

**Answers from the Dutch Copyright Association (DCA) ('Vereniging voor Auteursrecht') to the ALAI Punta del Este Questionnaire.**

**Protected Rights**

**2.1 Protected Rights**

*Answered by the Centre for Intellectual Property (CIER) at the Institute for Private Law, University of Utrecht .<sup>1</sup>*

**Q: Protected patrimonial rights: How do countries put into effect the new rights (or clarified rights) established by the treaties?**

A: Assuming that you refer to the WIPO Copyright treaty and the WIPO Performances and Phonogram treaty from 1996 the answer is the following.

The WIPO Copyright treaty did not result in amendments of the exclusive economic rights in the Dutch Copyright law since the making available right was already formulated in a technology neutral way to include communication to the public of works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (vide Article 8 of the aforementioned treaty). The Dutch making available right has even served as a source of inspiration for the right of making available that became a centerpiece of the WIPO Copyright Treaty.<sup>2</sup>

The Dutch Neighbouring Right Act was however amended to include a right of making available to the public. The right of rental to the public of originals or copies of works (vide Article 7 of the aforementioned treaty) was already arranged for in the Dutch Copyright Act.

***Reproduction rights***

**Q: Subsequent to the TRIPS and WIPO treaties, did your national law specify that reproduction rights apply to digital copies?**

A: The Dutch Copyright Act does not specify that reproduction rights apply to digital copies. In Dutch case law and doctrine it is considered to already encompass that right. This is consistent with earlier transpositions of the European Computer Programs Directive and the European Database Directive that were not amended to that effect either.

**Q: If your law has not so specified, are amendments expected?**

A: No, such amendments are not expected.

**Q: In lieu of or in addition to legislation, did your country's case law already apply reproduction rights to digital copies?**

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<sup>1</sup> With contributions of Madeleine De Cock Buning and Willem Grosheide and with thanks to Daan van Eek for his preparatory work.

<sup>2</sup> P.B. Hugenholtz, The Implementation of Directive 2001/29/EC in The Netherlands, *Revue Internationale du Droit d'Auteur (RIDA)* 2005-206, p. 117-147.

A: In Dutch case law and doctrine the reproduction rights to digital copies was indeed already recognized. The reproduction does not need to provide a perceptible reproduction and, it is irrelevant which procedure is used in order to create the reproduction, therefore, it includes *digital* copies as well.<sup>3</sup>

Most notably and earliest is the case law concerning the reproduction of computer software. For example the Amsterdam District Court ruled in 1997 that computer games are copyright protected and to reproduce these games is an act of infringement.<sup>4</sup> In 1999 the President of the District Court in Amsterdam regarded the download of the source code files of software programmes an unlawful act of reproduction.<sup>5</sup> The exclusive right of reproduction for software was also recognized in the case Van der Schraaf/Van Spijker.<sup>6</sup> Furthermore a website that was digitally copied, was protected by exclusive reproduction rights.<sup>7</sup> The President of the District Court in The Hague ruled in 1997 that the reproduction and distribution of digital copies of the LiteROM (a CD Rom) was infringing copyright.<sup>8</sup> In 2000 the Amsterdam District Court ruled that several PCM-newspapers infringed the rights of freelance journalists by placing their centralized electronic archive with a third party and thereby reprocing them.<sup>9</sup>

Please note that the provision of methods which enable third parties to reproduce protected material was not considered as an act of reproduction in itself as ruled by the Court of Appeal of Amsterdam 28 March 2002 (KaZaA/Buma, Stemra).<sup>10</sup> Creating a *hyperlink* that enables a user to search for a file is not regarded to be an act of reproduction since the sole addition of hyperlinks does not necessarily create a copy of the file.<sup>11</sup> Furthermore the temporary digital copy for a search engine is further to art. 13a Dutch Copyright Act not regarded to be an act of reproduction. See on art. 13a Dutch Copyright Act on temporary reproduction the answer to the following questions.<sup>12</sup>

**Q: Does the legislative or judicial coverage of digital copies include temporary or transient copies?**

A: Article 13a of the Dutch Copyright Act, exempts temporary or transient copies under certain conditions from the reproduction right. It reads as follows;

The reproduction of a literary, scientific or artistic work does not include temporary reproduction of a passing or incidental nature and forming an integral and essential part of a technical process whose sole purpose is to enable

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<sup>3</sup> See Spoor, J.H., Verkade, D.W.F., Visser, D.J.G., *Auteursrecht. Auteursrecht, naburige rechten en databankenrecht* Deventer: Kluwer 2005, p. 174.

<sup>4</sup> Pres. Rb. Amsterdam, 17 April 1997, *CR* 1998/4, p. 181.

<sup>5</sup> Pres. Rb. Amsterdam, 4 november 1999, *AMI* 2000/3, p. 47.

<sup>6</sup> V.zr. Rb. 's-Gravenhage 12 februari 2002, *AMI* 2002/3, p. 107.

<sup>7</sup> Rb Almelo, 22 December 2005, 75179 / KG ZA 05-308.

<sup>8</sup> See Pres. Rb. 's-Gravenhage 4 December 1997, *AMI* 1998/3, p. 42 and *AMI* 1998/7, p.128.

