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The Press Exception in the Dutch Copyright Act

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1. Introduction

This chapter focuses on the press exception as laid down in Article 15 of the Dutch Copyright Act. Information has gained increasing social and economic importance in the course of the past century, not only for those who make it their business to gather, treat and circulate it, but also for those who receive and use it. The transformation of the 20th century from an industrialized into an information society has intensified the need for a free flow of information where the news of the day and its analysis constitutes one of the building blocks of a participating citizenry and a booming information sector. The Netherlands, with its strong democratic and publishing traditions, exemplifies this evolution. Not surprisingly, the press exception has a long history in international and Dutch copyright law, albeit one marked by dramatic changes in technology and market conditions. In the following pages, the first section describes the justifications for the press exception. The next section gives an overview of the main legislative changes that took place over the years, analyses the judicial interpretation of the different elements of the provision and discusses the current practice with respect to the exchange of articles on current topics between news organizations. The following section puts the press exception in a European context: given the optional character of the press exception in the Information Society Directive, this section focuses on the solutions put in place in the neighbouring countries. The last section draws a short conclusion.

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2. The press exception in context

Most copyright systems in the world allow under certain conditions publishers of newspapers and periodicals to reproduce articles from other newspapers and periodicals, without the prior authorization of the rights owner. So does Article 15 of the Dutch Copyright Act, which not only promotes the free flow of information, but which at some point in history, also reflected industry practice. To a large extent, this provision indeed serves to prevent acts of unfair competition between members of the news publishing industry. The contours given to the limitation therefore have a definite impact on the shape of the information market. Remarkably since the very adoption of the provision in the Act, the press exception has had this twofold objective: to promote the free flow of information and to regulate competition among news organizations.

Early commentators on the Copyright Act 1912 stress that an untempered application of the copyright rules would lead to an untenable situation in society: were the owner's rights to be enforced to their fullest extent, the intellectual discourse would be seriously hindered, which would violate the letter and spirit of the copyright rules. Consequently, all copyright systems contain limitations on copyright. When delineating the boundaries of the limitation, it is the legislator's task to ensure that the restriction does not extend beyond what is required by the public interest.¹

From its very inception in the Act of 1912, Article 15 was meant to facilitate the dissemination of news of the day, news reports and articles, with a particular emphasis on those relating to political matters. According to the original text, with the exception of serial stories and tales, any newspaper article could be reproduced by another newspaper provided the source was indicated, unless the reproduction thereof was expressly forbidden. The initial text also stressed that the reservation of rights could not apply to articles concerning political discussions, news items and miscellaneous reports. Indeed, De Beaufort noted already in 1909 that the circumstances that gave rise to the adoption of a specific limitation allowing the reproduction of articles published in periodicals and newspapers were common occurrence in international relations. Hardly any newspaper in those days could survive without citing or borrowing articles from prestigious foreign publications.²

1 L.G. van Praag, *De Auteurswet 1912 en haar verband tot de herziene Berner Conventie*, Rotterdam: Nijgh & van Ditmar's Uitgever-Maatschappij 1912, p. 85; F.W.J.G. Snijder van Wissenkerke, *Het Auteursrecht in Nederland*, Gouda: G.B. van Goor Zonen 1913, p. 203.

2 H.L. De Beaufort, *Het Auteursrecht in het Nederlandsche en Internationale Recht*, diss. University of Utrecht, 17 December 1909, republished by Vereniging Buma, Amsterdam, 1993, p. 383.

The provision therefore traditionally served three main interests, those of authors, the public and publishers. The reproduction of articles by other newspapers was seen as the best reward for the journalists' intellectual labour. By establishing and reinforcing the journalists' authority and merit in a given field, the further reproduction of articles was considered to serve their pecuniary interests as much as their moral interests. The provision further served the public interest, because the content of a great number of newspapers, in particular local papers, having little financial resources, would have remained insignificant had they been unable to draw elements from bigger newspapers. By conferring rights owners the ability to prohibit the reproduction of their article through specific mention, the provision safeguarded the publishers' interests in all hypotheses, including in the very exceptional case where they would have had special reasons to wish that their article not be further reproduced. If on the other hand, in order to reproduce a newspaper article, the prior authorization from the rights owner had been required rather than be *presumed* in the absence of prohibition, it would in practice rarely have been requested. Even in the early 20th century, it was thought that the increasing demand for current news in modern journalism would not have given news enterprises the time needed to obtain permission. Consequently, the reproduction would not have taken place to the detriment of the triple interest mentioned above.³

