

ALAI 2013 QUESTIONNAIRE - NETHERLANDS

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ENGLISH

Part I: Lawful dissemination – exhaustion, individual management and the role of collective management organisations

1.1. Relevance of exhaustion of rights in the digital environment?

- (1) ***In your country, does making copies of works available over digital networks (in the network environment) implicate the distribution right?***

Since the European Court of Justice (ECJ) issued its judgment in the case of Oracle/Usedsoft¹ the making available of copies of software can (in some circumstances) implicate the distribution right. The Court ruled that ‘a communication to the public’ (over a digital network) becomes ‘distribution’ when there is a transfer of property. A license to use particular software, which is not limited as regards time, can, according to the ECJ, be equated to such a transfer of property and consequently be considered as distribution. However this judgment concerned the question whether there was distribution (and consequently exhaustion) in the sense of Directive 2009/24/EC (Software Directive). It is still not clear to what extent the considerations of the ECJ in this case are applicable in the field of ‘normal’ copyright. Directive 2001/29/EC (Copyright Directive) seems to make it impossible to regard the making available of copies over digital networks as ‘distribution’.² On the other hand, some have pointed out that the ECJ seems to also have founded its judgment on economic considerations and probably also a ‘higher norm’, namely the principle of the free traffic of goods and services within the EU. Therefore it is not impossible that the ECJ will apply the same reasoning in the field of ‘normal’ copyright. Until the ECJ has provided more clarity regarding this question, it is hard to provide a definitive answer. There have not yet been any cases in the Netherlands which specifically addressed this issue.³

- (2) ***If so is the right exhausted when copies of works are so distributed?***

If there is distribution over a digital network as described above, the principle of exhaustion also applies.

- (3) ***Does digital exhaustion of right apply to all kinds of works, or just to computer programs, or is digital exhaustion at all relevant in your country?***

¹ ECJ, 5 July 2012, C-128/11 (usedsoft/Oracle)

² See for instance point 29 of the preamble.

³ M.R.F., Senftleben, “Het eerste schaap over de dam. Over het Usedsoft/Oracle-arrest van het HvJ EU en de verdere ontwikkeling van de uitputtingsleer en de digitale omgeving”, AMI 2013-2, p. 56-60

As pointed out under 1, it is unclear to what extent 'digital exhaustion' applies to other works than computer programs.

- (4) ***Is there a difference between a "sale" of a copy and a "license" of the right to make a copy, of the copyrighted work in question? If so, how is the difference between the two defined?***

Traditionally there was always a clear difference between the sale of a copy and the license to make a copy. 'Sale', according to Dutch law, implies that the object being sold is a *zaak* (a physical object) and that there is a transfer of *property*. 'Sale' of non-physical objects was not deemed possible in the Dutch law system and therefore 'sale' of digital products (i.e. products that are not delivered in physical form) was also not deemed possible.⁴

The grant of a licence was traditionally seen as something clearly different than sale of a copy. When a license is granted to make a copy of a particular copyrighted work, then this does not lead to a (intellectual) property right for the one who made the copy. It is simply considered as a permission to make a copy of the work or, in other words, a waiver of the relevant right holder's right to enforce his copyright with regard to the particular copy that is made. In any case there is no 'sale' as aforementioned. Consequently, sale and a licence to make copy were always two clearly different things.

Some recent judgments have brought about some significant changes in this regard, at least insofar as it concerns the sale of software. The Dutch Supreme Court and the ECJ (Usedsoft) recently ruled that a license to use a (downloadable) copy of a software program, which is not limited in time, should be seen as 'sale' of the relevant program. Especially the Usedsoft judgment made it clear that one can also have a property right on non-physical objects (i.e. bits and bytes). These judgments seem to indicate that the rather strict doctrine in the Netherlands as regards the meaning of the terms property and sale, should probably be revised.⁵

1.2 Collective versus individual management: Different models of collective and individual licensing

- (5) ***What are the collective licensing societies in your country? What works and what rights does each of them represent? Does the author grant exclusive or non-exclusive rights to these societies? To what extent is licensing of copyrighted works centralized in your country?***

Buma /Stemra: This organization controls the rights of composers, writers and publishers of musical works. Exclusive rights are granted, although there are some exceptions to this rule. In recent years a lot of major (Anglo-American) publishers have withdrawn their

⁴ F.W. Grosheide, "Een revolutie in het EU-auteursrecht? Enkele kanttekeningen bij het UsedSoft/Oracle-arrest", AMI, 2013-2

⁵ Dick van Engelen, "Twee voor de prijs van één. Een markt voor tweedehands software licenties en een nieuw Europees eigendomsrecht op bits and bytes", NJB 38, 2012, p. 2678-268h and Hoge Raad, 12 April 2012, LJN: BV1301

repertoire from collective rights management and started to license large service providers themselves on a pan-European basis (in collaboration with other CRO's), pursuant to Recommendation 2005/737 of the European Commission. Subsequently these publishers have given Buma/Stemra a mandate to license their rights for so called 'national services', i.e. services that do not operate on a pan-European basis. So with regard to these right holders, it could be said that the grant of rights was non-exclusive.