<sup>9</sup> Other people, not connected to the aforementioned newspapers could access this central PCM-database, which was ruled to be an act of infringement as well, Rb. Amsterdam, 9 augustus 2000, *AMI* 2001/3, p. 66.

<sup>10</sup> The Dutch Supreme Court has not decided on this particular matter in its ruling in this case. Hoge Raad, 19 december 2003, *AMI* 2004-1, p. 9 (Buma/KaZaA); Hof Adam 28 maart 2002 (KaZaA/Buma Stemra, verw. HR 19 december 2003, *AMI* 2004/1, p. 6 m.nt. Hugenholtz).

<sup>11</sup> Pres. Rb. Rotterdam 22 augustus 2000, *AMI* 2000, p. 205, m.nt. Koelman, *CR* 2000, p. 259 m.nt. Struik, *IER* 2000, nr. 55, p. 268 m.nt. EJA, *Mf* 2000, nr. 61, p. 344 m.nt. Overdijk (*Kranten.com*); Rb. Arnhem 16 maart 2006, *AMI* 2006/3, p. 93.

<sup>12</sup> Hof. Arnhem 4 juli 2006, *AMI* 2007/3, p. 93, m.nt. Koelman (*Zoekallehuizen.nl*).

- a) the transmission in a network passing between third parties by an intermediary, or
- b) a lawful use and if it has no independent economic value.”

This article an implementation of art. 5(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

### ***Right to distribute tangible objects***

**Q: Did Article 6 of the WIPO Treaty (Article 8 of the WPPT), which provides for a right of distribution, result in actual or pending changes to your national copyright law? Has case law played a role in the development of the distribution right?**

A: These articles on the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership, have not resulted in any pending or actual changes concerning distribution rights in the Dutch Copyright Act.

Case law has played a role in the development of the distribution right. Please note that the Dutch Supreme Court (Hoge Raad) has ruled that not only the actual distribution of copies is considered to be part of the distribution right but also the offering for sale/rental is considered part of the distribution right.<sup>13</sup>

**Q: Is the right of distribution co-extensive with art. 6, or is it broader?**

A: The general right of distribution is somewhat broader. It includes more than sale or other transfer of ownership of a work. See answer to prior question: not only the actual distribution of copies is considered to be part of the distribution right but also the offering for sale/rental is considered part of the distribution right.<sup>14</sup>

**Q: Does the right of distribution of tangible articles persist after the first sale?**

A: After first sale of a copy that is sold by or with the permission of a copyright-owner, the right of distribution is exhausted. With the exception of Lending and Rental rights. Furthermore according to art. 12b Dutch Copyright Act the exhaustion of the distribution right only holds for copies that are brought on the market within the EER. Please note that when adjustments are made to a copy after it has been sold that makes it suitable for a new market, the distribution right is not exhausted.<sup>15</sup>

### ***Right to make available to the public***

**Q: Has Article 8 of the WIPO Treaty (Article 10 of the WPPT), completing the right of communication to the public by the right to make available to the public, resulted in actual or pending changes in your national copyright law? Has case law played a role in the development of the making available right?**

A: The WIPO Copyright treaty did not result in amendments to the exclusive economic rights in the Dutch Copyright law since the making available right was already formulated in a technology neutral way to include communication to the public of works, by wire or wireless means, including the making available to the public of their works in such a way that

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<sup>13</sup> Hoge Raad 16 December 1986, *NJ* 1987, 64 (Stemra en NVPI/Discus)

<sup>14</sup> Ibidem.

<sup>15</sup> Hoge Raad 19 januari 1979, *NJ* 1979, 412 (Poortvliet)

members of the public may access these works from a place and at a time individually chosen by them (vide Article 8 of the aforementioned treaty).

**Q: Is the implementation of the right to make available made through the right of communication to the public? Through the right to distribute copies? Through reproduction rights? By an independent right? By an accumulation of various rights?**

A: The making available right is part of the existing broad and technology neutral right of communication to the public of a work through all available means (Openbaarmakingsrecht). This right does not only include the communication to the public, by wire or wireless means, but also the distribution right.

**Q: What is the relationship between ownership of the making available right and the characterization of the right (see previous question)?**

A: See previous question.

**Q: What national law do your country's courts apply to determine ownership of the making available right when the work is communicated (or made available) from one country, and received in another?**

A: The Dutch judiciary system has not yet provided any (published) rulings on this Matter.

## **2.2. New requirements**

*Answered by Kamiel Koelman, lawyer at Bousie advocaten, Amsterdam*

### *Technological protection measures*

**Q: How has this new requirement been established, not only as concerns legal texts but also through case law and/or administrative decisions and/or inter-professional agreements?**

A: Probably, you refer to the requirement of *protection* of technological measures. As was required by European legislation – the EU Copyright Directive of 2001 – the Dutch Copyright Act now protects technological measures. Basically, the Dutch legislator copied the provision of the EU Directive almost verbatim in the Dutch Copyright Act.