It might well have been industry practice to borrow articles and news reports from each other, but the possibility for a newspaper to reproduce articles published in other newspapers or periodicals has always had important economic ramifications for the news reporting industry. Indeed, competition for the swift delivery of information on current events, or 'hot news', has always been fierce among enterprises the primary business of which is to gather and disseminate information.⁴ News agencies are thus particularly vulnerable to piracy. If second-comers can reproduce articles of newspapers and periodicals without authorization or remuneration, the time-consuming and expensive activities of gathering and distributing information are likely to rapidly become unprofitable for any news enterprise. Consequently, the scope of the limitation permitting the unauthorized – and mostly free – reproduction of articles from newspapers and periodicals constitutes a determinant factor in the formation and development of the information market, to the same extent as the possibility for rights owners to

3 P. Waukermans, *La Convention de Berne pour la Protection des Oeuvres Littéraires et Artistiques*, Bruxelles: Misch et Thron 1910, p. 107.

4 R.A. Vecht, 'Artikel 15 Auteurswet 1912 en de bescherming van nieuwsberichten', *Informatierecht/AMI* 1992/6, p. 103-109, p. 103.

expressly reserve their right with respect to published articles.⁵

Given the existing competition for the supply of information, international organizations and national legislators have been prompted, over the past century, to periodically look for legal solutions to prevent acts of unfair competition between newspaper publishers.⁶ However, since such regulation fell outside the scope of copyright protection and since it would have put a restraint on the free flow of information, a provision regulating acts of unfair competition in the area of news publishing has so far never been adopted, leaving the production and dissemination of information instead to the workings of the private market.⁷ In the absence of a more specific provision to that effect, commentators have often seen in Article 15 of the Copyright Act a form of prevention of unfair competition between newspaper publishers and journalists.⁸

Beyond regulating industry practice, the press exception obviously strongly contributes to the dissemination of information within society. The possibility to borrow news articles and radio commentaries by one member of the press or media from another is usually seen as a means to bring information to the public that would not otherwise be available and in this sense as a measure designed to promote the free flow of information.⁹ The provision's importance for the free flow of information has been recognized repeatedly since its enactment in the Copyright Act 1912, not only by the legislator who extended its scope to other forms of dissemination than newspapers and periodicals, but also by the courts, not least by the Supreme Court.¹⁰ Nevertheless, even if the promotion of the free flow of information within the Dutch society lies at the heart of a broad interpretation of the provision, most debates concerning the press exception have revolved over the years around the contours of this exception.¹¹ More often than not, these debates aimed at safeguarding the interests of newspaper publishers.

5 L.M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague: Kluwer Law International 2002, p. 58.

6 See Vecht, 'Artikel 15 Auteurswet 1912' p. 103-109, p. 107; and P.B. Hugenholtz, *Auteursrecht op informatie*, diss. Amsterdam (UvA), Deventer: Kluwer 1989, p. 87. The discussion has arisen yet once again in Germany where the third basket of Copyright Reform may contain a provision granting a related right for newspaper publishers. See: Sabine Börger, 'Leistungsschutzrechte von Zeitungs- und Zeitschriftenverlagen im Zeitalter der Digitalisierung', Deutsche Bundestag, Wissenschaftliche Dienste, WD 10 - 3000 -045/09, 2009, <http://tinyurl.com/cg89e6v>

7 Th.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, Zwolle: W.E.J. Tjeenk Willink 1994, p. 227.

8 Van Praag, *De Auteurswet 1912*, p. 90; Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 208.

9 S. Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights*, Oxford: Oxford University Press 2006, p. 797.

10 Supreme Court of the Netherlands, 10 November 1995, *IER* 1996, 2 (Knipselkranten).

11 Vecht, 'Art. 15 Auteurswet 1912', p. 103-109.

3. The press exception in the Dutch Copyright Act

3.1 *Legislative history and relationship to the Berne Convention*

Legislative history

The text of Article 15 of the Dutch Copyright Act has gone through a total of six legislative amendments over the past 100 years, some more important than others. Most of these modifications can be explained by the dramatic changes brought about in the communications technology and the ensuing market conditions. The news is no longer solely communicated on paper as it was at the beginning of the 20th century. It is now also communicated through radio, television, the Internet and more recently through mobile devices. These technological developments have given rise to new modes of exploitation of news reports and articles by news enterprises, as well as new forms of authorized and non-authorized uses by second-comers. In this constantly changing environment, the legislator has had the difficult task of finding a balanced solution allowing on the one hand, news items, news reports and articles on certain current topics to circulate without restriction, while at the same time protecting the news publishers' economic interests. Through the years the Dutch legislator has therefore been asked to clarify the scope of the provision with regard to the nature of the articles and reports that can be reproduced, by which category of organizations or individuals, using which means of communication and under which conditions.