SENA: This is the organization in the Netherlands that manages so called neighboring rights of performers and producers of music. In the Netherlands persons or organizations that own the rights related to music recordings do not have the right to prohibit the public use of those recordings; they only have the right to receive a fair compensation for such use (the exception to this rule is on demand online exploitation). This compensation may only be collected by an organization approved by the government, which is SENA. These rights are therefore not granted to SENA. On the basis of the standard exploitation contract that SENA concludes with its members, SENA is granted a mandate to collect the aforementioned fair remuneration.

VIDEMA: This organization manages the rights related to TV-productions that can be seen on the most important Dutch TV channels. VIDEMA licenses the rebroadcasting ('in public') of those programs by companies in a commercial context, such as in bars, stores and hotels. Exclusive rights are granted.

SEKAM: This organization manages certain rights of the producers of film works, such as the right to issue licenses for the retransmission of those works by cable networks. According to the Dutch Copyright Act, such retransmission via cable networks may only be licensed collectively by right holders. SEKAM is the only CRO that manages these rights. Exclusive rights are granted.

VEVAM: This organization manages rights similar to those that SEKAM manages, but for directors of film works.

NORMA: This organization manages so called neighboring rights of many types of performers, not only performers of musical works. It for instance also licenses the retransmission of works via cable networks and distributes the income derived from private copying levies and lending rights. Exclusive rights are granted.

LIRA: This organization manages the rights of writers and translators of all kinds of written works, such as books, scenarios articles etc. Exclusive rights are granted with regard to most types of exploitation, however a non-exclusive mandate is granted with regard to, among other things, the licensing of digitization projects by museums, archives, libraries, publishers et cetera.

Pictoright: This organisation manages the rights of visual artists in the Netherlands, such as illustrators, photographers, graphic designers etc. As with LIRA, most rights are granted on an exclusive basis, but with regard to some types of exploitation (also digitization projects) a non-exclusive mandate to license is granted.

Stichting Leenrecht: This organization collects the levies related to so called lending rights. Stichting Leenrecht is the only organization in the Netherlands that is competent to collect these revenues.

Stichting ThuisKopie: This is the organization that collects the private copying levies from producers and importers of particular types of hardware, such as DVD's, CD's, MP3 players, laptops etc. It is the only organization in the Netherlands that is competent to collect these revenues.

Stichting Reprorecht: This organization collects the levies that companies, such as educational institutions, have to pay when they make photocopies of copyrighted works.

Like the previous two organisations mentioned, it is the only entity in the Netherlands that is competent to collect these fees.

(6) What differences are there regarding different types of works and different rights administered?

I believe this question is already answered under 5.

(7) To what extent is it now possible (or will it soon be possible) to automate the management of one's works?

I am not quite sure what exactly is meant with 'automated management of works' (AM). I assume that this term has a very broad meaning and that it also encompasses all kinds of digital rights management systems (DRM) meant to automatically control the behavior of users of products and services. There are of course many of these systems and it is very hard (if not impossible) to give an exhaustive description of the systems that are currently used in the Netherlands. Suffice it to say, that in the Netherlands (as in other countries) the content industry also makes a lot of use of AM and will probably also keep doing so in the future.

(8) What does automated management involve? What functions of management can be automated?

As noted under 7, there are many AM systems out there. What 'functions' of management exactly are automated, will, consequently, probably be different in each case, but perhaps some general 'functions' can be mentioned here. With a lot of content that is sold (or rather: the use of which is licensed), several constraints are often imposed on the user. For instance the ability to make (unlimited) copies is made impossible, access to (part of) a service is made impossible and/or sometimes even the exact use which is made of a particular service or product is monitored so that the relevant rights holder can intervene (and/or ask for an additional compensation) when his rights are infringed.⁶

It is perhaps worth to note a recent development in this regard that, strictly speaking, might not fall under the header 'automated rights management', but it at least seems related. In recent years some right holders started using software to automatically track down unauthorized use of their works on the internet (especially photos and newspaper articles). Often this is done by organizations which focus specifically on this task. The actions of these organizations are often heavily criticized, because the unauthorized use

⁶ P. B. Hugenholtz, *De toekomst van het auteursrecht: DRM met een vriendelijk gezicht?*, Text of a speech held at the symposium, *De toekomst van het auteursrecht*, Organized by XS4ALL, Amsterdam, 15 oktober 2004, available via: <http://www.ivir.nl/publicaties/hugenholtz/toekomstauteursrechtDRM.PDF>, and Kamiel Koelman, *Auteursrecht en technische voorzieningen. Juridische en rechtseconomische aspecten van de bescherming van technische voorzieningen*, academic dissertation 2003, available via: http://cli.vu/pdfs/auteursrecht_en_technische_voorzieningen.pdf

which they track down often concerns (non-commercial) use by consumers, who are then often forced to pay significant damages.

