

ALAI Study Days, Barcelona (2006): Copyright and Freedom of Expression

Report of the Netherlands ALAI Group

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1.- Explain (and comment on) the place of copyright in your Constitution and how does it relate to freedom of expression.

- *Are there any provisions in your Constitution (or in any especial laws dealing with fundamental rights) which deal with copyright? Under what terms? Is copyright a fundamental right? Is it granted to all authors, both national citizens and foreigners? Please provide a translation of the relevant constitutional text in English or French.*

The *Grondwet* (Dutch Constitution) does not contain any provisions that specifically deal with copyright. However, copyright is probably protected as a property right under art 1 of the First Protocol of the European Convention on Human Rights (The right to peaceful enjoyment of possessions and protection of property).

The *Auteurswet 1912* (Dutch Copyright Act, abbr. DCA) does not grant copyright protection to foreign authors, except in special cases (e.g. foreigners having domicile in the Netherlands or works first published in the Netherlands); see art. 47 DCA. This might indicate that copyright is not to be considered a fundamental right.

- *Indicate any other provisions in your Constitution that may be related, directly or indirectly, to copyright. For instance, dealing with freedom of expression (and freedom of creation) or any other fundamental right such as freedom of information, access to culture, or private property, privacy rights, etc...*

The following provisions of the Dutch Constitution can be regarded as related, directly or indirectly, to copyright: *art 7: Freedom of Expression*¹ and *art 10: Protection of Privacy*.²

- *What importance does your system give to the integration of copyright into the Constitution, and especially with the freedom of expression? Does one prevail upon the other? Do they complement each other? Is one a pre-condition for the other? May a work that results from an act which contravenes (i.e., goes beyond) the freedom of expression, be protected and entitled to all rights?*

¹ Article 7 [Freedom of Expression] reads:

(1) No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.
(2) Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.
(3) No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.
(4) The preceding paragraphs do not apply to commercial advertising.

² Article 10 [Right to Privacy] reads:

(1) Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.
(2) Rules to protect privacy shall be laid down by Act of Parliament in connection with the recording and dissemination of personal data.
(3) Rules concerning the rights of persons to be informed of data recorded concerning them and of the use that is made thereof, and to have such data corrected shall be laid down by Act of Parliament.

As stated, copyright is not integrated into the Dutch Constitution. Freedom of expression can be considered as an external limitation to copyright. In that case art. 10 of the European Convention on Human Rights (ECHR) is usually applied since that provision has direct effect and a broader scope than art. 7 of the Constitution. In the Netherlands the provisions of the ECHR have direct effect, and may therefore directly be invoked before the courts. If a provision of national law conflicts with a provision of the Convention, the latter will prevail. Art. 7 of the Dutch Constitution only deals with freedom of expression, and does not guarantee a freedom to impart and receive information, as does art. 10 ECHR. Unlike art. 7, art. 10 ECHR informs lawmakers and courts under which circumstances freedom of expression may be restricted. Any restriction must be ‘prescribed by law’, and ‘necessary in a democratic society’ to protect (among many other things) the ‘rights of others’.

Yet another reason why art. 10 ECHR is more important than art. 7 of the Dutch Constitution is that Dutch constitutional law courts cannot review the constitutionality of acts of Parliament and treaties. There is no constitutional scrutiny,³ nor is there a constitutional court in the Netherlands.

A work of authorship that contravenes the freedom of expression can still be protected by copyright. Dutch copyright does not discriminate against ‘immoral’ works, such as pornographic films, provided they qualify as original works.

- *Is there any case law addressing this matter? How has case law participated in defining the relationship between copyright and fundamental rights, in general, and freedom of expression, in particular? What are the most innovative contributions? Explain and cite specific cases, if applicable.*

Although courts in the Netherlands have long been hesitant to apply art. 10 ECHR in copyright cases, a few relatively recent decisions signify the gradual acceptance, in special cases, of an art. 10 defense.⁴ The first time such a defense was considered in court was in 1994.⁵ This case concerned an interview, published in the daily newspaper De Volkskrant, with a well-known ‘corporate raider’, which was illustrated by a photograph taken in the interviewee’s office. The photograph prominently, and humorously, featured one of the many sculptures on display in the office, a statuette of an archer, aiming, as it would seem, at the head of its collector. The Dutch collecting society for visual arts claimed damages for copyright infringement. The Court agreed that no statutory copyright limitation was applicable to the facts of the case, but went on to hold that this does not preclude a conflict between copyright and freedom of expression, as protected by art. 10 ECHR. The Court then proceeded to subject the collecting society’s claim to the test of proportionality inherent in art. 10 (2) ECHR. Nevertheless, the Court found for the plaintiff; depicting the work of art in such a prominent manner was not deemed to be required for the purpose of De Volkskrant’s news reporting.

In a landmark case decided in 1995, the conflict between copyright and freedom expression was expressly acknowledged by the Dutch Supreme Court. The *Dior v. Evora* case involved the reproduction of copyrighted perfume bottles in advertisements by a retailer offering parallel-imported goods for sale. Having concluded that no statutory copyright exemption applied to the facts of the case, the Court accepted there was room to move outside the existing system of exemptions, on the basis of a balancing of interests similar to the rationale underlying the existing exemptions.⁶ Having thus found sufficient room to accommodate the users’ interests by construing such an extra-statutory exemption, the Court however saw no need for direct application of Art. 10 ECHR.

In 1998, in a decision concerning the ‘missing pages’ of Anne Frank’s diary, reprinted without authorization by the Dutch newspaper ‘Het Parool’, the Amsterdam Court of Appeal decided that art. 10 did not override the copyright claims of the Anne Frank Foundation, which owns the copyrights in the diary.⁷ After carefully weighing the public interest in having the pages divulged against the interest of the Foundation in protecting, inter alia, the reputation of the Frank family members described in the diary fragments, the Court found for the Foundation, reversing the decision of the District Court.⁸

³ Article 120 reads: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

⁴ See P. Bernt Hugenholtz, ‘Copyright and Freedom of Expression in Europe’, in: Neil W. Netanel & Niva Elkin-Koren (eds.), *The Commodification of Information*, London/The Hague: Kluwer Law International 2002, earlier version available at <http://www.ivir.nl/publications/hugenholtz/PBH-Engelberg.doc>.

⁵ *Boogschutter*, District Court of Amsterdam 19 January 1994, [1994] Informatierecht/AMI 51; see comment P.B. Hugenholtz, [1994] NJCM Bulletin 673.

⁶ *Dior v. Evora*, Dutch Supreme Court (Hoge Raad) 20 October 1995, NJ 1996, 682.

⁷ *Anne Frank Fonds v. Het Parool*, Court of Appeal Amsterdam 8 July 1999, [1999] Informatierecht/AMI 116.

⁸ *Id.*, President District Court of Amsterdam 12 November 1998, [1999] Mediaforum 39.