The new Dutch provision has been in force since 2004. A few decisions concerning technological measures have been handed down since then. In summary proceedings, a lower court simply held that the sale of software that circumvented the protection of DVDs was unlawful under the provision. However, the defence that the Content Scramble System (CSS), which is the main DVD protection mechanism, is merely a form of access control and therefore not protected, was not used. (Vzr. Rb. Rotterdam 21 juli 2005, *AMI* 2005, p. 211, *BREIN c.s./Directwarehouse*). In another case, a lower court held that it was unlawful under the new provision to use a stolen password in order to access an online database of news articles (Vzr. Rb. Amsterdam 11 november 2004, *IER* 2005, p. 27-34, *ANP/NOVUM*). However, as the appellate court found that the alleged usage of the news articles was not sufficiently proven, the decision was reversed on appeal. Finally, another appellate court held that a system that prevented deep linking from a certain IP address by blocking traffic coming

from that address, was not protected, as mechanisms that are only directed against one specific party are not protected under the provision. Hof Arnhem 4 juli 2006, *AMI* 2007, p. 93 (*Zoekallehuizen*).

**Q: What are the civil, administrative; and criminal remedies against unauthorized circumvention of the technological protection measures, and against unauthorized distribution of circumvention devices or services? Are the remedies autonomous (*sui generis*); are they specific to the copyright law, or are general tort remedies applied? Is the magnitude of the remedy equal to that incurred in the case of copyright infringement? If not, why?**

A: Under the Dutch Copyright Act, circumvention and the provision of circumvention devices are considered unlawful acts for the purpose of general tort law. That is to say, the general remedies of tort law are applicable. The injured party can therefore apply for an injunction or, if the party violating the provision acted with fault, for damages.

The Dutch legislator felt that it would be inappropriate to introduce penal liability, because that would violate a basic principle of criminal law. The rules of criminal law have to be definite and clear. The description of an offence may not hold vague terms or ambiguities and as the legislator finds that the stipulations of the Directive and of article 29a of the Dutch Copyright Act on technological measures are not particularly clear, it would not be appropriate to introduce penal sanctions. Additionally, during the debates in parliament, it was expressed that the enforcement of copyright should be a private matter anyway.

**Q: What solutions has your country's law found to reconcile the benefits of certain exceptions and the respect for the technological protection measures?**

**Does the legislation establishing technological measures provide for circumstances justifying personal or preliminary actions (furnishing of means) to circumvent the technological measures (e.g., for the positive benefit of an exception)?**

A: No. Circumvention of *protected* technological measures is always unlawful. The explanatory memorandum with the Copyright Act may imply, however, that technological measures that hinder acts that are not restricted acts under copyright law, i.e. activities that are not to be considered reproducing or making available to the public for the purposes of copyright law, may be circumvented. Moreover, circumvention of technological measures that are solely applied to material that is in the public domain, is allowed as well.

**Q: More generally, how has your country's legislation, administrative measures and case law attempted to ensure the balance between technological protection and the benefit of certain exceptions?**

A: Yes and no. The new legislation allows the Minister of Justice to by decree introduce a requirement for copyright holders to "provide the means" which enable certain exempted acts. However, such decree has not yet been issued. Of course, until the Minister sees fit to issue a decree, no obligation to provide any means will exist.

The decree may only be issued for those exemptions permitting educational usage, usage by disabled people, private copying, copying for preservation purposes, ephemeral copying by broadcasting organizations and usage for judicial or administrative purposes.

Exactly which “means” the right holders will have to provide remains uncertain until a decree has been issued.

**Q: Who decides when the conditions justifying circumvention are fulfilled? A commission that develops an exception applicable to all concerned users ? A commission that develops an exception case-by-case? A court to whom a user wishing to benefit from an exception has made appeal? Are business practices developing to help determine when circumvention should be permitted?**

A: Nobody decides this. Circumvention of protected TMs is always unlawful, even if it could enable an act covered by a copyright exemption. However, as is explained above, the Minister of Justice may decide when right holders will have to provide the means that enable certain exempted acts. But even if these means will have to be provided, circumvention remains unlawful.

See for more information on the protection of technological measures in The Netherlands (and some other EU countries): <http://www.euro-copyrights.org/index/1/10>.

### ***Copyright Management Information (CMI)***

**Q: Has the implementation of this requirement to protect CMI been efficient in ensuring the viability of information communicated with the work?**

A: Unknown. There have been no court cases, nor a lot of discussion on this topic. It is unknown whether the industry feels the protection of CMI is efficient in ensuring the viability of information communicated with the work.

Below are unofficial translations by the Dutch Ministry of Justice of articles 29a (protection of technological measures) and 29b (protection of rights management information) of the Dutch Copyright Act. Copied from [http://www.ivir.nl/legislation/nl/copyrightact1912\\_unofficial.pdf](http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf).

### **Article 29a**

*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.*

*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.*

### **Article 29b**

*1 Those who intentionally and without being entitled to do so remove or amend electronic information relating to the management of rights or who distribute, import for distribution, issue or otherwise publish literary, scientific or artistic works from which such information has been removed or in which such information has been altered without authorization, and who know or ought to know that in so doing they are inciting infringement of the copyright or are enabling, facilitating or concealing such an infringement of the copyright will be acting unlawfully.*

*2 The phrase ‘information relating to the management of rights’ in this Article means all information supplied by the author or his successors in title connected with reproduction of a work or made known when a work is published and serving to identify the work, the author or his successors in title, or information concerning conditions for the use of the work as well as the numbers or codes containing that information.*

## **2.3. Exceptions**

### **2.3.1. General view of the three-step test**

**Answered by Martin Senftleben, Ph.D., as of September 2007, Professor of Intellectual Property, Free University of Amsterdam (Vrije Universiteit)**

**Q: Does your country’s legislation explicitly incorporate the three-step test?**

**A:** The Dutch Copyright Code (Auteurswet)<sup>16</sup> does not contain the three-step test. Certain elements of the test can be found in Art. 4 of the Dutch Law on the Protection of Databases (Databankenwet).<sup>17</sup> The provision prohibits use that would jeopardize the normal exploitation of a database or unreasonably prejudice its producer.