Perhaps the question also refers to the situation in which an individual rights holder can give digital service providers (DSP's) permission to use their works on their platform in return for a compensation (for instance a share of the advertising revenues) which is then automatically distributed. We are aware that Youtube has a system in place which allows users to upload 'reference files' of their works that enable Youtube to recognize the use of the relevant works on its platform. The right holder can then tell Youtube what he wants Youtube to do when the use of his work is detected on the platform. He can for instance tell Youtube to remove the content, but it is also possible to get a compensation for the use of the content. The whole process of recognition and consequently blocking and/or remuneration is, as far as we know, done automatically. We do not know to what extent other platforms also offer the possibility to generate revenues in this way.

(9) In what ways does the law in your country favor individual automated licensing?

The Dutch Copyright Act prohibits the circumvention of effective technological measures under certain conditions, pursuant to Article 6 of the Copyright Directive. This could perhaps be seen as a way in which the law 'favors' individual automated licensing.

(10) Is automated management possible without the cooperation of search engines?

If for instance a computer program contains technological measures which make it impossible to make more than one copy, then that is of course possible without a search engine. When it concerns the type of rights management referred to under 8 (second paragraph), then I imagine this could hardly be conducted without the use of some type of search engine.

(11) Given new technologies, is collective management still desirable? Does your answer depend on the type of work and/or on the type of rights licensed?

Collective management is still desirable. It is very hard for a lot of rights holders to effectively monitor all of the use which is made of their works without the help of a CRO. This is still especially true for offline exploitation. For instance, an individual author of music will not have the means (and the time) to visit all bars and restaurants to check whether his work is played there and to consequently grant a license. The same is of course true for other forms of exploitation and, despite technological developments, is also still true for online exploitation (although, as noted under 8, some new possibilities have come up to individually manage one's rights). For a lot of right holders it will be impossible (or at least too burdensome and costly) to effectively monitor all the use of their works on the internet individually. In addition to this, when rights are managed collectively, this strengthens the bargaining power of right holders considerably, making it possible to get

better compensations than in the situation in which the relevant rights are split up and licensed separately.

Another problem is that it is usually not very likely that users of protected content will be willing to negotiate a license with an individual right holder. If for instance music is played in a bar or on an online radio station, the owner would rather not negotiate with individual authors of works, and instead will refrain from playing such author's music. This last point also relates to another issue that is important; from the perspective of users of copyrighted content, it is, in principle, also undesirable if rights are individually licensed by right holders. This would make the process of obtaining the necessary licenses for particular use (for instance radio and TV programming, online music services etc.) extremely complicated, costly and perhaps even impossible. Collective licensing often provides a 'one stop shop' and takes away a lot of these transaction costs. It has to be noted here that the strong position of collective rights organisations (CRO's) is of course not beneficial in every way. Collective management often offers users a one stop shop, but the fact that they are (de facto) monopolists could also lead to abusive conduct. such as the imposition of excessive tariffs.⁷

Having said that, there seems to indeed be a desire among individual authors to have more flexibility as regards the management of their works. This does not usually mean that they want to manage their works themselves completely. Rather they would prefer to leave the licensing of certain types of exploitation to the relevant collective rights organisation (CRO's) and do the rest (for instance online exploitation) themselves, so they have more possibilities to manage those rights in the way they see fit.⁸

The conclusion in this regard must be that, although collective rights management may, in some cases, not be as much of a necessity as it always was, it usually still is a practical and desirable way of managing and licensing rights, both from the perspective of right holders and users of copyrighted content.

(12) From the point of view of authors and users, what are the respective advantages and disadvantages of individual management (which can be more responsive to individual authors' intent) and collective licensing (which reduces transaction costs, especially for users)?

I believe, these questions have been answered already.

⁷ Several complaints have for instance been filed with the Dutch competition authority (Nederlandse Mededingingsautoriteit, NMa) against the collective rights organisation Buma/Stemra for purported excessive pricing policies. See for instance: NMa, 21-05-2005, Stemra/Mosselman (3720-31) and NMa, 02-04-2008, Buma/Fresh.fm (3295 /133).

⁸ A complaint was also filed with the NMa against Buma/Stemra for not offering enough 'flexibility' as regards the management of the rights of authors. The NMa eventually came to the conclusion that Buma/Stemra offered enough possibilities to exclude particular forms of exploitation from the mandate granted (Nma, 21 december 2007, XS4All v Buma, 4070 / 22).

(13) Are there legislative measures taken or planned in order to endorse either individual or collective management (or both)? Can you foresee a trend in legislative measures ahead in this area of law?