The most recent case dealing with the subject is the case of *Scientology v. XS4all*.⁹ Author Karin Spaink had posted large portions of confidential Scientology documents on her website, which contained extensive criticism of Scientology. In the past, the Church of Scientology had often invoked copyright law to try to keep its teachings secret, and discourage public criticism of its writings. In this case the Church sued a number of internet service provider, and Karin Spaink. Defendants argued their case *inter alia* on the basis of free speech, and did so successfully. The Court of Appeal of The Hague held that in the absence of a statutory limitation that might cover Spaink's extensive postings, Scientology's copyright was trumped by the freedom of expression enshrined in art. 10 ECHR. The Court underscored the non-profit and informative character of Karin Spaink's website and the contribution of her postings to the public democratic debate. The general interest of having a public debate on Scientology in this case outweighed the interest of the Scientology Church of enforcing its exclusive rights. Before the Dutch Supreme Court the case was eventually repealed by the Church at the very last minute.

- *What positions do commentators adopt on this topic?*

While some commentators perceive the direct application of art. 10 ECRM as a threat to copyright, or even deride it as 'chicanery',¹⁰ most others have accepted it.¹¹ Most commentators, however, agree that such direct application occur only under exceptional circumstances. In the past several Dutch commentators, and the Dutch Government, have supported the idea of introducing a fair use style provision in the Dutch Copyright Act to relieve the tension between copyright and freedom of expression.¹²

2. - Indicate which are the general copyright statutes in your country, or any other statutes in other fields of law (contract law, liability law, press and media regulation, etc.) that may affect copyright.

The general copyright statutes in the Netherlands are:

- Auteurswet 1912 (Copyright Act)
- Wet op de Naburige Rechten 1993 (Neighboring Rights Act)
- Databankenwet (Database Act)

Being a Member State of the EU, Dutch copyright law is heavily influenced by the seven harmonization directives in the field of copyright and neighboring rights.

Statutes that may affect copyright directly or indirectly include:

- Burgerlijk Wetboek (Dutch Civil Code)
- Mediawet (Media Act)
- Mededingingswet (Competition Act)

3.- How is the subject matter of copyright defined, and to what extent is such definition aimed at protecting (or related to) freedom of expression?

- *Is the definition statutory? What role does case law play in the development of the definition?*

⁹ *Scientology v. XS4ALL*, Court of Appeal the Hague 4 September 2003 [2003] AMI 217.

¹⁰ H. Cohen Jehoram, 'Copyright and freedom of expression, abuse of rights and standard chicanery: American and Dutch approaches', EIPR 2004, p. 275-279.

¹¹ P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989, p. 150-170; D.W.F. Verkade, *Intellectuele eigendom, mededinging en informatievrijheid*, Deventer: Kluwer 1990, p. 38-39; E.J. Dommering a.o., *Informatierecht. Fundamentele rechten voor de informatiesamenleving*, Amsterdam: Cramwinckel 2000, p. 431-455; J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 5-9.

¹² J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 220.

Dutch law does not define ‘the work of literature, science and art’ that is protected under copyright. Art. 10 of the Dutch Copyright Act gives examples of what types of works are eligible for copyright protection. This list, however, is not exhaustive.¹³ The ‘work’ concept has been gradually developed in case law. In the *Romme v. Van Dale* case¹⁴ the Dutch Supreme court has given the following definition: ‘a work is considered to be a literary, scientific or artistic work if it has an own, original character and bears the personal stamp of the maker.’

- **How and to what extent are ideas, facts and etc. excluded from the subject matter of copyright? May freedom of expression (or other fundamental rights) affect the interpretation of the very concept of “protected work”? For instance, is the concept of originality linked to the exercise of the freedom of expression, in the sense that artistic works are deemed original more easily than other kind of works? Cite and explain any statutory provisions and case law that may be relevant.**

Under Dutch law ideas and facts are excluded from the subject matter of copyright. There is no provision in the Dutch Copyright Act to this end, but this ground rule is firmly established in legal doctrine and can be deduced from case law. In *Van Gelder v. Van Rijn* the Dutch Supreme Court stated that ‘only the concrete expression of the creativity of the author is protected under copyright.’ The Court thus excluded a specific style, method of operation or idea from copyright protection

In *Van Dale v. Romme*¹⁵ the Dutch Supreme Court underscored that, in principle, collections of data are outside the scope of copyright. The Court applied a strict test of originality by requiring that the compilation of selected data (in this case keywords of a dictionary) not only bear the personal stamp, but also reflect the ‘personal vision’ of its compiler. It remains to be seen whether this test is in conformity with the European standard of ‘the author’s own intellectual creation’, as laid down in the EU Database Directive.

¹³ Article 10 DCA reads as follows:

1. For the purposes of this Act, literary, scientific or artistic works include:
 - 1°. books, pamphlets, newspapers, periodicals and all other writings;
 - 2°. dramatic and musical works;
 - 3°. recitations;
 - 4°. choreographic works and entertainments in dumb show;
 - 5°. musical works, with or without words;
 - 6°. drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like;
 - 7°. geographical maps;
 - 8°. drafts, sketches and three-dimensional works relating to architecture, geography, topography or other sciences;
 - 9°. photographic works;
 - 10°. cinematographic works;
 - 11°. works of applied art and industrial designs and models;
 - 12°. computer programs and the preparatory material;
- and generally any creation in the literary, scientific or artistic areas, whatever the mode or form of its expression.
2. Reproductions of a literary, scientific or artistic work in a modified form, such as translations, arrangements of music, cinematographic and other adaptations and collections of different works shall be protected as separate works, without prejudice to the copyright in the original work.
3. Collections of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means, shall be protected as a separate work, without prejudice to other rights to the collection and without prejudice to the copyright or other rights to the works, data or other materials included in the collection.
4. Collections of independent works, data or other materials as referred to in the third paragraph, for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment do not fall within the category of works referred to in the first paragraph, sub 1e.;
5. Computer programs do not fall within the category of works referred to in the first paragraph sub 1e.

¹⁴ *Van Dale v. Romme*, Dutch Supreme Court (Hoge Raad) 4 January 1991, NJ 1991, 608.

¹⁵ *Van Dale v. Romme*, Dutch Supreme Court (supra).

Freedom of expression does influence the subject matter of copyright at different levels. The work has to be expressed and original; it has to be a product of the mind. In contrast to patent law, infringement occurs only if a work is copied; copyright does not monopolize expression: an independently created but identical work does not constitute a reproduction.

- *In your system what kind of protection is granted to compilations of factual works and data? For instance, the “sui generis” right on databases: has your country –be it a EU member or not- implemented it? Is there any case law on the matter? How is such protection affecting the exercise of the freedom of expression, in terms of creating new works and/or accessing and using the information contained in them. Cite and explain any relevant provision or case law.*

The Dutch legislature has implemented the ‘sui generis’ database right by enacting the Database Act in 1999. There is an abundance of case law on the database right, which need not be summarized here.¹⁶ Whether a compilation of factual works and data is protected by database right depends on whether there has been made a substantial investment in obtaining, verifying or presenting the information.

On 9 November 2004 the European Court of Justice¹⁷ clarified that the Database Directive only protects the obtaining of data and facts, not the *creation* of data and facts. For that reason no sui generis protection should be granted to horse racing schedules and lists of football fixtures. ‘Created’ facts and data are protected only if additional substantial investment can be demonstrated.

