason for this is that the parties apply contractual arrangements that avoid future uncertainties regarding the amount of the royalty.

One of the aims of the DSM Directive is to extend the legal opportunities for weaker contracting parties, including the EU-level harmonization of the bestseller clause. According to Article 20 DSM, Member States shall ensure that in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed on turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

The essay examines the possible effects of the extension of the bestseller clause to new areas in the national copyright law and the relationship between the new provisions and civil law invalidity rules.

Keywords: *correction of license by court, bestseller clause, DSM directive, (copyright) contract adjustment procedure*

1. INTRODUCTION

This short essay¹ will focus on the so-called bestseller clause of the *Hungarian Copyright Act*, the *Act LXXVI of 1999 on Copyright* (hereinafter referred to as *HCA*), as it was amended on 1st June 2021 by Article 17 of Act XXXVII of 2021 on the harmonization amendment of the Act LXVI of 1999 on copyright and the amendment of the Act XCIII of 2016 on collective management of copyright and neighbouring rights (hereinafter referred as *Amending Act*). The bestseller clause can be evaluated as an atypical invalidity rule whose latest amendment only enhanced this atypical aspect. I will analyse this aspect of the regulation.

The bestseller clause has been in the Hungarian copyright regime since 1999 (Art. 48 HCA). The legislator made extensive changes in the copyright regime in HCA, which took effect in 1999. Major changes were made in the norms applied to set the royalties and remunerations paid for uses. The main goal of the copyright codification was to harmonize the copyright system with the principles of market economy and with the other substantial changes in the legal system.² Besides the extensive liberalisation of the former copyright contract law, the legislation took into account that the author is typically the weaker party when concluding a license, therefore numerous rules were included in the regulation to protect the author's legitimate interests (Faludi, 1999, pp. 161–164). Nevertheless, the chapter on contracts of the 1999 Act could not be considered revolutionary by far even when it was passed. It can rather be regarded as the codification of market and judicial practice created by the change of the political regime. Since then not many changes have been made in the licensing chapter of the HCA: the only modifications worth mentioning were the mitigation of strict provisions on written contracts (Art. 45 HCA; Art. 15 Amending Act) and the introduction of rules with regard to the temporal scope of agreements of the related rightholders, due to extending the term of protection (Art. 55 HCA). Perhaps it is not far-fetched to state that the practice codified in 1999 has stood the test of time.

The bestseller clause had been unchanged in the HCA from 1999 until its text was modified in 2021. Even this was not explained by any internal problem of the regulation. Its reason cannot be found in the judicial practice, taking into consideration the fact that we cannot talk about such practice in Hungary with regard to the bestseller clause in the last 22 years since 1999.³ The amendment was brought

¹ It is the written form of the lecture held at the international scientific conference titled “Invalidity in the European Civil Codes”, organised by the University of Miskolc, Faculty of Law, on 3rd December 2021.

² In defense of the author as a weaker party, Péter Gyertyánfy urged the re-creation of the rules of contract law already in 1996. See Gyertyánfy, 1996.

³ The Hungarian literature on the bestseller clause is very poor. The practice of the Hungarian Council of Copyright Experts does not know any case dealing with the bestseller clause either.

about by the aim of the European Union to harmonise this field and the obligation to implement the DSM directive.⁴

It is worth putting the regulation in a wider context and analysing the international and European Union framework of the bestseller clause so that the clause and its practical significance can be assessed properly.

2. INTERNATIONAL BACKGROUND OF THE BESTSELLER CLAUSE

Although the concept of intellectual work has always been international, and this feature has been supported by multilateral international treaties for over a hundred years, they lack the complex regulation of contractual law, and regulation of different aspects of royalty for transferring the right of use is severely incomplete. (The rules of international contract law are summarized by *Daniel Alexander Zampf*. Cf. Zampf, 2002, p. 63.)