The question whether the three-step test should be incorporated into the Auteurswet featured prominently in the discussion on the implementation of the EC Copyright

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<sup>16</sup> Law of September 23, 1912, “houdende nieuwe regeling van het auteursrecht” (Auteurswet 1912), online available at: << <http://wetten.overheid.nl/> >>.

<sup>17</sup> Law of July 8, 1999, “houdende aanpassing van de Nederlandse wetgeving aan richtlijn 96/9/EG van het Europees Parlement en de Raad van 11 maart 1996 betreffende de rechtsbescherming van databanken” (Databankenwet), online available at: << <http://wetten.overheid.nl/> >>.

Directive.<sup>18</sup> According to Art. 5(5) of the Directive, the exceptions and limitations for which the Directive provides “shall only be applied” in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder. As Art. 5(5) refers to the application of exceptions and limitations, it was argued that the three-step test of the Copyright Directive was addressed not only to national legislators but also to the courts, making it necessary to lay down a national copy of the three-step test in the Auteurswet. This line of argument, however, did not prevail in the process of law making. Instead, it was felt that Dutch legislation already concretised the three-step test by clearly defining the conceptual contours of exceptions and limitations. Moreover, the view was held that judges remained free to take into account the three-step test when interpreting and applying exceptions and limitations – irrespective of whether or not the test was explicitly set forth in the Auteurswet.<sup>19</sup> In consequence, the Dutch Copyright Directive Implementation Act of July 6, 2004, which entered into force on September 1, 2004, did not provide for a national three-step test.<sup>20</sup>

**Q: If not, may (or must) a court apply the test?**

A: In fact, Dutch courts applied the three-step test already prior to the implementation of the EC Copyright Directive. In the case “Zienderogen Kunst”, dating back to the year 1990, the Dutch Supreme Court (Hoge Raad) invoked the three-step test of Art. 9(2) of the Berne Convention to support its holding that the quotation of a work may not substantially prejudice the right holder’s interest in the exploitation of the work concerned.<sup>21</sup> In 2003, the Amsterdam Court of Appeals (Gerechtshof Amsterdam) found that a parody did not harm the normal exploitation of the parodied work because it concerned a different market.<sup>22</sup>

Pursuant to Art. 13(1) of the Copyright Directive, the national legislation of EC Member States should have been brought into line with the Directive before December 22, 2002. The implementation in Dutch law on September 1, 2004, therefore, was late. As to the period between the expiry of the implementation date set in the Directive and the entering into force of the Dutch Implementation Act, the Court of The Hague (Rechtbank ’s-Gravenhage) permitted direct recourse to the three-step test of Art. 5(5) of the Directive in a ruling of

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<sup>18</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>19</sup> For an overview of the arguments advanced in the debate, see *Cohen Jehoram*, “Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets”, *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2005, 153; *Koelman*, “De nationale driestappentoets”, *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2003, 6; *Senfleben*, “Beperkingen à la carte: Waarom de Auteursrechtlijn ruimte laat voor fair use”, *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2003, 10; *Senfleben*, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International: The Hague/London/New York 2004, 278-281.

<sup>20</sup> Law of July 6, 2004, “houdende aanpassing van de Auteurswet 1912, de Wet op de naburige rechten en de Databankenwet ter uitvoering van richtlijn nr. 2001/29/EG van het Europese Parlement en de Raad van de Europese Unie van 22 mei 2001”, online available at: << <http://wetten.overheid.nl/> >>. Cf. Stb. 2004, 336 and 409.

<sup>21</sup> Hoge Raad, decision of June 22, 1990, no. 13933, published in: *Nederlandse Jurisprudentie* 1991, 268 with comment by *Spoor*; *Informatierecht/AMI* 1990, 202 with comment by *Dommering*; *Ars Aequi* 40 (1991), 672 with comment by *Cohen Jehoram*. Cf. Hoge Raad, decision of June 26, 1992, no. 14695, published in: *Nederlandse Jurisprudentie* 1993, 205 with comment by *Verkade*.

<sup>22</sup> Gerechtshof Amsterdam, decision of January 30, 2003, published in: *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2003, 94.

March 2, 2005.<sup>23</sup> The decision concerned the making of digital press reviews for internal use in ministries. The Court held that the practice of scanning and reproducing newspaper articles for this purpose was in conflict with the three-step test. After the implementation of the Copyright Directive on September 1, 2004, Dutch courts seem to continue their practice of using Art. 5(5) of the Copyright Directive as a reference point. In a decision of May 3, 2006, concerning online advertisements reproducing the so-called “TRIPP TRAPP chair”, the Court of Zwolle-Lelystad (Rechtbank Zwolle-Lelystad) referred to Art. 5(5) in the context of Art. 23 Auteurswet – a national limitation permitting the use of certain artistic works for the purpose of advertising their public exhibition or sale.<sup>24</sup> The Court found that the use in question prejudiced the exploitation interest of the right holder. This was one of the reasons why the Court denied compliance with Art. 23.