Dutch law also boasts a unique quasi-copyright regime of protection of non-original writings. Art. 10(1)(1) DCA states that ‘for the purposes of this Act, literary, scientific or artistic works include books, pamphlets, newspapers, periodicals and all other writings ...’. In the *Radioprogramma* cases¹⁸ the Dutch Supreme Court developed a system for protection of writings without a personal character. The details of this regime, which in the past has served an important role in protecting databases, has been described in detail in the Dutch national report to the ALAI Congress of 1989. Works that are covered by the sui generis regime of the Database Act do not qualify as ‘writings’ (art. 10(4) DCA).

4.- What exclusive rights are the authors granted under your copyright system?

- *List them. Provide the statutory language in English or French.*

Besides the author's moral rights, which are protected under art. 25 DCA, rightholders enjoy two economic economic rights, both of which are defined and interpreted in a very broad manner: a right of reproduction (*verveelvoudiging*) and a right of communication to the public (*openbaarmaking*). The first right (defined in articles 13 and 14) comprises a right of reproduction (copying), as well as a right of translation and adaptation. The right of communication to the public (article 12) effectively covers all acts of making a work available to the public, including acts of publishing and distribution, performing, exhibiting, reciting, broadcasting, cable (re)transmission, etc.

Article 12 (communication to the public)

1. The communication to the public of a literary, scientific or artistic work includes:

- 1°. the communication to the public of a reproduction of the whole or part of a work;*
 - 2°. the distribution of the whole or part of a work or of a reproduction thereof, as long as the work has not appeared in print;*
 - 3°. the rental or lending of the whole or part of a specimen of the work, with the exception of works of architecture and works of applied art, or of a reproduction thereof which has been brought into circulation by or with the consent of the right holder;*
 - 4°. the recitation, performance or presentation in public of the whole or part of a work or a reproduction thereof;*
 - 5°. the broadcasting of a work incorporated in a radio or television programme by satellite or other transmitter or by a closed-circuit system as referred to in article 1 sub g of the Wet op de Telecommunicatievoorzieningen.*
- 2. Rental as referred to in paragraph 1 sub 3°. means making available for use for a limited period of time for direct or indirect economic or commercial advantage.*

¹⁶ See Institute for Information Law, ‘The Database Right File’, <http://www.ivir.nl/files/database/index.html>.

¹⁷ ECJ 9 November 2004, cases C-203/02 (*BHB v William Hill*), C-338/02 (*Fixtures Marketing Ltd v Svenska Spel AB*), C-444/02 (*Fixtures Marketing Ltd v OPAP*), C-46/02 (*Fixtures Marketing Ltd v Oy Veikkaus Ab*).

¹⁸ Dutch Supreme Court (Hoge Raad) 17 April 1953 [1954], 27 January 1961 [1962], 25 June 1965 [1966].

3. Lending as referred to in paragraph 1 sub 3° means making available for use, for a limited period of time, by establishments accessible to the public, for no direct or indirect economic or commercial advantage.
4. A recitation, performance or presentation in public includes that in a restricted circle, except where this is limited to relatives or friends or equivalent persons and no form of payment whatsoever is made for admission to the recitation, performance or presentation. The same shall apply to exhibitions.
5. A recitation, performance or presentation which is exclusively for the purposes of education provided on behalf of the public authorities or a non-profit-making legal person, in so far as such a recitation, performance or presentation forms part of the school work plan or curriculum where applicable, or which exclusively serves a scientific purpose, shall not be deemed public.
6. The simultaneous broadcasting of a work incorporated in a radio or television programme by the organization making the original broadcast shall not be deemed a separate communication to the public.
7. The broadcasting by satellite of a work incorporated in a radio or television programme means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and back to earth. Where the programme-carrying signals are encrypted, this shall be deemed to constitute the broadcasting by satellite of a work incorporated in a radio or television programme if the means of decrypting the broadcast are provided to the public by or with the consent of the broadcasting organisation.

Article 13 (adaptation)

The reproduction of a literary, scientific or artistic work includes the translation, arrangement of music, cinematographic adaptation or dramatization and generally any partial or total adaptation or imitation in a modified form, which cannot be regarded as a new, original work.

Article 14 (reproduction)

The reproduction of a literary, scientific or artistic work includes the fixation of the whole or part of the work on an object, which is intended to play a work or to show it.

- In most copyright laws, the right of adaptation is envisioned to allow for subsequent creation (to adapt or transform the work). What is the scope of the adaptation right, if applicable, under your law? Is it granted as an exclusive right (in the sense that each derivative work requires prior authorization)? Which rationales (amount of use? substantiality? etc) are used to determine that a new work has been created? Cite and explain any statutory provisions and case law that may be relevant.

Each derivative work requires prior authorization. This chain is unlimited. Making a film based on a Dutch translation of a French novel would require permission of both the Dutch translator and the French writer. To establish whether the derivative work qualifies as an adaptation or as a ‘new original work’ (article 13), Spoor, Verkade and Visser make a distinction between the ‘objective’ and ‘subjective’ features of a work.¹⁹ Material that already existed, like facts, data, theories, are considered to be objective. Subjective elements are all the elements that depend on the personal taste and preference of the author. To decide whether a work can be considered as a reproduction or adaptation of a prior work, a Court would first make an inventory of the subjective features of plaintiff’s work, and next assess which of these features are copied in defendant’s work. For instance, in the *Castaway* case²⁰ a British television production company claimed that the format of its ‘Castaway’ reality show had been misappropriated by Dutch company Endemol, producer of ‘Big Brother’. The Court of Appeal compared the subjective features of both shows’ formats and decided that there was no copyright violation because of the many differences between the two formats. The fact that they were both based on the same basic idea was not sufficient for a finding of infringement.

- What is the term of protection of works, under your law? Once the work is in the public domain, is there any other protection (be it under copyright or elsewhere) that may still be enforceable, thus limiting ability of the public to freely use it? For instance, how can the moral right of integrity, if applicable, affect the public domain? Cite and explain any statutory provisions and case law that may be relevant.

The term of protection of works under Dutch law is laid down in art. 37 DCA:

¹⁹ J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 67.

²⁰ *Castaway v Endemol*, Dutch Supreme Court (Hoge Raad) 16 April 2004, [2004] AMI 172.

1. Copyright shall expire 70 years after 1 January of the year following the year of the death of the author.
2. The duration of the copyright belonging jointly to two or more persons in their capacity as co-authors of a work shall be calculated from 1 January of the year following the year of the death of the last surviving co-author.

Special cases of authorship are dealt with in art. 38 DCA:

1. The copyright in a work of which the author has not been indicated or has not been indicated in such a way that his identity is beyond doubt shall expire 70 years after 1 January of the year following that in which the work was first lawfully communicated to the public.
2. The same shall apply to works of which a public institution, association, foundation or company is deemed the author, unless the natural person who created the work is indicated as the author on or in copies of the work which have been communicated to the public.
3. If the author discloses his identity prior to the end of the term referred to in paragraph 1, the duration of the copyright in the work concerned shall be calculated in accordance with the provisions of article 37.

Moral rights (personality rights) expire together with the economic rights, or even sooner. No perpetual moral right exists in the Netherlands. Art 25(2) provides:

Upon the death of the author, the rights referred to in paragraph 1 shall belong, until the expiry of the copyright, to the person designated by the author in his last will and testament or in a codicil thereto.

Therefore, if no person has been designated by the author, the moral right expires upon his death.

5.- The system of exceptions and limitations under your law. General framework.