The *Berne Convention*, adopted in 1886, which constitutes the backbone of international copyright, basically contains only rules on the various aspects of legal actions (transfer or waive of rights) concerning copyright. The issue of royalty is treated only in special cases when the freedom of contract cannot prevail due to the circumstances of the use, supposedly because of the unequal economic weight of the parties. This moderate approach is followed by the international treaties concluded later, especially the copyright agreements of the World Intellectual Property Organization (von Lewinski, 2008, pp. 427–428).

International rules – or rather the lack of them – clearly shows that the contracting parties did not intend to conclude agreements on the rules of contracts, which was partly the result of them traditionally being less open to any harmonization and partly because copyright agreements focused on ensuring material rights for a long time and when they were granted, it was law enforcement that caused difficulties on an international scale, therefore harmonization also turned into this direction.

As the harmonization of the contract laws of member states in the European Union is beyond the competences of the Union, no complex copyright contract law can be found in the copyright directives and regulations issued so far (von Lewinski, 1996, p. 49).

While in the EU member states with Anglo-Saxon legal system *freedom of contract* prevails, in France a relatively detailed copyright contract law was created,⁵ and in Spain, copyright obligations were addressed in more than fifty paragraphs of the copyright act.⁶ With such a diversity of national regulations, Union rules have always been moderate and to this date, it interferes with the rules of copyright contract law where it would seriously infringe any of the fundamental rights.

⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter referred as DSM directive).

⁵ Loi Nr. 92-597 Code de la propriété intellectuelle (CPI).

⁶ Ley 43/1994 de Propiedad Intelectual (B.O.E. Nr. 313. 31. 12. 1994).

So the scope of international and European rules does not comprehend the entirety of copyright contract law. In the case of international regulations, it is mainly caused by the differences among the various national copyright regulations. In international treaties concluded by countries with very differentiated copyright systems, it is obviously a difficult task to agree on some common contract rules. In the European Union, the lack of competence of the Union in the creation of contract law contributes to this.

However, the fact that there are some provisions on the royalties scattered both in international treaties and in European directives is to be analysed separately. The scattered regulations have one thing in common in this respect: both regulatory levels support the functionality of the market and the principle of *'qui pro quo'* (consideration due for the service). Thus they only provide for rules on royalty when without this, the functioning of the market would be distorted or the interest of the weaker party would be seriously and typically infringed. So express regulation does not mean that without such a regulation the due/adequate/fair royalty should not be paid, either in international treaties or in EU acts, but on the contrary: where there is no express rule regarding them, the legislation takes it for granted that the service is in proportion with the royalty so there is no need for any public power to interfere with market conditions.

To give a complete picture, it is to be noted here that most legal systems today provide sufficient guarantees for the fair remuneration of authors or the holders of related rights for the licensing managed by copyright collective rights management organizations even if there is no contractual agreement, so the regulation of collective rights management clearly strengthened the positions of the authors. As opposed to this, authors concluding single contracts are more and more likely to find themselves in the role of the weaker party so authors must be supported in the conclusion of single license as regards setting the royalty.

3. COPYRIGHT CONTRACT LAW AND GENERAL COPYRIGHT LAW

The regulation of copyright contract law is necessarily in close connection with the general contract laws as the general standards of civil law complement copyright standards as background rules everywhere. There is no example of the copyright acts giving a comprehensive and closed contract law regulation, refraining from applying the rules of civil law.

The only significant difference between national copyright laws is how detailed rules are prescribed by the legislation or whether any separate copyright contract law is created with detailed provisions for the different types of licenses or whether the rules are included in the copyright act only in a separate chapter. Concerning the regulation of the amount of royalties prescribed in licenses, two major types can be distinguished. In most cases the royalty is determined exclusively by the contractual intention of the parties, the legislator will not interfere with freedom of contract. The French CPI and the earlier mentioned Spanish copyright act expressly prescribe *fees that are in proportion with the scope of the license*, without establishing any special

regulation for the control of the content of the contract apart from the general rules for being challengeable or declaring it null and void.