In sum, Dutch courts are not unlikely to apply the three-step test. In particular, the test’s inclusion in the EC Copyright Directive may encourage judges to use it as a reference point for the interpretation of national limitations. In the Pink Floyd case, the Hoge Raad has drawn certain boundary lines with regard to the interpretation of national provisions in conformity with EC directives.<sup>25</sup> To ensure a sufficient degree of legal security, a national provision may not be given a meaning in the light of an EC directive that conflicts with the provision’s unequivocal wording if, considering the national legal text concerned, this interpretation was not foreseeable. It seems that this standard does not constitute a serious obstacle to the interpretation of Dutch copyright limitations in the light of the three-step test.<sup>26</sup>

**Q: In what order are the three steps of the test examined? What definitions have been given by legislation; administrative measure or caselaw to each of the conditions?**

A: In most of the aforementioned decisions, the three-step test was merely invoked to confirm and support a finding which the court had already deduced from national legislation or case law. None of the decisions mentions the first condition of the three-step test “certain special cases”. The two following conditions – conflict with a normal exploitation and unreasonable prejudice to legitimate interests – are not necessarily separated clearly from each other. In all decisions, however, the analysis begins (and often already ends) with the normal exploitation test.

As to the conceptual contours of the three-step test, some basic indications can be found in the decision of the Court of The Hague of March 2, 2005.<sup>27</sup> As explained above, the decision concerned the practice of scanning and reproducing newspaper articles for the purpose of establishing digital press reviews for internal electronic communication (via e-mail, intranet etc.) in Dutch ministries. The government press reviews offered certain search and archive functions. In 1995, the Hoge Raad had already clarified that analogue press

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<sup>23</sup> Rechtbank ’s-Gravenhage, decision of March 2, 2005 (LJN: AS8778), online available at: << <http://zoeken.rechtspraak.nl/> >>, published in: *Computerrecht* 2005, 143. Cf. *Koelman*, “Fixing the Three-Step Test”, *European Intellectual Property Review* 2006, 407 (411).

<sup>24</sup> Rechtbank Zwolle-Lelystad, decision of May 3, 2006 (LJN: AW 6288, no. 106031, rolnummer HA ZA 05-211), online available at: << <http://zoeken.rechtspraak.nl/> >>.

<sup>25</sup> Hoge Raad, decision of October 25, 1996, published in: *Nederlandse Jurisprudentie* 1997, 649; *Informatierecht/AMI* 1997, 29.

<sup>26</sup> However, see the comments by *Cohen Jehoram*, “Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets”, *Tijdschrift voor Auteurs-, Media- en Informatierecht* 2005, 153 (159-160).

<sup>27</sup> Rechtbank ’s-Gravenhage, decision of March 2, 2005 (LJN: AS8778), online available at: << <http://zoeken.rechtspraak.nl/> >>, published in: *Computerrecht* 2005, 143.

reviews were permissible under Art. 15 Auteurswet – a national limitation concerning press reproductions.<sup>28</sup> The Court of The Hague took this decision as a starting point. It pointed out that the permissible analogue practice was sufficient to ensure the “free flow of information”<sup>29</sup> within the government and exhausted the scope of the limitation. In the opinion of the Court, Art. 15 Auteurswet had to be interpreted in the light of the three-step test of Art. 5(5) of the EC Copyright Directive. In consequence, the national limitation could only be applied if the digital government press reviews satisfied all conditions of the test.<sup>30</sup>

In this regard, the Court took the view that “a normal exploitation” of newspaper articles in the sense of the three-step test included their digital exploitation. It pointed out that emerging digital markets for newspaper services were becoming more and more important. Against this background, the digital government press reviews were found to “jeopardize” the normal exploitation (second condition of the three-step test) and, in any case, to unreasonably prejudice the publishers’ legitimate interests (third condition). The Court added that, even if a normal exploitation was understood not to extend to digital forms of exploitation, the press reviews would still unreasonably prejudice the publishers’ legitimate interest in promising future markets. Digital format, inevitably, offered enhanced possibilities of searching and archiving press articles. The extension of the analogue press review limitation to the digital environment would thus impede the exploitation of important additional possibilities of use.<sup>31</sup> In respect of the conceptual contours of the three-step test, it can be inferred from this decision that the term “a normal exploitation” may be understood to include potential future markets. It seems that, according to the Court, emerging digital markets must be likely to acquire some economic importance in order to be considered in this context. As to the question of an unreasonable prejudice to legitimate interests, the decision shows that exploitation interests, such as the interest in promising future markets, may be considered again at this stage of the test procedure.

It is to be noted that the Court did not clarify whether there actually was a conflict with a normal exploitation. The finding that the digital press reviews “jeopardize” a normal exploitation can be interpreted in this way. However, it seems that the Court did not feel obliged to answer the question of a conflict with a normal exploitation – in any case, it was convinced that there was an unreasonable prejudice to the publishers’ legitimate interests. The question of whether the limitation fails the second or the third condition of the three-step test, however, is of crucial importance. If there is a conflict with a normal exploitation (second condition), the limitation is automatically impermissible. An unreasonable prejudice to legitimate interests (third condition), by contrast, can potentially be reduced to a permissible reasonable level by providing for the payment of equitable remuneration.<sup>32</sup> Leaving the question of a conflict with a normal exploitation open, the Court of The Hague, thus, did not

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<sup>28</sup> Hoge Raad, decision of November 10, 1995, published in: *Nederlandse Jurisprudentie* 1996, 177.