- Does your law provide for a list of specific statutory exceptions/limitations to copyright or for an open system of exceptions/limitations? Or both? If open, how (under which criteria) are they defined and limited? If listed, is it an open list? Is there still room for exceptions/limitations outside the statutory list or not? And how is case law “adjusting” the open system or the listed exceptions/limitations to the new challenges opened by digital technologies?

Dutch copyright law provides for a closed list of specific statutory exceptions/limitations to copyright. There is no such thing as an open ‘fair use’ norm like in the United States. On the other hand, as we have seen in the *Dior v Evora* case discussed above, the list of limitations is not completely closed. By analogy another limitation can be constructed if it fits in the system of the other limitations and can be considered to deal with a problem that has not been envisaged by the legislator. The Dutch government has declared in 1999 to be in favour of a ‘fair use’ norm, but after the adoption of the EU Copyright Directive the introduction of such an open norm has probably ceased to be viable because of the exhaustive list of exceptions in articles 5.1-5.3 of the Directive.²¹ However, since the Directive deals only with exceptions to the rights of reproduction and communication to the public, the Dutch system of exceptions leaves more room for ‘open’ limitations to other exclusive rights, especially the right of adaptation.

- Identify and try to classify the exceptions/limitations according to the purposes or principles deemed to justify them (i.e., teaching or research; free speech; information; private use; some specific social action etc.) To what extent are such principles (justifications) defined in the statutes or are they “interpreted” by courts and/or commentary?

Limitations connected with ‘freedom of expression and information’

Article 15 (adaptation)

Article 15a (quotation)

Article 15b (work of public authorities)

²¹ J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 216-219

Article 15c (lending)

Article 15h (closed networks)

Article 16a (use in a report current event)

Article 18 (pictures of works located in public places)

Article 18a (incidental processing)

Article 18b (parody)

Limitations connected with governmental information

Article 11 (laws, judicial decisions)

Article 15b (published works of public authorities)

Limitations connected with libraries

Article 15c (lending)

Article 15h (closed networks)

Article 16h (reprographic reproduction)

Article 16n (reproductions by libraries, museums and archives)

Limitations connected with ‘teaching or research’

Article 16 (education)

Article 16h (reprographic reproduction)

Article 16n (reproductions by libraries, museums and archives)

Limitations connected with ‘private use’

Article 16b (private copy)

Article 16c (electronic private copy)

Limitations connected with ‘contractual expectations’

Article 23 (authorization owner work)

Article 24 (authorization painter)

Other limitations

Article 15i (exploitation for the benefit of handicapped individuals)

Article 17c (congregational singing during a religious service)

Have there been any significant developments in the approach towards exceptions/limitations over the last few decades, and more particularly in recent years as a result of the WCT and WPPT 1996 Treaties and, where applicable, the EU Directive 2001/29/EC on Copyright in the Information Society?

The following articles have been amended or added to the Dutch Copyright Act in the course of the implementation of the EU Copyright Directive:

<i>Article 16b</i>	(reproductions for private use) is now only applicable to traditional forms of copying. ²²
<i>Article 16c</i>	(electronic reproductions for private use) now also requires fair compensation (levies) for digital private copying of written works. ²³
<i>Article 15h</i>	(new) closed network exception for public libraries, museums or archives. ²⁴
<i>Article 15i</i>	(new) reproductions for disabled individuals. ²⁵
<i>Article 16n</i>	(new) reproduction for preservation of certain works by archives, libraries and museums. ²⁶
<i>Article 18</i>	(pictures of works made to be located in public places) no longer requires that the work used not constitute the main theme of the picture. ²⁷
<i>Article 18a</i>	(new) incidental uses of works. ²⁸
<i>Article 18b</i>	(new) parody or caricature. ²⁹
<i>Article 23</i>	(freedom to reproduce by possessor of work of art) rephrased and somewhat restricted. ³⁰

As this list demonstrates, several limitations aimed (*inter alia*) at protecting freedom of expression have added or expanded, notably articles 18, 18a and 18b. Of the amended limitations, article 18 is perhaps the most controversial. Prior to its revision, this provision allowed for reproduction or communication to the public of works of architecture, visual and plastic art (sculptures) placed on, or visible from, public roads, on condition that the reproduced work not be the main object represented. The old article typically applied to situations where persons were depicted in front of a statue in a public square. The scope of the revised article is broader in several ways. First, the ‘main representation’ requirement has been dropped. Second, it applies to all works in ‘public places’, provided that the work “has been made to be permanently placed in public places” and is being reproduced ‘as is’. According to the legislature, such works are, to a certain extent, dedicated to the public domain.³¹ Therefore, publishing postcards of a sculpture in a public park is now permitted without the right holder’s authorization. The amended provision has been criticized as being overbroad. Moreover, the notion of ‘public place’ appears to be ambiguous. Does it, for instance, include museums? According to the lawmaker, probably not.³²

- *Are there any projects currently under consideration involving possible amendments or developments in the field of copyright exceptions/limitations or that, in general, may affect the relationship between copyright and fundamental rights? Indicate the fields and the way in which the amendment is expected.*

No.

- *Is there any provision or regulation dealing with the so-called “orphan works” (whose copyright owner is difficult to locate)? Is the conflict between copyright and public interest, concerning these works, somehow being addressed, if not by law, by courts and/or commentary?*

No. An organization that attempts to deal with this problem is the *Stichting FotoAnoniem* (Foundation Photo Anonymous). This is a non-profit organization that operates a large database with extensive data on professional

²² For instance; drawing, handwriting and non-digital photographing.

²³ Based on art 5 section 2 subsection b of the EU Directive 2001/29/EC

²⁴ Based on art 5 section 3 subsection n of the EU Directive 2001/29/EC

²⁵ Based on art 5 section 3 subsection b of the EU Directive 2001/29/EC

²⁶ Based on art 5 section 2 subsection c of the EU Directive 2001/29/EC

²⁷ Based on art 5 section 3 subsection h of the EU Directive 2001/29/EC

²⁸ Based on art 5 section 3 subsection i of the EU Directive 2001/29/EC

²⁹ Based on art 5 section 3 subsection k of the EU Directive 2001/29/EC

³⁰ Based on art 5 section 3 subsection j of the EU Directive 2001/29/EC

³¹ Explanatory Memorandum, 28482, no. 3, p. 52; M.R. de Zwaan, ‘Artikel 18 Aw (kunst op openbare plaatsen)’, [2005] AMI 88.

³² Explanatory Memorandum, 28482, no. 3, p. 25.

photographers, and has as its aim to trace and contact authors of photographs that are difficult to locate. If not successful in its search FotoAnoniem offers the user of an ‘orphan’ photo a contract under which the user obliges himself to pay normal royalties to the Foundation, which will be distributed to the rightholder as soon as he is located. The contract holds the user harmless from all possible claims of the rightholder, if he ever shows up.

6.- Which exceptions/limitations can be identified in your law, or have been designed by case law, to allow for subsequent creation?

Article 15a (Quotation)

1. Quotations from a literary, scientific or artistic work in an announcement, criticism or scientific treatise or publication for a comparable purpose shall not be regarded as an infringement of copyright, provided that:

1o. the work quoted from has been published lawfully;

2o. the quotation is commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved;

3o. the provisions of Article 25 are observed; and

4o. so far as reasonably possible the source, including the author’s name, is clearly indicated.