HCA declares as a general principle that for the use of a work royalty is to be paid if the law does not provide anything else [Art. 16(4) HCA]. It has been proved by judicial practice that royalty should be paid not only for a user license but also for unauthorized/infringing use, which can appear as a claim for the payment of damages or as a claim to the recovery of the enrichment achieved via the infringement.

According to a word-by-word interpretation of the norm, the parties may agree on any type of payment other than the royalty in proportion to the revenue earned in connection with the use of the work. The text of the law also implies that if the parties do not agree on the royalty otherwise, the dispositional rule will prevail, so in this case, if the author did not waive it expressly, the royalty must be set in proportion with the income deriving from the use. Nevertheless, it is only true with the limitation that the contract must contain some provisions for the royalty as it is an essential element, the *essentiale negotium* of the contract. The lack of any agreement on the royalty implies that the parties did not agree on an important element, therefore the contract was not concluded. Certainly, it is difficult to imagine a situation when the parties agree on the payment of a royalty but not its amount. If the contract contains any formal errors (because the parties only made an oral agreement on the royalty) and the court will remedy the invalidity of the agreement, the rule of proportionate royalty cannot prevail as in these cases it is much more reasonable to set the same prices as those set down in the verbal contract.

In the case of works of art (paintings, sculptures), it is not a rare situation that the work only becomes valuable when the original is sold or the copyright exploitation rights are transferred. It would be seriously unjust if the authors did not benefit from the increased value of their works. Thus in copyright law, two methods have been elaborated to restore the balance for the benefit of the author.

The doctrine of *Artist's Resale Right* grants artists the right to proper remuneration on any commercial resale of their works of art after it is first sold. This remuneration, therefore, is due to the author for each resale continuously, independently of any concrete sale agreement, but under it, and it cannot be waived beforehand. It grants the author material benefit from any later success of their works of art (Tomasovszki, 2021).

By contrast, *the bestseller clause* is a general copyright contract law institution (so it can be applied not only for works of fine art), enabling the later amendment of a contract when the remuneration set down in the contract becomes disproportionate to the profit made by the user after the contract is signed.

The agreement infringes the author's substantial lawful interest in having a proportional share in the income resulting from the use because the difference in value between the services provided by the parties becomes strikingly great as a result of the considerable increase in the demand for the use of the work following the conclusion of the agreement.

The bestseller clause of the HCA can clearly be distinguished from the regulation of civil law on extreme disproportionality as in this case the disproportionality comes

about *ex post*, only after the agreement is signed. This regulation must be distinguished from contract amendments made by courts on the basis of the Art. 6:192 of the Civil Code too, as in this case judicial amendments can be made not only in the case of long-term legal relations.

Nevertheless, the scope of the *bestseller clause* is narrower because the balance of proportionality can only be problematic (and the contract can be amended according to the bestseller clause) if the royalty is not set in percentages. If the royalty is determined in percentages, it logically increases with the success of the work (e. g. the number of copies (sold)).

As the *bestseller clause* is a rule that expressly protects the interests of the author, it can be enforced, unlike the rule of extreme disproportionality in Art. 6:98 of the Civil Code (which can be referred to by either contracting party who has suffered an injury), only for the benefit of the author, only the author may request the later amendment of a contract, adjusting the proportional royalty.

Judicial practice in copyright law has not created a separate content for the concept of extreme disproportionality, so extreme disproportionality must be interpreted as is general in civil law. (Sándor, 2021)

With regard to the fact that the contract does not contain any error when signed, any later imbalance in the *synallagma* will not incur all the legal consequences of invalidity: the Copyright Act only enables the court amendment of a contract, considerably limiting the scope of claims.

It must also be noted that the bestseller clause can also be applied to contracts transferring rights and to the contracts of performing artists.

4. NATIONAL CASE LAW OF THE BESTSELLER CLAUSE WITHIN THE EU

Nonetheless, the bestseller clause has not been incorporated in practice in Hungary, and not many cases have been brought to the courts in other EU member states either which resulted in the judicial amendment of the royalty set down in the contract, and only a few member states apply this means in their contract laws.

