

Evaluation of the Act on oversight and dispute resolution for collective management organisations: Summary

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Introduction

On July 1st 2013 a bill was signed into law amending the Act on oversight and dispute resolution for collective management organisations in copyright and related rights, to broaden and strengthen the oversight of collective management organisations (CMOs). As in the previous law, the Dutch copyright board (CvTA) was assigned oversight of the collective management of copyright and the timely and just distribution of funds by CBOs. CMOs collectively collect licencing fees from end-users and/or distribute funds to the holders of copyright and related rights, such as authors, performers, producers and publishers.

The main motivation behind the law of 2013 was the impression that the oversight of CMO's was not functioning properly, that tariffs and contracting practices were not sufficiently transparent and that unnecessary tensions existed between CMOs and end-users.

The main objective of law of 2013 is therefore to strengthen the transparent and efficient functioning of the CMOs , benefiting both end-users and copyrights holders. To achieve this objective, several intermediate goals have been formulated in the legislative drafting process of the Law of 2013:

- Creating a level playing field for different types of CMOs
- Increasing transparency of CMOs
- Improving the collection and distribution licencing fees by CMOs
- Increasing the effectiveness of the CvTA
- Offering accessible and effective dispute resolution between end-users and CMOs.

To achieve these objectives, the Law of 2013 contains various instruments. In this evaluation of the Law of 2013 its main goal, intermedia goals and its instruments are researched successively. Besides these goals and instruments, several specific topics are discussed as well:

- the relationship with the European Directive on collective management of copyright and related rights
- the Standards for Remuneration Act (WNT)
- the Freedom of Information Act (WOB)
- the financing of the CvTA

- the question whether or not to combine the annual report and the oversight report of the CvTA.

To this end a literature study has been conducted and interviews have been held with a large number of stakeholders, including all CMOs and representatives from end-users and (representatives of) copyright holders.

Conclusions concerning the main goal and sub goals

The execution of the law of 2013 and the oversight of the CvTA have made several contributions to the main goal of the law of 2013, which is to strengthen the transparent and efficient functioning of the CMOs, benefiting both end-users and copyrights holders. This main goal has been achieved in some aspects, however, not (yet) in others. This conclusion is based on the achievement on the intermediate goals (as formulated above).

To create a level playing field between CMOs, CMOs collecting or distributing funds above a certain threshold are subject to oversight of the CvTA. This has created a level playing field and thereby the intermediate goal has been achieved.

Increasing the transparency of CMOs has not been achieved in all circumstances. With the Law of 2013 CBOs are subject to more transparency obligations. CMOs are to a large extent compliant to these obligations, by making more information public. In addition, the strengthening of the monitoring instruments of the CvTA, such as access to records of CMOs, ex ante oversight and enforceable requests for information, have led to more insight into the functioning of CMOs for the CvTA. On the other hand, transparency of CMOs practices is still sub-optimal. For instance: transparency of the tariffs charged by the CMOs has increased only slightly, partly because of confidentiality clauses in contracts between CBOs and users, on which transparency obligations do not apply.

Increasing the effectiveness and efficiency of the collection and distribution of licencing fees by CBOs has only been partly achieved so far. The law of 2013 has provided additional requirement for the period in which funds are to be distributed among copyright holders and the CvTA has more insight in the revenue structure and the management of CMOs. However, the impact of the 15% cap of management costs of CMOs is unclear. Such a cap is, regardless of the exact percentage, not a precise instrument curb management costs by CMOs. Joint billing of end-users has been implemented by CMOs where relevant, but has not led to more efficient transactions and a decrease of transaction costs for end-users. End-users indicate that more efficiency can be obtained by introducing joint administration of end-user billing for all CBOs at once.

To increase the effectiveness of the CvTA various instruments have been introduced in the Law of 2013. Our research demonstrates that the effectiveness of the CvTA has in fact increased as a result of the Law of 2013. At the same time, further improvement of effectiveness seems possible. These improvements concern for example the duration of enforcement and adjudication of the CvTA and regulatory uncertainty caused by ambiguous legislative drafting of enforcement provisions. These possibilities for further improvement lead us to conclude that the intermediate goal of increasing effectiveness of the CvTA has not yet been achieved.

To offer accessible and effective dispute resolution for end-users and CMOs, the Copyright Dispute Resolution Body (“De Geschillencommissie auteursrecht”) has been established. This intermediate goal has therefore been achieved. However, because hardly any cases have been submitted to the Copyright Dispute Resolution Body, the committee has not been able to contribute to increasing the transparency of the tariffs charged by CBOs. It is unknown why the number of submitted disputes has remained this low.

The CvTA has, as a regulatory agency with new methods in a new legal framework, gone through a learning curve regarding its new methods of oversight, a new regulatory landscape and its own positioning therein. The CvTA has pursued a consistent approach to its oversight, which sought to do justice to all of its new and old responsibilities and duties while also monitoring new developments in the field. Also, the CvTA has strengthened its position in relation to the CMOs. However, this evaluation finds that the CvTA could have

positioned itself more robustly, based on a consistent strategy of oversight. Therefore there is room for improvement, in particular by developing a consistent and problem-oriented model for oversight and enforcement that is predicated on the main and intermediate goals of the in the Law of 2013. This would include a contextual analysis of the major problems to be solved and an analysis of what kind of research and use of (formal and informal) instruments would be required, supplemented with annual priorities and points of focus.

Conclusions concerning specific topics

Self-regulation is formally beyond the control of the CvTA. However, it is often not effective without the threat of enforcement when self-regulation does not lead to the desired behaviour. This makes supervision and self-regulation complementary, with a role for the regulatory authority. Between the CvTA and the CMOs there is some overlap of the legal framework and self-regulation, which causes relatively small administrative burdens.

The legislature has anticipated well on the European Directive on management of collective rights and related rights in the legislative process of the Law of 2013. Implementation of the European Directive may lead to a further intensification of oversight and may thus affect the strategy of the CvTA and their required capacity. With the transposition of the European Directive all CBOs in the Netherlands will be placed under regulatory oversight. Thereby article 17 of the Law of 2013, the threshold above which CMOs fall within the ambit of the Law, will become superfluous.

The CvTA has put a lot of effort into administering the WNT for CMOs, which has required a lot of capacity. The required capacity for this form of oversight may decrease in the future when the CvTA becomes more experienced. Administering the WNT, however, is only possibly at the expense of the effectiveness of the main tasks of the CvTA. Therefore it would be reasonable to consider to transplanting WNT oversight of CMOs to the Ministry of the Interior, which administers the WNT in other fields. This also to reduce the fragmentation of WNT oversight.

The CvTA publishes an annual report and an oversight report annually. These reports have a different purpose, since the annual report gives insight in the CvTA itself and the oversight report is focused on the functioning of the CBOs. Given these differences, the separate publication of the two reports is reasonable. However, the reports could be discussed in the House of Representatives simultaneously.

WOB-requests form a disproportional burden on the capacity of the CvTA. Other regulatory authorities have similar experiences, and presumably have found ways to mitigate the administrative burden caused by WOB-requests. Therefore, there seems to be no reason to make a specific exception for the CvTA in terms of WOB-requests.

Based on our analysis there are no obstacles to (partly) financing the CvTA by the CMOs. However, when CMOs would partially fund the CvTA, certain safeguards would need to be established, for instance concerning the independence of the CvTA.