2. In this Article the term ‘quotations’ shall also include quotations in the form of press summaries from articles appearing in a daily or weekly newspaper or other periodical.

3. This Article shall also apply to quotations in a language other than the original.

This article not only allows text quotations, but also illustrative quotations and (implicitly) sound quotations. Under the conditions mentioned, one can quote freely and for free. The key issue here is the size of the quotation. Para. 1(2) requires that the quotation be ‘commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved’. The Dutch Supreme Court has interpreted earlier versions of this provision in 1990³³ and 1992³⁴. In the first case, the three-step test of art. 9(2) BC was used as a benchmark. In the second case, which concerned the use of a large copy of an illustrated book cover in a book review, the Court held that the quotation right can not be successfully invoked if the purpose of the alleged ‘quotation’ is largely decorative.

Article 18b (Parody)

Publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche will not be regarded as an infringement of copyright in that work, provided the use is in accordance with what would normally be sanctioned under the rules of social custom.

Since the implementation of the EU Copyright Directive in 2004, the use of a work for parody is explicitly permitted, if the use is *in accordance with what would normally be sanctioned under the rules of social custom*.

- ***Which other provisions can be identified in your law, or have been designed by case law, on this issue? Cite and explain any statutory provisions and case law that may be relevant.***

Article 24 of the Dutch Copyright Act allows painters to reproduce their own earlier works, even if they have transferred the rights therein.

7.- Which exceptions/limitations can be identified in your law, or have been designed by case law, to ensure access and use of works?

- ***For instance, identify the exceptions/limitations for purposes of information and news, teaching and research, libraries, private (non-commercial) use; and especially how they apply in digital contexts (i.e. digital libraries, press-clippings, blogs, etc.). Provide the statutory language in English or French.***
- ***For each of them, consider: What is its scope? How (to what extent) are the exclusive rights limited by the exceptions/limitations? Are all rights affected equally? What is its justification or rationale (i.e., fundamental rights, public interest, economic measures, social action, etc)? Is it envisioned for specific***

³³ Zienderogen Kunst, Dutch Supreme Court (Hoge Raad) 22 juni 1990, NJ 1991, 268.

³⁴ Damave v Trouw, Dutch Supreme Court (Hoge Raad) 26 juni 1992, RvDw 1992, 177.

purposes and uses? Which ones? Does it refer to all kind of works or specific works? Is it subject to specific conditions or rather open? Is it technologically neutral? How well does it apply to digital technologies? Cite and explain any case law that may be relevant.

Limitations connected with information and news

Article 15 (news reporting)

1. It shall not be regarded as an infringement of copyright in a literary, scientific or artistic work to adopt news reports, miscellaneous reports or articles concerning current economic, political or religious topics or works of the same nature that have been published in a daily or weekly newspaper or weekly or other periodical, radio or television program or other medium fulfilling the same purpose, if:

1o. the adoption is made by a daily or weekly newspaper or weekly or other periodical in a radio or television program or other medium fulfilling the same purpose;

2o. the provisions in Article 25 are observed;

3o. the source, including the name of the author, is clearly indicated; and

4o. copyright is not expressly reserved.

2. A reservation as specified in paragraph 1 at point 4o may not be made in relation to news reports and miscellaneous reports.

3. This Article shall also apply to adoption into a language other than the original.

The news reporting exception has a twofold rationale. First, to facilitate the ‘free flow of information’, and second, to codify established trade practices within the newspaper industry, where the reproduction of news reports from other newspapers has traditionally been accepted as a ‘quid pro quo’, subject to indications of source.

The scope of the news reporting exemption (article 15) was at issue in the case of *Stichting Reprorecht v. NBLC*.³⁵ Defendant, the Dutch national organisation of public libraries, provided a clipping service for library users. Could the service be qualified as an exempted "newspaper" or "magazine" within the meaning of article 15? Failing to find a guiding principle in article 10 bis (1) of the Berne Convention, the Court turned to the legislative history of article 15. During the parliamentary debate the responsible ministers had stated repeatedly that clipping services would fall under the scope of this provision. This ‘authentic’ interpretation of the provision led the Court to hold that clipping services are exempted under article 15. In a later decision by the District Court of The Hague³⁶ the Court, however, refused to treat a CD-ROM containing literary reviews ‘clipped’ from a large number of Dutch newspapers, as an exempted clipping service.

Both cases were decided before the implementation of the EU Copyright Directive that introduced the three-step-test (art 5 (5)). In the recent case of *NDP v. De Staat* (State of the Netherlands), which concerned ‘digital’ clippings used by the Dutch State,³⁷ the District court of The Hague applied the three-step-test in assessing the scope of article 15. According to the Court, these digital press-clippings would undermine the normal exploitation of the works and unreasonably prejudice the interests of the copyright owners, especially due to the vast searching possibilities that digitized clippings permit.

Article 16a (use in a report current event)

It shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work to make a short recording, showing or announcement thereof in public in a photographic, film, radio or television report, provided that this is justified for giving a proper account of the current event that is the subject of the report and provided that the source, including the author's name, is clearly indicated as far as reasonably possible.

Until 2004 it was required that the short recording, showing or announcement was ‘necessary’. This has been changed into ‘justified’, which is a less severe requirement.³⁸ The exclusive rights of the copyright owner are affected equally and the *droit de paternité* is respected ‘as far as reasonably possible’. The provision is not technologically neutral. It applies only to a photographic, film, radio or television report.

³⁵ *Stichting Reprorecht v. NBLC*, Hoge Raad (Dutch Supreme Court) 10 November 1995, IER 1995, 41.

³⁶ *LiteROM*, District Court of The Hague, 3 May 1995, [1995] AMI 116.

³⁷ *NDP v De Staat*, District Court of The Hague, 2 March 2005, [2005] Computerrecht 143.

³⁸ J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, 260.

Limitations connected with ‘teaching or research’

Article 16 (teaching)

1. *Reproduction or publication of parts of a literary, scientific or artistic work exclusively for use as illustrations for teaching purposes, so far as justified by the intended and non-commercial purpose will not be regarded as an infringement of copyright, provided that:*
 - 1o. *the work from which the part is taken has been published lawfully;*
 - 2o. *the adoption is in accordance with what might reasonably be accepted under the rules of social custom;*
 - 3o. *the provisions of Article 25 have been observed;*
 - 4o. *so far as reasonably possible the source, including the author’s name, has been clearly indicated; and*
 - 5o. *a fair payment is made to the author or his right-holders.*
2. *In the case of a short work or a work as referred to in article 10, paragraph 1, sub 6°, 9° or 11°, the entire work may be taken over for the same purpose and subject to the same conditions.*
3. *Where the taking over in a compilation is concerned, only short works or short passages of works by one and the same author may be taken over and, in the case of works referred to in article 10, paragraph 1, sub 6°, 9° or 11°, only a small number of those works and only if they are reproduced in such a way that they differ considerably in size or process of manufacture from the original work, with the proviso that where two or more such works were communicated to the public together, the reproduction of only one of them shall be permitted.*
4. *The provisions of this article shall also apply where the reproduction is in a language other than the original.*

The phrase ‘so far as justified by the intended and non-commercial purpose’ was added in 2004. The provision is technologically neutral. The publication or reproduction can take place through any medium, including digital technologies. The Dutch law does require ‘fair payment’ to right holders.