Dutch law introduced it in 2015 (Senftleben, 2017–2018), and since then there has been no known case law. It has been part of German law since 2004, but the literature knows only a few cases. A good example was recently the case of the Director of Photography of the movie ‘Das Boot’, who was granted 580,000 Euro instead of the 100,000 set originally (OLG München, 21. 12. 2017 – 29 U 2619/16). The disproportionality after concluding the synchronization contract was the result of the fact that the movie was granted numerous awards so the profit deriving from it increased considerably. Another movie that ended up in court was the Pirates of the Caribbean (BGH Urteil vom 10. 5. 2012 – I ZR 145/11). In this case, the law court awarded a higher royalty for the achievement of the German voice actor. Here the court emphasized in the explanation of the decision that when the agreement was signed the actor did not see the market conditions concerning the expected success of the movie, still does not constitute such carelessness on his side, which would give any reason to the court not to correct the terms and conditions of the agreement

later. The situation was made more intense as the dubbed footages originally intended for distribution in Germany were later also used in Austria and Switzerland.

From Poland, only one case is known, which was not brought to court eventually, but was discussed in the press in detail. The series called *Witcher*, written by Andrzej Sapkowski is widely known.⁷

Based on the two volumes of short stories and a series of five novels and a sixth separate novel by the Polish writer, three video games (and three other video games that do not constitute a series but are worth mentioning) a film and two series have been produced, out of which Netflix's own production running by the name of 'Witcher' can be highlighted besides the Polish film and series. What must be emphasized and is relevant to copyright among these works is the three video games. These games are all based upon the books by Sapkowski focusing on Geralt of Rivia, the witcher, who rids the people living on the Continent in the centre of the world created by Sapkowski of various monsters for money. With regard to their story, the games follow the events written about in the books, but they are not part of the plot created by the writer, so they can be considered fan-fictions in this respect. From the three games that belong to the main storyline, the third element of the series should be emphasized. This work is considered to be one of the best open-world action role-playing games, which is indicated by the fact that by December 2019 over 28 million copies were sold worldwide. Although a 554% rise in its sales also contributed to this number, which was driven by the release of the Netflix series in that month, it can firmly be stated that it was this game that brought world fame for the works that are set in the world of *Witcher* as over 20 million copies of the game were sold in June 2019. Eventually, the author managed to enforce his claim to a fair share of the profit made out of the unexpected popularity of the video games and the dispute was closed with an agreement 'beneficial for all parties'.⁸

The bestseller clause does not have extensive practice apart from these extreme cases. It is supposedly caused by the contract law practice, which avoids such cases in advance, and by the fact that in case of any change in the value, the amendment of the agreement as the only possible solution can be avoided if the parties themselves agree on the modification of the contract suitable for them. Certainly, it also requires the necessary attitude from the parties. It is conspicuous that Hungarian judicial practice has had no such case, which might indicate that in Hungarian law there is no need for this rule, the parties can take care of their problems with disproportionality for themselves. By a positive interpretation, it can be stated that the function of the rule is to persuade the parties to come to an agreement.

However, this rule could be beneficial in those cases when the work is used in accordance with an agreement signed earlier but meets with popularity bigger than

⁷ <https://wccftch.com/the-witcher-author-million-usd/> (Accessed: 16 September 2022).

⁸ Demand for Payment by Andrzej Sapkowski. Available at: https://www.cdprojekt.com/en/wp-content/uploads-en/2018/10/31450043_rb_15-2018_-_demand-for-payment.pdf (Accessed: 16 September 2022).

expected. If we think of the new online popularity of old movies and old musical albums, the necessity of this rule becomes perfectly understandable.