The initial adoption of the provision in 1912 gave rise to substantial debates in the Chamber of representatives and later on by commentators, as did the legislative amendments brought to the provision in 1931 and 1985. Discussions arose time and again on the meaning of the words 'news of the day', 'miscellaneous information' and 'articles', and on the possibility to reserve rights preventing the reproduction of such 'articles'. Most important amendments were prompted by revisions of the Berne Convention, which the government elected to implement into Dutch law. Other modifications were rather technical in nature and for this reason did not generate as much discussion or opposition. Before turning to the Act of 1912 and its subsequent amendments, in the following subsection, let us first examine the history of the press exception in the Berne Convention.

Relationship to the Berne Convention

The Berne Convention has contained a provision allowing for the reproduction of news of the day, miscellaneous information and newspaper articles since its very inception in 1886. The delineation of the scope of this exception gave rise to extensive debates not only at the time of adoption of the initial provision, but also

at several conferences of revision of the Berne Convention during the subsequent 50 years.¹² The controversy, already in those days, concerned the scope of the exception and the balance to be achieved between protecting the rights owner's interests and promoting the free flow of information.

Article 7 of the Convention appeared in the initial text of the Convention but was revised during the Paris Revision of 1896, to provide that:

Serial stories, including tales, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced, in original or in translation, in the other countries, without the sanction of the authors or of their lawful representatives. This stipulation shall apply equally to other articles in newspapers or periodicals, when the authors or editors shall have expressly declared in the newspaper or periodical itself in which they shall have been published that reproduction is forbidden. In the case of periodicals it shall be sufficient if such prohibition is indicated in general terms at the beginning of each number.

In the absence of prohibition, such articles may be reproduced on condition that the source is indicated.

The prohibition cannot in any case apply to articles of political discussion, to news of the day, or to miscellaneous information.

After intense debate during the Berlin Revision of 1908, the new text of the press exception in the Convention was modified in three respects. First, the complete protection of the first paragraph was extended to cover all works, whether literary, scientific, or artistic. Second, the freedom to reproduce articles as laid down in the second paragraph of the provision was limited in two ways: first, by the fact that only newspaper articles could be reproduced, unless expressly forbidden; second, by the fact that only newspapers were allowed to make such reproductions, to the exclusion of private individuals. The third modification had as result to completely deny protection only in the case of news of the day and miscellaneous information, contrary to the previous formulation, which excluded 'articles of political discussion' as well. Article 9 of the Berne Convention (Berlin Revision, 1908) read as follows:

Serial stories, tales, and all other works, whether literary, scientific, or artistic, whatever their object published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors.

¹² Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, p. 797.

With the exception of serial stories and tales, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.

The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news.

This new wording was a compromise solution that satisfied no one and gave rise to severe inconsistencies.¹³ The Dutch Government formulated a reservation against Article 9 of the Berlin text and decided instead to transpose Article 7 of the Berne Convention in its version adopted in Paris on 4 May 1896.

The provision was slightly modified at the Rome Revision Conference in 1928 to specify that the reproduction from one newspaper or periodical to another is only permissible in relation to ‘articles on current economic, political or religious topics.’ These modifications were introduced in Dutch law through the legislative amendments of 1931. No modification was brought to the press exception at the Brussels Revision Conference in 1948, although the subject had been put on the conference’s agenda. The text of the press exception in the Berne Convention took its current and final form at the Stockholm Revision Conference in 1967. Old Article 9 became Article 10*bis*(1) of the Berne Convention and underwent extensive reshuffling, for the first paragraph disappeared to be incorporated into the new general right of reproduction (new Article 9) and the third paragraph moved to Article 2(8). Article 10*bis*(1) on the press exception now reads:

It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

With the Revision of the Stockholm Conference, the prohibition of reservation on news of the day or miscellaneous facts of information has been transformed into a mandatory exclusion from copyright protection. Article 2(8) of the Convention

¹³ Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, p. 797.