The European Commission recently published a proposal for a new Directive on the collective management of copyright on music.⁹ It becomes apparent from the proposal that the Commission wants to ensure that right holders will have the possibility to only grant CRO's permission to manage particular "categories of rights or types of works, or other subject matter of their choice". This can be probably be seen as a legislative measure which is aimed to endorse individual management, since it ensures that rights holders throughout the EU will not be obligated to assign all of their rights to a particular society and they can instead manage those rights (partly) for themselves or assign particular categories of rights to different CRO's.

1.3 Multi-territorial licenses

(14) In your country, what are the actual legal rules for granting transborder multi-territorial licences?

There are currently no specific Legal rules as regards multi territorial licensing. This does not mean that the granting of multi territorial licenses is completely unregulated. The ECJ has frequently had the opportunity to give its opinion about the practices of CRO's in the light of the European competition rules, also as regards their practices regarding multi territorial licensing (or rather the lack thereof). CRO's in Europe license eachother's repertoire on the basis of reciprocal representation agreements. These agreements enable a CRO from Germany to license the rights (directly) controlled by a CRO in the Netherlands and vice versa. The mandates granted in such agreement are however usually limited to the territory the relevant CRO is situated in. So the aforementioned German CRO will, in principle, only be competent to license the repertoire controlled by the Dutch organisation within Germany, and not in any other countries. The ECJ has ruled, in short, that reciprocal agreements between CRO's which contain clauses that limit the ability of those CRO's to grant multi-territorial licenses, can constitute a violation of the competition rules if the implementation of those clauses is the result of a concerted practice and there is no way to offer an economic explanation for this behavior, other than anti-competitive concertation.¹⁰ Interestingly the ECJ recently ruled in the *CISAC* case that, even as regards online exploitation, territorial limitations in reciprocal agreements concluded between CRO's may still be justified in the light of the competition rules. The European Commission had argued that because the fact that online use can (easily) be monitored from a distance, there could be no other explanation for territorial limitations in reciprocal agreements other than anti-competitive concertation (at least insofar as it concerned online exploitation and/or enforcement). The ECJ stated that there might still be valid

⁹ For the text of the proposal see:

http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf

¹⁰ See for instance ECJ judgment in Case 395/87 (*Ministère public v Tournier*), par 20-25.

explanations for such limitations- especially in the context of monitoring unauthorized online use- and that the Commission did not do enough to prove otherwise.¹¹

In addition to this it should be noted that the upcoming Directive on collective rights management contains a number of rules regarding multi territory licensing. The Directive states that member states should ensure that CRO's may only issue such licenses when they conform to a particular set of standards. They must have "sufficient capacity to process electronically, in an efficient and transparent manner, the data needed for the administration of such licenses, including for identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to right holders."

(15) What is the current practice of granting transborder multi-territorial licences?

It is hard to give a complete and exhaustive explanation about what the current state of multi territorial licensing is for all types of works and all categories of exploitation. In the Netherlands the current practice is probably not different from most other countries in the EU. The fact that rights are split up according to territorial delineations, also poses problems here. This is especially true for large online providers of music which, if they want to offer the 'world repertoire' in every state of the Union, will have to obtain a licence from every CRO in every country in addition to licences of record labels and (large) publishers that have (partly) withdrawn their repertoire from collective management. As noted before, the upcoming Directive of the European Commission will bring about some significant changes in this regard. One of the main aims of the Directive is to facilitate the multi territorial licensing of rights related to music in the online environment. Presently there are already some examples of multi territorial licensing of rights related to music in the Netherlands. For example a large Dutch publisher has recently mandated Buma/Stemra to license its online rights on a pan-European basis, but these types of initiatives are not as numerous as in some other countries.

In the audiovisual sector the problem of territorial limitations is also relevant. Also in this field users of content would benefit from the development of more 'one stop shops' and a decrease in transaction costs. The European Commission has taken a number of measures to facilitate the development of 'one stop shops' in the music sector, but similar steps have not been taken as regards the audiovisual sector. An additional problem in this regard is the fact that large European AV companies and Hollywood production companies will probably not choose for collective management of their rights anywhere in the near future. This hinders the development of online audiovisual initiatives. The issue in this regard is not necessarily copyright itself, but the licensing process that right holders employ (i.e. every territory is licensed separately).¹² In the Netherlands, this especially leads to problems on the demand side. Because online audiovisual platforms do not have the possibility to get all necessary licenses at one 'shop' for all territories in the EU, the availability of such platforms is lacking in some countries and perhaps also in the Netherlands. The need for Dutch right holders in this sector for multi territory licensing is,

¹¹ CISAC case, 12 April 2013, T-442/08

¹² KEA et al., *Multi Territory Licensing of Audiovisual Works in the European Union*, Final Report.

on the other hand, probably limited. There is a limited demand for Dutch audiovisual productions abroad. However when Dutch audiovisual works are exploited multi territorial, this will also be a complicated process, especially where (some of) the relevant rights are assigned to CRO's, whose mandates are territorially limited.¹³

In the gaming industry this problem is less relevant, because the relevant rights are usually assigned to the producer of the game. This means that licensing agreements concerning the rights to a game are usually not limited to a particular territory. So in this case, it can be said that there is a practice in which multi territorial licensing takes place and is relatively unhindered.