<sup>29</sup> In this regard, cf. *Koelman*, “Fixing the Three-Step Test”, *European Intellectual Property Review* 2006, 407 (411).

<sup>30</sup> *Rechtbank ’s-Gravenhage*, decision of March 2, 2005, para. 5-16.

<sup>31</sup> *Rechtbank ’s-Gravenhage*, decision of March 2, 2005, para. 16-19.

<sup>32</sup> See Records of the Diplomatic Conference for the Revision of the Berne Convention, held in Stockholm from June 11 to July 14, 1967, WIPO: Geneva 1971, 1145-1146. Cf. *Senftleben*, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, Kluwer Law International: The Hague/London/New York 2004, 125-133; *Dreier*, *Berne Convention*, 42-43; *Dreier/Hugenholtz*, *TRIPS*, 203-205; *Senftleben*, *WIPO Copyright Treaty*, 107-111; in: *Dreier/Hugenholtz* (eds.), *Concise European Copyright Law*, Kluwer Law International: The Hague/London/New York 2006.

indicate whether the payment of equitable remuneration would enable the extension of the analogue press review limitation to the digital environment.

Finally, the decision is of particular interest because it sheds light on the relationship between clearly-defined limitations in the Auteurswet and the open-ended, abstract three-step test. In the decision of the Court of The Hague, the national limitation serves merely as a gateway to the three-step test. After positing that the digital government press reviews must fulfil the three-step test, the Court based its entire decision on the test. It even felt that several questions concerning Art. 15 Auteurswet could be left unanswered because the press reviews did not comply with the three-step test anyway.<sup>33</sup> In other words, the three-step test forced the national limitation onto the sidelines. The resulting discussion of the press reviews in the light of the test's abstract conditions, virtually, resembles a fair use analysis. The use in question was held to be unfair because of its corrosive effect on promising digital markets. The specific requirements of Art. 15 Auteurswet, by contrast, did not play a decisive role. The three-step test of Art. 5(5) of the Copyright Directive thus increases the influence of abstract, flexible criteria on the system of clearly-defined limitations in Dutch copyright law.

**Q: Has the WTO panel decision of June 2000 concerning the interpretation of local exceptions by national courts had an impact on the interpretation of exceptions by your country's courts?**

A: No. None of the Dutch court decisions concerning the three-step test refers to the WTO panel report. Nevertheless, a line may be drawn between the findings of the panel and certain elements of Dutch court decisions, such as the discussion of promising future markets by the Court of The Hague.<sup>34</sup>

### **2.3.2. Interoperability**

*Answered by Christiaan Alberdingk Thijm, lawyer at SOLV Advocaten, Amsterdam<sup>35</sup>*

**Q: Do your country's laws or administrative regulations contain provisions concerning interoperability of computer programs with other computer programs?**

A: Yes, the Auteurswet (Dutch Copyright Act, abbr. DCA) has implemented article 6 of the Computer Programs Directive<sup>36</sup> almost without prejudice in article 45m, which reads<sup>37</sup>:

#### **Article 45m**

*1 The making of a copy of a work as referred to in article 10, paragraph 1, sub 12° (i.e. computer programs, red.), and the translation of the form of its code shall not be deemed an infringement of copyright if these acts are indispensable for obtaining information necessary*

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<sup>33</sup> Rechtbank 's-Gravenhage, decision of March 2, 2005, para. 10-14.

<sup>34</sup> Cf. *Senftleben*, "Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law", *International Review of Intellectual Property and Competition Law* 2006, 407 (424-426).

<sup>35</sup> With thanks to Douwe Linders and Ashwin van Rooijen.

<sup>36</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0250:EN:HTML>).

<sup>37</sup> Unofficial translation from the Institute for Information Law, University of Amsterdam ([http://www.ivir.nl/legislation/nl/copyrightact1912\\_unofficial.pdf](http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf)).

*to achieve the interoperability of an independently created computer program with other programs, provided that:*

- a) these acts are carried out by a person who has lawfully obtained a copy of the computer program or by a third party authorised by him to carry them out;*
- b) the information necessary to achieve interoperability is not already readily available to the persons referred to in paragraph a); and*
- c) these acts are limited to the parts of the original program which are necessary to achieve interoperability.*

*2 The information obtained pursuant to paragraph 1 may not:*

- a) be used for any other purpose than to achieve the interoperability of the independently created computer program;*
- b) be given to third parties except where necessary for the interoperability of the independently created computer program;*
- c) be used for the development, production or marketing of a computer program that cannot be regarded as a new, original work or for other acts which infringe copyright.*

The article regards the boundaries within it is allowed to decompile computer programs, meaning in short the process of unravelling the program to obtain the source code. By analyzing the source code, the program developer can obtain the interface specifications needed to create an interoperable program. The reproductive acts mentioned in the heading of paragraph 1 would normally be prohibited because of the copyright protection afforded to computer programs in The Netherlands. Paragraphs 1a), b) and c) and paragraphs 2a), b) and c) give the conditions under which the exception of article 45m DCA applies.