states that ‘the protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.’ The usefulness of this provision was called into question: does this exclusion constitute a public-policy exception or is it merely the confirmation that news items are incapable of constituting literary and artistic works? Ricketson and Ginsburg would seem inclined to adopt the second view, saying that this rule simply ‘embodies the basic principle that copyright protection does not extend to facts and information per se, but only to the form in which those facts are presented’. As such, Article 2(8) of the Convention is not necessary.¹⁴ However, while the provision excludes protection under ‘this Convention’, it does not prevent countries of the Union from granting protection, for example, under unfair competition law.¹⁵

One of the most important modifications brought by the Stockholm Revision is the fact that the press exception of Article 10*bis*(1) is no longer mandatory. The lawfulness of reproductions from the press and by the press is a matter now entirely left to the discretion of the countries of the Union. The acts permitted pursuant to the exception have been broadened, however, to include broadcasting or the communication thereof by cable, just as the subject matter of the exception has also been expanded to cover articles and broadcast works of the same character. Since the press exception was no longer confined to the reproduction of printed articles, delegates of the Stockholm Conference thought it more fitting to include it in Article 10*bis* which dealt with the reporting of current events by such other means as broadcasting.¹⁶ As shown in the next subsection, the press exception in the Dutch Copyright Act was subject to numerous amendments in order to comply with international obligations and to adapt to technological changes.

3.2 *The Act of 1912 and subsequent amendments*

While the initial relationship between Article 15 of the Dutch Copyright Act and the Berne Convention was a stormy one, subsequent legislative amendments brought the Dutch Act more or less in line with the content of Article 10*bis*(1) of the Berne Convention. Be that as it may, the Dutch press exception stills shows interesting features not all of which are to be found in other copyright acts or even in the Berne Convention.

¹⁴ Id., p. 499. See also: De Beaufort, *Het Auteursrecht in het Nederlandsche en Internationale Recht*, p. 386.

¹⁵ See: van Praag, *De Auteurswet 1912*, p. 90.

¹⁶ Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, p. 801.

Initial Act of 1912

In line with Article 7 of the Paris text of 1896 of the Berne Convention, Article 15 of the Act of 1912 read as follows:

It shall not be regarded as an infringement of copyright in a newspaper or periodical the reproduction of articles, reports and other documents published therein by another newspaper or periodical, provided that the newspaper or periodical from which they are taken, is clearly indicated.

Serial stories, including tales, published in newspapers or periodicals may not be reproduced, in original or in translation, without the permission of the authors or of their lawful representatives.

This stipulation shall apply equally to other articles in newspapers or periodicals, when the authors or editors have explicitly declared in the newspaper or periodical itself in which they are published that reproduction is forbidden. In the case of periodicals it shall be sufficient if such prohibition is indicated in general terms at the beginning of each number.

A reservation as specified in the previous paragraph may not be made in relation to articles of political discussion, to news of the day, or to miscellaneous information.

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

De Beaufort distinguishes three types of writings governed by the provision: serial stories and tales, articles over political discussion, and other articles. The reproduction of the first category is always subject to the permission of the author, while the reproduction of other articles published in newspapers and periodicals is allowed unless the rights have been reserved. The second category, the articles on political discussion, gave rise to an intense debate. De Beaufort explains that the unconditional permission found in the Paris text of 1896 to adopt articles on political discussion from foreign newspapers and periodicals was undoubtedly based on the fact that the practice was widespread and almost inevitable. During the Berlin Conference, attendees recognized, however, that there was no real justification to completely deny protection to writings that would otherwise meet all requirements for copyright protection. For this reason, the protection of articles on political discussion was raised in the Berlin text of 1908 to the same level as all other types of articles. Under 'articles on political discussion' were to be understood only the writings that concerned the daily politics and not essays on political and socio-economic issues. Nevertheless, in the Dutch Act, in line with the Paris text of 1896, articles on political discussion were put on the same line as news of the day and miscellaneous information, in the sense that

the reproduction was always allowed even where the rights owner had made a reservation of rights.¹⁷

According to the legislative history, one of the main reasons presented by the Dutch Government to register a reservation to Article 9 of the Berlin text of 1908 of the Berne Convention and adopt Article 7 of the Paris text of 1896 instead, was the fact that only newspaper articles could be reproduced, unless expressly forbidden. This formulation was felt to be too narrow, because it meant that the reproduction of similar articles taken from periodicals, rather than newspapers, would have been subject in all cases to the rights owners' prior authorization. This, in turn, would have created obstacles for the reproduction of articles from foreign periodicals.¹⁸