Article 16h (reprographic reproduction)

1. *A reprographic reproduction of an article in a daily or weekly newspaper or weekly or other periodical, or of a small part of a book and other works incorporated into such a work will not constitute an infringement of copyright, provided that a payment is made for this reproduction.*
2. *A reprographic reproduction of the whole work will not constitute an infringement of copyright if it may reasonably be assumed of a book that no new specimens are being made available to third parties for payment in any format whatever, provided that a payment is made for this reproduction.*
3. *Government orders may prescribe that, in relation to the reproduction of works as specified in Article 10, paragraph 1, at 1o, exemptions may be granted from the provisions of one or more of the foregoing paragraphs for purposes of public policy and for carrying out the work of institutions concerned with public policy. Such orders may specify more detailed rules and impose more detailed conditions.*

This provision provides for a statutory reprography license. It is only applicable to reprographic reproduction (i.e. photocopying).

Article 16n (reproductions by libraries, museums and archives)

1. *Reproduction by libraries, museums or archives accessible to the public whose purpose does not include the attainment of a direct or indirect economic or commercial benefit will not be regarded as an infringement of copyright in a literary, scientific or artistic work, provided that the sole purpose of the reproduction is:*
 - 1°. *the restoration of the specimen of the work;*
 - 2°. *retention of a reproduction of the work for the institution if the specimen is threatening to fall into disrepair;*
 - 3°. *to keep the work in a condition in which it can be consulted if there is no technology available to render it accessible.*
2. *Reproduction as specified in paragraph 1 shall only be authorized if:*
 - 1°. *the specimen of the work forms part of the collection held by the library, museum or archive accessible to the public relying on this limitation; and*
 - 2°. *the provisions in Article 25 are taken into account.*

This article has the aim to prevent that certain documents fall into disrepair, and to ensure access to a document in case the technology that makes the document accessible is no longer available.

Limitations connected with ‘private use’

Article 16b (private copy)

1. *Reproduction shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work if it is restricted to a few specimens intended exclusively for personal exercise, study or use by the natural person who has carried out the reproduction without any direct or indirect commercial motivation or has caused it to be carried out exclusively for his own benefit.*
2. *In the case of a work as referred to in article 10, paragraph 1, sub 1°., including the score or parts of a musical work, the reproduction shall furthermore be limited to a small portion of the work, except in the case of:*
 - a. works of which it may reasonably assumed that no new copies will be made available to third parties for payment of any kind;*
 - b. short articles, news items or other texts, which have appeared in a daily or weekly newspaper or weekly or other periodical.*
3. *In the case of a work as referred to in article 10, paragraph 1, sub 6°., the reproduction must differ considerably in size or process of manufacture from the original work.*
4. *If reproduction permitted under this Article has taken place, the copies may not be issued to any third parties without the consent of the author or his right-holders, unless that issue takes place because of any judicial or administrative proceedings.*
5. *Government orders may specify that a fair payment should be made to the author or his right-holders for the reproduction specified in paragraph 1. The orders may issue more detailed rules and impose more detailed conditions.*
6. *This Article shall not apply to reproduction as specified in Article 16c, or to the imitation of works of architecture.*

Article 16c (electronic private copy)

1. *Reproduction of the work or any part thereof shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work provided that the reproduction is carried out without any direct or indirect commercial motivation and is intended exclusively for personal exercise, study or use by the natural person who made the reproduction.*
2. *The manufacturer or the importer of any object intended to allow a work such as specified in paragraph 1 to be heard, to show it or to relate it will be due to make a fair payment to the author or his successor in title.*
3. *The manufacturer's obligation to make the payment will arise at the point when the manufactured object is ready to be put into circulation. The importer will become subject to this obligation at the time of importing.*
4. *The obligation to pay shall lapse if the person obliged to make the payment under paragraph 3 exports the object as specified in paragraph 1.*
5. *The payment shall be due only one time per object.*
6. *Government orders may prescribe more detailed regulations in relation to the objects giving rise to the obligation for payment as specified in paragraph 2. Government orders may also provide more detailed regulations and impose more detailed conditions as regards the implementation of this Article in relation to the level, indebtedness and format of the fair payment.*
7. *If a reproduction permitted by this Article has taken place, objects as defined in paragraph 1 may not be issued to third parties without consent from the author or his successors in title unless the issuance occurs for judicial or administrative proceedings.*
8. *This Article shall not apply to reproduction of a collection accessible by electronic means, as specified in Article 10, paragraph 3.*

Since 2004, article 16b applies only to traditional forms of copying, while article 16c covers electronic copying. The articles apply to all works, except buildings, computer programs and collections accessible by electronic means (i.e. databases). The main difference is that 'traditional' (analogue) private copying does not give rise to an obligation of 'fair payment', whereas electronic private copies are subjected to levies. Manufacturers and importers of rewritable CD's and similar media are obliged to pay this fair compensation. Currently, levies are imposed on audio and videotapes, mini discs and virgin CD's. Internal memories, ipods and DVD record players with a memory are still free of charge.

8.- How are these exceptions/limitations (under questions 6 and 7) being interpreted and applied by courts? (Please limit your answer to the extent that has not been dealt with under previous questions)

- *What is the principle that guides the interpretation of these exceptions/limitations by case law? For instance, are they being interpreted according to their rationales or justifications (that is, according to*

the general interest or fundamental right that underlies them) or are they being interpreted solely according to other principles (such as, for instance, the principle of restrictive interpretation)?

According to traditional authors' right doctrine, limitations are exceptions to (the rule of) protection, and ought therefore be narrowly construed. Following modern doctrine, however, limitations should be interpreted in the light of their rationale, and wherever limitations reflect fundamental rights they should be interpreted (broadly) in the light of corresponding fundamental rights.

- *Is the result the same for all exceptions/limitations? For instance, do courts interpret the copyright law provisions differently in the context of the creation of a new work or in the context of a mere consumptive use? Does the interpretation of the copyright law depend upon the fundamental right (or rationale) that justifies each specific exception?*

As stated, the rationale of a limitation is important for the interpretation of it. As we have seen in the *Dior/Evora* case, there was no infringement of the rights of the copyright owner because the limitation, although not mentioned in the copyright statute, fitted well in the system of copyright limitations. It connected with the rationale of the limitations, but it just had not been taken into consideration by the legislator.

- *How is the three-step-test (stated in the WCT and WPPT Treaties, as well as in the EU Directive 2001/29/EC on Copyright in the Information Society) used to interpret the scope of the statutory exceptions/limitations? Has it been adopted into statutory law? Is it a test aimed at the legislator (when introducing new exceptions/limitations –if that is possible- or when defining the scope of the existing ones) or at the courts (when applying the law to the specific case)? How is it being used (and interpreted) by courts?*

Because of the codification of the three-step-test in art. 5(5) of the EU Copyright Directive, rules of Dutch copyright are indirectly subjected to it. However, the test has not been specifically transposed into statutory law. According to the Dutch legislature the test is primarily directed towards the legislature, and implementation in the Copyright Act would lead to unwanted legal uncertainty.³⁹ Although the three-step-test has not been implemented in the Dutch law, courts will still be tempted to apply it in case of doubt about the breadth of a copyright limitation.⁴⁰

9.- Is your copyright regime an “encapsulated” system (only “built-in” limitations apply) or may it be directly affected by external provisions, such as Constitutional fundamental rights, Treaties, common law (judge made) concepts? Cite and explain relevant case law. (Please limit your answer to the extent that has not been dealt with under previous questions)

As previously explained, notwithstanding the fact that the Dutch copyright law indeed has an 'encapsulated' system of limitations, it still can be affected by external provisions, like competition law, human rights and national private law.