5. BESTSELLER CLAUSE AND THE DSM DIRECTIVE

The DSM directive of the European Union prescribes for the Member States to introduce a contract adjustment mechanism. In the legal systems of most Member States, it will mean far-reaching changes as they have limited regulations for authors' contracts if at all. The directive mentions a reason completely different from the regulatory considerations mentioned earlier, which renders the introduction of the bestseller clause (and the harmonization of the Union) indispensable:

Recital 79 DSM reads:

'Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers, or by their representatives on their behalf, related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States should be able to either establish a new body or mechanism, or rely on an existing one that fulfils the conditions established by this Directive, irrespective of whether those bodies or mechanisms are industry-led or public, including when part of the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure are to be allocated. Such alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.'

So the directive does not consider the amendments of contracts by the court as the ideal solution but recommends an intermediate solution for the Member States, which is between the private agreements of the parties and the amendment of the agreement made by a court.

By implementing the directive, the original text of Article 48 of the Copyright Act will not change. But two complementary rules have been created: according to the first, the bestseller clause should not be applied for remunerations set based upon the tariffs of collective management organizations [Art. 48(2) HCA]. However, as it was mentioned, it is not surprising as the regulation of copyright collective management organizations is differentiated enough for any situation requiring the application of the bestseller clause. Another novelty is the provision for the alternative resolution of disputes. This was implemented by the Hungarian legislature in the Copyright Act, appointing a dispute settlement body working as a part of the Council of Copyright Experts, which works with the Hungarian Intellectual Property Office. The procedure of the dispute settlement body may have multiple advantages over judiciary procedures: its members must be appointed from amongst the members of the Council of Copyright Experts, so the parties can rely on the opinions of experts in certain fields of copyright (Art. 102 HCA).

6. CONCLUSION

In conclusion, today only a temporary statement can be made: the new regulation seems to break down the means of civil law by which the balance of the synallagma tipped after the agreement was signed is restored by incorporating the possibility of alternative dispute resolution in the system. The bestseller clause put a limitation on the tool that could be used in case of the invalidity of a contract to avoid unsettled legal relationships for already started uses.

From the aspect of codification, it seems that the regulation in the copyright act considers law courts as the main rule and the possibility of alternative resolutions is considered to be a complementary solution. Nevertheless, knowing the practice (or the lack of it), it can be expected that more serious situations that make direct solutions between the parties more difficult will push the parties towards seeking alternative resolutions. If the parties can trust the settlement of their dispute to a third party, this third party may take them to the law court later.

REFERENCES

- [1] Faludi G. (1999). *A felhasználási szerződés*. Budapest: Közgazdasági és Jogi Kiadó.
- [2] Gyertyánfy P. (1996). A magyar szerzői jogról. *Magyar Tudomány*, Vol. 1996, No. 12, pp. 1521–1525.
- [3] von Lewinski, S. (2008). *International Copyright Law and Policy*. Oxford: Oxford University Press.
- [4] von Lewinski, S. (1996). Urhebervertragsrecht. In: Schricker, G. – Bastian, E. M. – Dietz, A. (eds.). *Konturen eines europäischen Urheberrechts*. Baden-Baden: Nomos, pp. 49–57.
- [5] Sándor I. (2021). A feltűnő értékaránytalanság egyes elméleti és gyakorlati aspektusai. *Miskolci Jogi Szemle*, Vol. 16, No. 3, pp. 50–69.
- [6] Senftleben, M. (2018). More Money for Creators and More Support for Copyright in Society- Fair Remuneration Rights in Germany and the Netherlands. *Columbia Journal of Law & the Arts*, Vol. 41, No. 3, pp. 413–433.
- [7] Tomasovszki E. (2021). *A követő jog alapproblémái és szabályozási kérdései*. PHD dissertation. Available at: https://dea.lib.unideb.hu/dea/bitstream/handle/2437/322802/Tomasovszky_Edit_PhD_nyilvanos_titkosított.pdf?sequence=1&isAllowed=y.
- [8] Zampf, D. A. (2002). *Kollektive Wahrnehmung von Urheberrechten im Online-Bereich. Rechtliche Rahmenbedingungen für ein Tarifmodell zur Nutzung von Musik im Internet*. Münster: LIT Verlag.