The publishing rights with regard to books are often split up according to territorial delineations, but in practice this only poses problems as regards the availability of non-Dutch books in the Netherlands. Due to language barriers, there is a limited demand for Dutch books outside of the Netherlands (and Belgium). Publishers of Dutch books will consequently usually only have to obtain a license for a (very) limited amount of territories.¹⁴

(16) In your country, is the present situation considered satisfactory from the view point of authors, intermediaries and consumers?

As probably becomes apparent from the previous answer, the present situation is not always considered as satisfactory, especially not from the perspective of users of copyrighted content and consumers. Due to the fact that getting the necessary licenses for the entire EU is often a costly and burdensome process, some DSP's will refrain from rolling out their services in every country. So, in short, the main problem with the present situation is that obtaining all the necessary licenses usually involves a lot of transaction costs for DSP's, which in turn means that the market for the delivery of online (entertainment) is probably not as developed as it could be.

¹³ iVir, Centerdata en SEO, *Digitale Drempels, knelpunten voor legaal digitaal aanbod in de creatieve industrie*, Amsterdam 2012, p. 35, available via:

http://www.ivir.nl/publicaties/vangompel/digitale_drempels.pdf

¹⁴ iVir, Centerdata en SEO, *Digitale Drempels, knelpunten voor legaal digitaal aanbod in de creatieve industrie*, Amsterdam 2012, p. 72, available via:

http://www.ivir.nl/publicaties/vangompel/digitale_drempels.pdf

Part II Illicit Dissemination and the role of intermediaries

II.1 Liability and Implication of intermediaries

II.1.1 Who are the technological intermediaries

(17) *In your country, is there a statutory list of intermediaries which are subject to a special liability regime? If so, which intermediaries are listed? Does this list comprise Web 2.0 hosts, search engines, link aggregators?*

Yes, the relevant Article is 6:196c (1-4) from the Dutch Civil Code (Burgerlijk Wetboek) which is the implementation of the relevant clauses from the European E-Commerce Directive (2000/31/EC).¹⁵ This article contains an exemption for different types of (online) service providers. These cannot be held liable if they act in conformance with particular criteria. A service provider can, for instance, not be held liable if he 'transmits' particular information at the request of a third party or provides access to a communication network, but only insofar as he does not initiate the transmissions, does not select the receiver of the transmission, and does not select or modify the information contained in the transmission (So called 'mere conduits').

Such a service provider can also not be held liable for the automatic, intermediate, and temporary storage of the transmission if the sole purpose of the storage is to make the information's onward transmission to other recipients of the service on their request more efficient on the condition, among others things, that the provider does not modify the information, and will remove information if the source of the transmission has been removed from the network or a court or administrative authority has ordered removal of the material (so called 'caching'). Article 6:196c also contains an exemption of liability for 'hosting' providers, i.e. providers that offer services which consist of the storing of information at the request of the recipients of the service. They cannot be held liable if (in short) they do not have actual knowledge of (specific) infringements on their network (and they are also not aware of any circumstances from which such infringements should become apparent) and, when they do gain knowledge or awareness of those infringements, act expeditiously to remove the relevant content.

As becomes clear from the above, the list does not explicitly mention "Web 2.0 hosts, search engines, link aggregators". The E-Commerce Directive deliberately does not regulate search engines, as becomes apparent from article 21 of the Directive.¹⁶ Search engines are also not (explicitly) dealt with in the Dutch Copyright Act or Article 6:196c of the Civil Code. Web 2.0 hosts (in principle) fall under the hosting 'safe harbor'. There has been case law in

¹⁵ Articles 12-14 of the Directive.

¹⁶ R. Chavannes, 'Hype of echt link. De hyperlinkaansprakelijkheid van informatieaanbieders, internetaanbieders en zoekmachines', *JAVI*, februari 2003-1, p. 4

the Netherlands with regard to hosting platforms.¹⁷ As outlined above, these types of platforms are exempt from liability insofar as they abide to the relevant criteria, most importantly an effective notice and take down policy (NTD). It is furthermore important to ascertain whether the hosting provider has an 'active role' with regard to the acts that are performed on his network. The host has to limit itself to the mere technical and automatic processing of data to be able to benefit from the exemption of liability. In the event that an online auction platform such as eBay assists users by optimizing (particular) offers, it can no longer be assumed that its role is neutral.¹⁸ In a later case it was clarified that when a platform helps to optimize all the offerings of the users on the platform, this does not mean that an active role can be assumed; only when assistance is given in connection with *particular* offerings, the platform will not fall under the hosting exemption.¹⁹ As noted, there is also no specific exemption for search engines.