What lacks in the DCA is a clear indication that the provisions contained in article 45m are of a mandatory nature, as is required by article 9 of the Computer Programs Directive.

In article 45m DCA the third paragraph of article 6 of the Computer Programs Directive has not been implemented. This third paragraph reads:

*3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.*

This limitation is important because it stems from the Berne Convention's "three-step test" and the European Commission found that this omission could lead to unreasonable detriment to the rightholder.<sup>38</sup>

Another omission in the DCA related to interoperability is the failure to implement article 1(2) of the Computer Programs Directive, which contains the words:

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<sup>38</sup> Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and affects of Directive 91/250/EEC on the legal protection of computer programs, 10 April 2000, COM(2000) 199 final, p. 13 ([http://eur-lex.europa.eu/LexUriServ/site/en/com/2000/com2000\\_0199en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2000/com2000_0199en01.pdf)).

*Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.*

Interfaces are of crucial importance to interoperability, so their eligibility for protection is important as well. However, it was believed that Article 1(2) presented no more than the general idea/expression dichotomy and the omitting Member States applied this as a general principle of copyright law.<sup>39</sup>

#### **Article 45I**

*A person who is entitled to perform the acts referred to in article 45i (loading, displaying, running, transmission and storage, in so far as these acts are necessary for the reproduction red.) shall also be entitled, while performing them, to observe, study or test the functioning of the work concerned in order to determine the ideas and principles underlying it.*

Although not strictly limited to purposes of interoperability, article 45I DCA is in fact very helpful in establishing interoperability. Although the rights conferred on the user are dependent on the right to reproduce in the first place so the article does not confer any real new rights, the fact that one can obtain interface specifications through article 45I precludes a right to decompile based on article 45m.

**Q: Do your country's laws or administrative regulations contain provisions concerning interoperability of computer programs with other works in digital format?**

A: No, although the decision of the District Court of Leeuwarden (see answer 2(b)) might suggest otherwise, decompilation is only permitted for program-to-program interoperability, not for program-to-data.

**Q: Do your country's judicial decisions address interoperability of computer programs with other computer programs?**

A: Yes:

- Regarding article 45m DCA, the words “has not previously been readily available” in paragraph 1b) of the Computer Programs Directive are not literally translated to Dutch. The Dutch wording translates as is mentioned above in the unofficial translation: “not already readily available”.  
Some say that the wording in the Directive implies that the availability of the information should be established to exist up front. Which would mean that the user of the program does not have to request the information from the copyright holder to be entitled to decompile according to the conditions in article 45m.<sup>40</sup> Courts do not seem to agree with this very strict reading of the article. If the information can be obtained from the copyright holder directly, the user has acted contrary to paragraph 1b) and thus the exception of article 45m does not apply.<sup>41</sup>
- A very technical judicial decision regards the communication between weighing equipment and the administration of a retailer. The copyright holder of the

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<sup>39</sup> idem, p. 9.

<sup>40</sup> J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 605 (no hyperlink).

<sup>41</sup> *Servicecenter*, District Court of The Hague 11 September 2002, *BIE* 2003/24, p. 171 (no hyperlink).

communication protocol, who was also a weighing equipment producer, stated that it was impossible for other producers to connect to the administration of the specific retailer without infringing on his copyright. This statement was based on the fact that the administration software did not transmit any useful information which could be used to legitimately decompile it. The Court did not agree. It was proven that the administration software sent out at least one code “33”, and thus it was not “just a receiver”. So it could be possible that a working protocol could be built without infringing on the original one and thus unlawfulness was not proven.<sup>42</sup>

- There is one decision in which a plea on article 45m DCA was granted, though on completely wrong grounds.<sup>43</sup> Pendula runs an administrative program on which data from a group of schools is collected. The schools wish to switch to a different program and order Pendula to convert the data to a different format by running a very simple script on its computer. The Court rules that Pendula should do this because it would not be allowed to forbid the schools to decompile its program to find out how to convert the data, because of article 45m DCA. Since it is easier for Pendula to run the script, it should do so. But the fact that the script is “already readily available” should actually work for the benefit of Pendula. In the end the Courts decision is based on the wrong starting point that article 45m DCA entails an obligation to deliver interoperability.<sup>44</sup>

**Q: Do your country’s judicial decisions address interoperability of computer programs with other works in digital format?**

A: The last mentioned decision under answer 2(a) touches on the subject. The Court ruled that article 45m DCA entailed an obligation to provide interoperability information with the purpose of making the data interoperable with a different computer program. Besides the remarks about the decision made above, it must be said that such a decision would most likely have no ground in the law, since article 45m merely mentions the goal of interoperability with other “programs”.

**Q: Do your country’s laws contain provisions concerning interoperability related to the presence of technological protection measures (e.g., for purposes of overcoming the inability to read lawfully acquired files on certain playback devices)? Describe the system in place (e.g., legal provisions, special commissions with the power to require interoperability) to achieve interoperability.**

A: No, article 29a, paragraph 4 DCA (implementation of article 6 of the Information Society Directive<sup>45</sup>) does not so much intent to facilitate interoperability. It is merely in place

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<sup>42</sup> *Digi Nederland vs. Van Berkel*, Court of Appeal of The Hague 4 December 1997, *BIE* 1999/66, p. 230 (no hyperlink).