Another legal instrument that on occasion might serve as an extra-statutory limitation, is article 6:168(1) of the Civil Code which states that 'the judge may reject an action to obtain an order prohibiting unlawful conduct on the ground that such conduct should be tolerated for reasons of important social interests. The victim retains his right to reparation of damage, according to this title'. This provision has served at least on one occasion to limit the rights of a copyright owner. In this case the court rejected an architect's petition for an injunction on the grounds that the halt of building activities would constitute a disproportionate means of redress, considering all interests at hand.

May freedom of expression or any other fundamental right or public interest restrict (moral concerns, etc) or expand the statutory copyright system or is it immune to external "interferences"?

This question has already been dealt with above.

- *If immune to external interferences, is there any example of courts over-stretching the interpretation of statutory concepts to "fit" any fundamental rights or public interests not expressly envisioned in*

³⁹ J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 223-224.

⁴⁰ See *NDP v De Staat* discussed above.

the copyright law? If not immune, cite and explain cases where such external interferences occurred.

Id.

- *Is there any statutory provision or relevant case law not examined above, where freedom of expression –or any other fundamental right- has been “directly” applied to (reduce or expand) the scope of copyright?*

Article 12(4) of the Dutch Copyright Act reads as follows:

A recitation, performance or presentation in public includes that in a restricted circle, except where this is limited to relatives or friends or equivalent persons and no form of payment whatsoever is made for admission to the recitation, performance or presentation. The same shall apply to exhibitions.

To establish whether there is a ‘restricted circl’ limited to relatives or friends or equivalent persons, the fundamental right of privacy is applied. As the Dutch Supreme Court has clarified in the *Willem Dreeshuis* case, only groups of people that fall within the scope of someone’s private life can be considered as a group of ‘equivalent persons’⁴¹ Strong ties that are ‘barely less tight’ than ties of family or friendship are required between the persons concerned. In this case the Supreme Court ruled that persons living in a home for the elderly did not comply with this requirement.

In the case of *Buma v De Zon*⁴² the Dutch Supreme Court held that there is no communication to the public if a person playing music in public does so purely for his own pleasure, but that this is different if the person has a commercial interest that the music is audible for other people as well. For this reason owners of restaurants can not invoke this exception.

10.- To what extent may the regime of exclusive rights and exceptions/limitations be modified (or in some way be affected) by means of licensing terms and Technological Protection Measures (TPM) set by the copyright owner?

- *Are the exceptions/limitations mandatory? Can they be contracted out of? Does your law in some way address the issue that the parties to a license may agree to prohibit specific uses allowed for under the relevant copyright act? Does your law provide for any other contractual safeguards vis-à-vis users?*

Opinions differ in the Netherlands on this subject. Some authors argue that (some of) the exceptions of and the limitations on copyright are actually mandatory, while others disagree and argue that there are no exceptions that cannot be contracted out of.⁴³ Art. 10 ECHR, rules of competition law and provisions of consumer law could lead to the invalidity of certain contractual provisions. In connection with software and databases we do find in the Dutch law provisions that address the issue. The implementation of the Computer Programs Directive has led to article 45j in the Dutch Copyright Act:

Article 45j

Unless otherwise agreed, the reproduction of a work as referred to in article 10, paragraph 1, sub 12°. by the lawful acquirer of a copy of said work, where this is necessary for the use of the work for its intended purpose shall not be deemed an infringement of copyright. Reproduction, as referred to in the first sentence, in connection with loading, displaying or correcting errors cannot be prohibited by contract.

In the EU Database Directive we can find a somewhat similar provision that prohibits contractual ‘overrides’ of certain limitations. This is implemented in article 3 (2) of the Dutch Database Act.

- *Does your law somehow address the issue of “unjustified” denials to license and, in general, any “anomalies” in the exercise of copyright (if this is predictable of any exercise of an exclusive right of the author)? Are there specific provisions addressing any “unjustified” denials to license by*

⁴¹ *BUMA v. Willem Dreeshuis*, Dutch Supreme Court (Hoge Raad) 9 March 1979, NJ 1979, 341

⁴² *BUMA v. De Zon*, Dutch Supreme Court (Hoge Raad) 1 June 1979, NJ 1979, 470

⁴³ See L. Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright*, London / The Hague / Boston: Kluwer Law International 2002

collective management societies? Is there any provision (copyright or elsewhere: abuse of right, abuse of dominant position) that might be used to force a copyright owner to license when there is no other “substitute” for the work (for instance, imagine that the work has become a cultural or historical “icon”)?

Art. 82 of the EC Treaty and art. 23 of the Dutch Competition Act, its counterpart in Dutch competition law, both provide for remedies against abuses of a dominant position. These rules may for instance apply if a collective management society refuses to licence. Under Dutch law there is no specific provisions addressing unjustified denials to license by collective management societies.

An interesting case concerning access to television program listings has been ping-ponged between civil courts, administrative courts and the Dutch Competition Authority for almost a decade. Public broadcaster NOS and commercial television broadcaster HMG had refused to license their program listings to newspaper publisher De Telegraaf. Referring to the *Magill* doctrine developed by the ECJ⁴⁴, the Authority held that the broadcasters had abused their dominant position, and imposed a provisional compulsory license. By refusing to license, Dutch consumers were effectively prevented from buying newspapers containing program listings, an information product that did not, and still does not, exist on the Dutch market. In a parallel civil proceeding, the Court of Appeals of The Hague, ruling provisionally in summary proceedings, also found the broadcasters' behaviour abusive, in a decision that was later upheld by the Dutch Supreme Court.⁴⁵ Unimpressed, the administrative court of appeal, however, squashed the Competition Authority's decision. According to the court, the Authority had failed to motivate why a newspaper containing program listings, as was envisaged by De Telegraaf, would qualify as a 'new product' within the meaning of the *Magill* doctrine. Substantial consumer demand for a product that is not yet on the market does not as such make it a 'new product'.⁴⁶

The civil law doctrine of misuse of right is codified in article 3:13 of the Dutch Civil Code. The doctrine has been invoked in several cases involving allegedly abusive practices by collecting societies.⁴⁷ Another civil-law doctrine that may serve as a remedy against excessive copyright claims is the rule of fairness and reasonableness (art. 6:248 of the Dutch civil code).⁴⁸

- *Are Technological Protection Measures protected under your law? How are they related to copyright exceptions/limitations? May they be implemented in a way that could prevent a user to benefit from an exception? If an EU member, please indicate the specific choice made by the legislator when implementing of art.6(4) of the Directive 2001/29/EC on Copyright in the Information Society.*

Technological Protection Measures are protected by art. 29a of the Dutch Copyright Act, which implements article 6 of the EU Copyright Directive. Art. 29a is noteworthy only for its reluctance to directly transpose art. 6(4) of the Directive, the 'facilitation' requirement. Instead, art. 29a(4) delegates the power to the Government to provide for such an obligation by way of government ordinance, if right holders fail to voluntarily facilitate the exercise of copyright exemptions. The instrument of an ordinance will allow a flexible and timely response, according to the Government.⁴⁹ Interestingly, art. 29b(4) refers not only to the obligatory exceptions of art. 6(4)(1) of the Directive, but also to the optional private copying exemption mentioned in art. 6(4)(2).