Up until now there has not been any case law in the Netherlands that specifically dealt with the question whether a 'general' search engine such as the Google search engine infringes copyright, but there has been case law regarding so called 'dedicated search engines' (i.e. search engines that only search through a number of specific websites, such as the websites of car dealers).²⁰ It has to be noted though that these cases mostly concerned the question whether the relevant search engines infringed the database rights of the relevant right holders. Judges and legal scholars seem to disagree about the question whether a search engine infringes copyright and/or database right.²¹ In the context of 'general' copyright, the most interesting case is probably *Zoekallehuizen.nl* ('search all houses').²² This site offered a search engine by which end users could look through the vast amount of houses that were offered for sale in the Netherlands on websites of real estate brokers without having to go to the individual websites of the brokers. In so doing, *Zoekallehuizen.nl* regularly made cache copies of the content of the websites of the brokers in order to derive particular data from them. The Court of Appeals came to the conclusion that, among other things, these reproductions could not be prohibited due to the rule contained in Article 13a of the Copyright Act which permits temporary reproductions that form an essential part of a technical process. *Zoekallehuizen* also displayed summaries of the offers that could be found on the websites of the brokers. The Court ruled that this was also allowed, because it could be seen as a 'quotation' in the sense of Article 15a of the Copyright Act. Finally, the Court concluded that the brokers did not have any database rights in relation to the content of

¹⁷ See for instance Court of Appeals Leeuwarden 22 May 2012, LJN BW 6296 (*Stokke/Marktplaats*), District Court the Hague, 24 oktober 2012, (*BREIN/XS Networks*). The most important case of the ECJ in this respect is the case between *l'Oréal* and eBay (12th of July 2011, C-324/09)

¹⁸ ECJ, 12 July 2011, C-324/09, par. 116

¹⁹ Court of Appeals Leeuwarden, 22 May 2012, LJN BW 6296 (*Stokke/Marktplaats*), par. 5.6

²⁰ Court of Appeals Amsterdam, 13 December 2007, LJN BC0125 (*Jaap.nl*), District Court Utrecht, LJN BB8341 (*Gaspedaal.nl*), Court of Appeals Arnhem, 4 July 2006, LJN AY0089 (*Zoekallehuizen.nl*)

²¹ P. B. Hugenholtz, 'De auteursrechtelijke groeipijnen van Google', *Ars Aequi*, February 2011, p. 95.

²² Court of Appeals Arnhem, 4 July 2006, LJN AY0089 (*Zoekallehuizen.nl*)

their websites, because, in short, there was no 'substantial investment' in the obtainment or presentation of the data.

There has not been much case law concerning link aggregators, such as Google News. It must be assumed that these type of providers are in principle also not capable of falling under the safe harbour provisions of the E-Commerce Directive (and article 6 :196 of the Civil Code). As noted, it becomes apparent from the Directive that search engines should (probably) be regarded as unregulated under the Directive and the same goes for "providers of hyperlinks".²³ A lot of what has been noted above concerning search engines (in principle) also applies to link aggregators. The distinction between a search engine and a link aggregator is often probably also not easy to make, because a lot of platforms offer a mixture of those services. Another thing that should be noted, is that a distinction should be made between websites that offer links to illegal content and sites that offer links to legal content. The (systematic) linking to illegal content often ensues liability under tort law whereas (systematic) linking to legal content is usually permitted.²⁴ The criteria mentioned under 21 are especially relevant for the liability of sites that systematically provide links to illegal content. An interesting- and in the Netherlands also well known- example of a site that systematically provided links to legal sources, is the case concerning the site *Kranten.com* ('Papers.com'), which provided links to news items that could be found on websites of newspapers (in a similar fashion as Google News).²⁵ The Court ruled, in short, that the copying by *Kranten.com* of the titles of newspaper articles could constitute a reproduction and/or communication to the public of those works²⁶, but that that no authorization was needed because of the quotation exception and the 'news exception'.²⁷ Furthermore the Court also concluded that the newspapers did not have any database rights in relation to the lists of titles that could be found on their websites.

²³ Article 21 of the Directive.

²⁴ D. J. G. Visser and P. de Leeuwe, "Links en recht", *Ars Aequi*, June 2013, p. 451. An important exception to this general rule forms the use of so called 'embedded' or 'framed' links. The use of such links can, in particular circumstances, constitute a separate communication to the public for which autorisation of the right holder is required ; District Court The Hague, 19 december 2012, IEPT20121912 (*Buma/Stemra v. Souren*).

²⁵ District Court Rotterdam, 22 August 2000, IER 2000, 55 (*Kranten.com*)

²⁶ It has to be noted that the Court was doubtful whether these titles were protected under copyright at all (par. 4.6)

²⁷ The limitation of copyright contained in art. 15 of the Act which allows, in short, the copying of news items from a news paper (or similar medium) by other news papers (or similar media).