<sup>43</sup> K.J. Koelman, *Annotation on Openbaar onderwijs Zwolle vs. Pendula*, District Court of Leeuwarden 25 May 2005, *Computerrecht* 2005, p. 263-266 (<http://pubs.cli.vu/pub240.php>, Dutch only); and O. van Daalen, *Annotation on Openbaar Onderwijs Zwolle vs. Pendula*, District Court of Leeuwarden 25 May 2005, *AMI/Informatierecht* 2005/4, p. 146 - 149 (<http://www.xs4all.nl/~olvdp/papers/pendula.pdf>, Dutch Only).

<sup>44</sup> *Openbaar onderwijs Zwolle vs. Pendula*, District Court of Leeuwarden 25 May 2005, *Computerrecht* 2005, p. 263-266 (<http://www.rechtspraak.nl/ljn.asp?ljn=AT6118>, Dutch only).

<sup>45</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>).

with the purpose of giving government the possibility to limit the effect technological protection measures can have. Users of a work should be able to benefit from the exceptions on copyright the law has given to them, so long as they act in accordance with the law and contractual obligations, if any. Article 29a, paragraph 4 reads<sup>46</sup>:

*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.*

Regarding technological [protection measures, there is a potentially serious lack in the DCA., which may affect software-to-software interoperability as facilitated by Articles 45l and 45m DCA.

Recital 50 of the Information Society Directive states that harmonized protection for technological protection measures does not apply to protection measures for computer programs, which is exclusively addressed in the Computer Programs Directive (Article 7). However, neither the 50th Information Society Directive recital nor Article 7 Computer Programs Directive appears to be implemented in the DCA. As a result, technological protection measures as protected in the DCA may also (improperly?) cover computer programs. Moreover, technological protection measures may be used to limit the ability to reverse engineer or decompile a computer program. According to Recital 50 of the Information Society Directive, this result should have been avoided.

### **3. The author's place in copyright as modernized by the TRIPS Agreement and the WIPO Treaties**

*Answered by Antoon Quaadvlieg, Professor at Radboud University Nijmegen and lawyer at Klos Morel Vos & Schaap, Amsterdam.*

**Q: Please indicate the effect on the human author (i.e., on the actual creator; not a juridical person) of the legislative, administrative, and court decisions implementing the TRIPs and WIPO Treaties. To what extent have authors (as opposed to corporate copyright owners), benefited from these modernizations? To what extent have these modernizations harmed authors? Please take into account as well any relevant business or industry practices.**

A: As far as the regulation of exploitation rights under Dutch copyright law is concerned, the TRIPS Agreement and WIPO treaties hardly introduced fundamental changes. The structure of Copyright Act 1912, albeit of a 'classic' design, has proven through the years to be extremely flexible. It has easily absorbed the new rules. In the almost unanimous view of the doctrine, the making available right had been recognised in Dutch case law on the basis of the existing law before the TRIPs Agreement was concluded.<sup>47</sup> Of course, the new technical possibilities to some degree have led to the development of new modes of exploitation and, as may be assumed, to certain new business or industry practices. But none of these seem to be

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<sup>46</sup> Unofficial translation from the Institute for Information Law, University of Amsterdam

([http://www.ivir.nl/legislation/nl/copyrightact1912\\_unofficial.pdf](http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf)).

<sup>47</sup> Court of Appeal of The Hague 1 December 1994, *Informatierecht* AMI 1995, p. 51 note Mom, *Gijfa/Dinges*

revolutionary from a legal point of view. There in particular is no sign that provisions in TRIPS and WCT have prompted authors and right owners to develop new sources of revenues primarily based on these new *legal* rules. It is rather the technical and commercial development which has led the way. Those commercial and technical developments could *rely* on the legal regime, without that regime prompting the market to choose for certain new experiments. For instance, freelance authors have ascertained a modest supplementary payment for online exploitation of their contributions by the newspapers, but this remains a market in the margin of the newspaper, and does not constitute a new and independent market with new players and opportunities for substantial income.

As far as (the legal regime for) technical protection measures is concerned, it must be stated that although the new rules may have provided some additional legal security, which in itself may have been useful, they certainly have not been the legal impulse for a re-engineering of the copyright market for the benefit of authors, producers and consumers. At a moment, this may have been the intention of the European Commission, albeit not so much in the interest of human authors as producers and consumers.

As to the question whether authors, as opposed to corporate copyright owners, have benefited from these modernizations, the answer must be no, although there is no indication neither that they have harmed individual authors. The overall impression is nevertheless that the position of the human author is increasingly under pressure. But as far as legal conditions play a role in this respect, in the Netherlands this pertains more to copyright contract law, which is relatively poorly developed in this country, and perhaps to the regulations concerning works made for hire, which tend to be interpreted in a way rather friendly for employers. Besides, the main reasons for the weakening of the position of the author probably are not of a legal nature at all, but of a technical, commercial and economic nature, if not even sociological elements play a role. The regime for the exploitation rights seems to be rather 'neutral' in this respect – which means that they serve best the party in the best bargaining position - and the introduction of the new or clarified rights has not modified this character.