Article 29a Auteurswet

1 Where the phrase ‘technical provisions’ appears in this Article, it will be taken to mean technology, equipment or components whose normal use would include the prevention or limitation of actions in relation to works and that have not been permitted by the author or his right-holders. Technical provisions will be deemed to be ‘purposive’ if the use of a work protected by the author or his successors in title is managed by means of control of access or by application of a protective procedure such as encryption, encoding or some other transformation of the work or a copy protection that achieves the intended protection.

⁴⁴ *RTE v. Commission*, European Court of Justice, 6 April 1995, 1 C.E.C. 400.

⁴⁵ *NOS v. De Telegraaf*, Court of Appeals of The Hague 30 January 2001, [2001] Mediaforum 90; affirmed Supreme Court of the Netherlands (Hoge Raad) 6 June 2003, [2003] AMI 141.

⁴⁶ *NOS v. Dutch Competition Authority*, College van Beroep voor het Bedrijfsleven 15 July 2004, Case AWB 03/132.

⁴⁷ *BUMA v. Brinkmann*, Dutch Supreme Court 24 May 1968, NJ 1968, 252. See generally on misuse of copyright: P. Stein, AMI 1993, p. 123-126; A. van Rooijen, AMI 2006, p. 45-51.

⁴⁸ J. Krikke, 'Auteursrecht in de maat', [1995] AMI 1995 103-110.

⁴⁹ Explanatory Memorandum, 28482, no. 3, p. 59.

2 Those who circumvent purposive technical provisions knowingly, or who should reasonably know they are doing so, shall be acting unlawfully.

3 Those who provide services or make, import, distribute, sell, hire out, advertise or possess equipment, products or components for commercial purposes will be acting unlawfully if those items are:

a) offered, recommended, or traded with the intention of circumventing the protected operation of purposive technical provisions, or

b) of only limited commercial purpose or use, apart from the circumvention of the protected operation of purposive technical provisions, or

c) primarily designed, manufactured or adapted with the purpose of circumventing the protected operation of purposive technical provisions.

4 Government orders may establish rules obliging the author or his successor in title to provide the user of a literary, scientific or artistic work for purposes specified in Articles 15i, 16, 16b, 16c, 16h, 16n, 17b and 22 of this Act with the means necessary to profit from those limitations, provided that the user has lawful access to the work protected by the technical provisions. The provisions in the previous sentence will not apply to works made available to users under contractual conditions at a time and a place selected by the users individually.

- **Has any of these issues been addressed or solved by case law? For instance, is there any example (case law, etc) of instances where a use guaranteed by these exceptions and limitations is reduced by means such as licensing terms and Technological Protection Measures imposed by the copyright owner?**

No.

- **Examine and comment on any measures, existing under your law, to counterbalance it: competition rules, consumer rights, and perhaps –where applicable - the doctrine of abuse of right?**

One might speculate about the potential of these doctrines to counterbalance overreaching (legal protection of) TPM's, but there is as yet no Dutch case law to support this.

11.- Freedom of Expression beyond Copyright.

The purpose of this section is to address the same issues examined above, now dealing with other kind of property rights (or private interests), such as trademark law (to the extent not examined under the previous sections), image rights and personality rights; and compare the solutions to the copyright ones.

You are asked to identify any other private interest or "property-like" right in your Constitution or legal system that may be somehow related to copyright (either because it may directly affect protected works or because its principles could be applied "mutatis mutandi" to copyright) and explain how its relationship with other fundamental rights is being designed.

Comparable conflicts may occur in the field of 'portrait rights'. Articles 19-21 of the Dutch Copyright Act grant property-like protection to persons who have been portrayed on photos or other depictions. This 'portrait right', which is primarily based on the right to privacy, can be invoked both against the creator of the portrait (which explains its place in the law of copyright) and against third parties publishing the 'portrait'. Of these provisions art. 21 DCA is the most important. Accordingly, the portrayed person can oppose publication if 'a reasonable interest' to do so can be established.⁵⁰ To determine whether there is a reasonable interest, art. 8 ECHR (right to privacy) is frequently applied. The privacy right of the person portrayed does not only conflict with the (copy)right of the portrayer, but can also conflict with the freedom of expression and information of article 10 ECHR. In the landmark case of *Moordenaar G.J. Heijn*⁵¹ the Dutch Supreme Court held that even if a reasonable privacy-based interest on the side of the portrayed person can be established, a court must still apply a balancing of interests in the light of the conflicting rights of article 8 and 10 ECHR. In 2004 the European Court of Human Rights issued important guidelines considering this balance in the *Caroline of Hannover* case.⁵² These

⁵⁰ Article 21 DCA reads as follows:

If a portrait is made without having been commissioned by or on behalf of the persons portrayed, the copyright owner shall not be allowed to communicate it to the public, in so far as the person portrayed or, after his death, his relatives have a reasonable interest in opposing its communication to the public.

⁵¹ *Moordenaar G.J. Heijn*, Dutch Supreme Court (Hoge Raad) 21 January 1994, NJ 1994, 473.

⁵² *Caroline of Hannover v. Germany*, ECHR, 24 June 2004.

guidelines are now being followed by the Dutch courts. Another case decided by the Supreme Court, the *Discodanser* case,⁵³ dealt with the balance between the privacy of the portrayed person and the right of the advertiser who used the picture in an advertisement. Here the advertiser invoked article 10 ECHR, but the privacy of the portrayed person outweighed the interest of the advertiser.

Conflicts between industrial property rights and freedom of expression occur mainly in the realm of trademark law.⁵⁴ Dutch courts have recognized this conflict on various occasions.⁵⁵ In line with the decisions of the European Court of Human Rights⁵⁶, such unauthorized uses of trademarks are less likely to receive free speech protection if they are carried out for commercial purposes than for reasons of criticism or parody. Even so, Dutch courts tend not to be very generous in awarding free speech defences in trademark cases.⁵⁷

⁵³ *Discodanser*, Dutch Supreme Court (Hoge Raad) 2 mei 1997, [1997] AMI 143.

⁵⁴ See Report on Q188 (Conflicts between trademark protection and free speech) by Dutch Group of AIPPI.

⁵⁵ *Dior v. Evora*, Dutch Supreme Court, NJ 1996/682; *BMM v. Infocom*, Court of Appeal Amsterdam, BIE 2001, 50.

⁵⁶ *Barthold*, ECHR 25 March 1985, NJ 1987, 900.

⁵⁷ See e.g. *Philips v. Haagse Post*, President District Court of Amsterdam, KG 1981/111; *Scorpio Films v. Coca Cola*, Court of Appeal Amsterdam, NJ 1977, 59.