- (18) In case this list is based on a superior norm (such as, within the EU, a Directive),**
- did your national legislature just copy that list or did he add other intermediaries not listed?**
 - if he did so, did he subject them to the same legal regime as the intermediaries listed or did he create another liability regime for them?**

As noted, the relevant clauses were introduced pursuant to the E-Commerce Directive. The national legislature basically just copied the list and did not mention any other intermediaries.

- (19) How did the courts in your country deal with intermediaries which are not expressly listed in the relevant statute? Did the courts extend to these intermediaries an already applicable regime? Have they created a new regime?**

The categories mentioned in the E-Commerce Directive and the Dutch Civil Code encompass a wide range of online intermediaries. In the (Dutch) cases regarding the liability of online intermediaries, it usually concerned intermediaries which (in principle) could fall under these safe harbor provisions. Judges in these cases often eventually came to the conclusion that these provisions were not applicable because the intermediary concerned did not comply with all of the conditions for application of the safe harbor (for instance, because there was no efficient notice and take down procedure or they had actual knowledge of specific infringements) but I do not think that this means that you could say that it concerned an intermediary which was not “expressly listed in the relevant statute”. There has been some case law concerning other types of intermediaries, i.e. intermediaries that offer services that cannot fall under the safe harbor exception. Examples of such intermediaries have already been given under 17, so that will not be reiterated here. The Dutch Courts have not developed any comparable legal regime for intermediaries not listed in Article 6:196c Civil Code.

- (20) In your country, are there any plans to evaluate or revise the statutory list of intermediaries?**

We are not aware of any plans to revise the statutory list of intermediaries.

II.1.2 Bases for liability; mandatory or voluntary intervention

- (21) On what legal grounds are intermediaries held liable in your jurisdiction? Are there any special rules on intermediaries' liability or does general copyright or tort law form the basis of intermediaries' liability?**

In the Netherlands liability of online intermediaries follows from general tort law. When a particular provider does not fall under any of the safe harbor provision, he may under certain circumstances be held liable under article 6:162 of the Dutch Civil Code. In the case

law concerning liability of intermediaries, a number of factors have been mentioned as relevant, such as the fact that the intermediary:

- systematically and structurally facilitates copyright infringement;
- provides or facilitates access to a network containing substantially infringing content;
- has an active role in connection to the activities that take place on its network;
- induces the users of the platform to infringe intellectual property rights, for instance by encouraging them to share material;
- has actual knowledge of (particular) infringements on its network;
- profits from the infringements taking place on the platform; and
- has no effective notice and take down procedure in place.²⁸

It is probably worth to note here that, apart from the liability based on tort law, it is also possible for courts to impose obligations on online intermediaries on another basis, namely article 26d of the Dutch Copyright which was implemented as a result of the introduction of Directive 2004/48/EC (Enforcement Directive). This article makes it possible for courts to order intermediaries to, among other things, stop providing services to particular users and/or to take certain preventive measures to stop future infringements. This article was implemented pursuant to the Enforcement Directive (article 11). The important difference with general tort law is that article 26d can also be used to impose obligations on intermediaries that are not liable themselves under general tort law or copyright law. Even if an intermediary falls under the safe harbour provisions, such obligations can still be imposed on him, provided that these are effective, proportionate and do not pose unreasonable barriers to legitimate trade.²⁹

Obviously what is stated above is primarily relevant for intermediaries that play a role in the making available of infringing content. These criteria are less relevant for the question whether intermediaries that provide (or facilitate) access to legal content, such as Google News, can be held liable under copyright or tort law. Such intermediaries are however (also) dealt with under 19.

(22) What is the scope of intermediaries' liability (duty to monitor, filter and/or block, etc.?)

The extent to which an intermediary can be held liable and obligations can be imposed on him, always depends heavily on the circumstances of the case. What has been mentioned under 21 is also relevant to the scope of liability and/or the obligations imposed. Different

²⁸ C.F.M. de Vries, "Subjectieve verwijtbaarheid. Een toets om de aansprakelijkheid van internettussenpersonen voor het faciliteren van auteursrechtinbreuken te beoordelen", AMI 2012-1, p. 1-12. Relevant case law (among others): Court of Appeals Amsterdam, 15 June 2006, LJN AX 7579 (*ZoekMP3*), Court of Appeals Amsterdam, 16 March 2010, IER 2010, 78 (*BREIN/Shareconnector*), District Court Utrecht, 26 August 2009, IER 2009-60 (*Mnino*), District Court Amsterdam, 22 October 2009, AMI 2010-1 (*The Pirate Bay*)

²⁹ ECJ, 12 July 2011, Case C-324/09 (*L'Oréal/Ebay*), par. 140 and further.

types of obligations have been imposed on intermediaries in the Netherlands (in addition to any possible liability for damages), such as the obligation to:

- remove certain content;
- prevent further infringements;
- block access for consumers to certain websites (the lawfulness of such orders is still hotly disputed);³⁰
- stop hosting a particular website;
- provide particular data (e.g. name and address of particular users of platform);
- stop exploiting the relevant website(s).

(23) Are the duties of intermediaries regulated by law, best practices or other means of voluntary participation of intermediaries?

The duties of intermediaries are regulated by law. There is also a Code of Conduct regarding NTD procedures, which has been signed by most internet intermediaries.³¹

(24) Should there be international harmonization in this respect?

In the EU, the rules regarding the liability for intermediaries is already partially harmonized since the E-Commerce Directive determines that intermediaries cannot be held liable in particular situations. However this Directive does not give any guidelines as regards the question when intermediaries can be held liable when they do not fall under any of the safe harbour provisions. It probably makes sense to also harmonize the legal rules in this regard, because the free traffic of goods and services might be hindered when there are significant differences between the member states.

II.2 Toward the extension of obligations to financial and other intermediaries?

II.2.1 The role of financial and advertising actors

(25) Apart from ISPs, which other intermediaries are economically involved in the online dissemination and marketing of copyrighted works (e.g., financial intermediaries such as the providers of credit cards; advertisers et al.)?

Other intermediaries that could be mentioned here, in addition to the parties mentioned in the question, are advertising agencies, payment processors, banks and perhaps also providers of so called 'proxies'. Since the district court of The Hague ruled that several Dutch access providers should block access to the platform 'The Pirate Bay', a lot of websites have

³⁰ Anti Piracy organisation BREIN requested several access providers to block to the website *The Pirate Bay*. They refused and consequently BREIN started judicial proceedings in order to force the providers to block the website : District Court of the Hague, 11 January 2012, LJN: BV0549 (*BREIN/Ziggo*).

³¹ www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2008/10/09/gedragscode-notice-and-take-down.html

been providing such proxies by which users can circumvent the blocking of The Pirate Bay by their respective access providers. The Dutch anti-piracy organization BREIN has put a lot of effort into removing these proxies from the internet, but it seems impossible to eradicate these proxies completely. These proxies of course hinder the enforcement initiatives of anti-piracy organizations and CRO's considerably.

II.2.2 – Bases for liability

(26) In your country, is there any existing legal basis for extending certain obligations to financial and other intermediaries?

There is case law in the Netherlands which deals with aforementioned offering of proxies. An injunction can easily be obtained against these types of providers.³²

There has also been case law concerning payment processors. In the case of BREIN v. Techno Design³³ the Court ordered Techno Design to provide BREIN with information concerning some of the users of its services, namely owners of a particular Bit Torrent platform. The users of that platform could obtain additional services, such as increased download possibilities, if they paid the owners of the platform. These payments were realized via the services of Techno Design. Because BREIN was not able to identify the owners of the relevant platform through other means, the Court afforded the relief sought.

In a recent case the question also came up to what extent banking institutions can be forced to provide information regarding an account holder.³⁴ BREIN had trouble identifying the one responsible for a particular online piracy platform (FTD world). The name that was used to register the domain name did not exist and the hosting provider was located in Russia and did not respond to any of BREIN's requests to take down the site. Therefore BREIN wanted to get to know the identity of the one responsible for the website via the bank ING (users of the platform could transfer money an ING account). The Court stated that in a case like this it comes down to a balancing of the interests of the parties concerned. It stated that BREIN had not (yet) tried everything to obtain the relevant data through other means, ING was not 'instrumental' (i.e. did not play a crucial role) with regard to the infringement (unlike for instance a hosting provider) and that banks have a 'special role' in the legal and financial world, meaning that customers (in principle) should be able to rely on the confidentiality of the information related to their account. In these circumstances the interests of the bank and the account holder outweighed the interests at stake on the side of BREIN.

To my knowledge there is no case law which deals with other intermediaries who are less directly involved in the unauthorized dissemination of copyrighted works (e.g. advertising agencies). It should be noted here that BREIN has recently started contacting a large amount of advertisers and advertising agencies, with the aim to persuade them to no

³² District Court of the Hague, 1 July 2012, IEPT20120711

³³ District Court The Hague, 6 December 2011, KG ZA 11-1183 (*BREIN/Techno Design*)

³⁴ District Court Amsterdam, 14-05-2013, KG ZA 13-409 SR/MV (*BREIN/ING*).

longer make use of platforms which illegally offer copyrighted content. A lot of the relevant companies were apparently willing to adjust their policy to try to prevent that their advertisements would turn up on an illegal platform.

(27) Are you aware of any discussions in your country with regard to future law making concerning such (additional) obligations?

We are not aware of any legislative initiatives with regard to such intermediaries.