One last point discussed at the time of adoption of the Dutch Act was the extent of the obligation to mention the source of the articles. The texts of 1896 and 1908 of the Berne Convention showed a difference here as well: the obligation to mention the source under the Paris text applied only to articles the reproduction of which could be forbidden through a reservation of rights, contrary to the Berlin text which extended the obligation also to articles on political discussion, news of the day and miscellaneous information. De Beaufort and Snijder van Wissenkerke both expressed critique concerning Article 7 of the Paris text, convinced as they were that the Netherlands would have done better to implement Article 9 of the Berlin text. Both commentators feared that the provision of the Dutch Act would give rise to unequal and unfavourable treatment of foreign publications, both in terms of what could be reproduced and of the requirement of indication of the source, and that this would negatively affect relations between Dutch and international publishers of newspapers and periodicals.¹⁹

Amendments of 1931

The Dutch Copyright Act 1912 was modified following the signature of the Berne Convention at the Rome Revision Conference in 1928. This occurred through the legislative amendments of 1931. Noteworthy is the government's decision to reconsider the reservation made back in 1912 and to unconditionally implement Article 9 of the Berne Convention, since it offered greater protection than Article 15 of the Dutch Act. Regarding articles taken from and reproduced in a national newspaper or periodical, the provision could remain essentially unmodified. However, with respect to the reproduction of articles taken from foreign

17 De Beaufort, *Het Auteursrecht in het Nederlandsche en Internationale Recht*, p. 389.

18 Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 211.

19 De Beaufort, *Het Auteursrecht in het Nederlandsche en Internationale Recht*, p. 394; and Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 215.

publications, two changes were necessary to establish that 1) the reproduction of articles was only lawful if the articles concerned current economic, political or religious topics, and only insofar as the rights were not explicitly reserved; and 2) the copyright could also be reserved in relation to articles on political discussion in foreign newspapers and periodicals. The provision now read as follows:

It shall not be regarded as an infringement of copyright in a newspaper or periodical to take over articles, reports and other documents published therein, with the exception of serial stories and tales, without the permission of the author or his lawful representatives by another newspaper or periodical, provided that the newspaper or periodical from which they are taken, is clearly indicated, and unless the rights are explicitly reserved. In the case of periodicals it shall be sufficient if such reservation is indicated in general terms at the beginning of a number. A reservation may not be made in relation to articles of political discussion, to news of the day, or to miscellaneous information.

The power to take over in the previous paragraph, exists with respect to foreign newspapers and periodicals only in relation to news of the day, miscellaneous information or current articles on economic, political or religious topics; the last sentence of the preceding paragraph is not applicable to articles which relate to political issues.

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

As a result of these modifications, the Dutch press exception created a differentiated regime for national and foreign newspapers and periodicals: while the former was believed to reflect industry practice, the latter was meant to comply with the requirements of the Berne Convention (Rome, 1928). This double solution was deemed admissible under the Berne Convention since this Convention has no effect on purely internal disputes.²⁰ The amendments of 1931 further remained relatively uncontroversial: a proposal to clarify the manner in which the source should be indicated was rejected by a majority in parliament, on the ground that any additional specification would likely give rise to a strict and inflexible application of the provision, to the detriment of industry practice itself.

Amendments of 1972

The amendments of 1972 brought little change to the press exception. The main modifications to Article 15 of the Act concern the clarification of the type of

²⁰ H. Pfeffer, *Kort commentaar op de auteurswet 1912*, 2nd ed., entirely reworked by Gerbrandy, Haarlem: De Erven Bohn 1973, p. 154.

publications covered by the exception, namely daily and weekly newspapers or periodicals rather than the vague expression ‘newspaper or periodical’, and the requirement to give the name of the author, if it appears in the source. The 1972 legislative amendments retained the double regime for national and foreign newspapers and periodicals. However, commentators, like Pfeffer, began to raise serious doubts as to the conformity of this rule with industry practice:

The regular reader of newspapers and periodicals will have noticed that reproduction without authorization rarely takes place. And indeed: journalists pledge to respect each other’s work, and this provision is hardly used in practice. The belief of De Beaufort and Wickers Hoeth that the power to take over [articles] serves the public interest is correct, but the practice proves that the common view still does not condone the taking over left and right of everything that is loose and fixed. The journalistic practice is (thankfully) more stringent than the law allows.²¹

Amendments of 1985

The legislative amendments of 1985 gave the press exception a major overhaul. Not only did these amendments abolish the differentiated regime established in 1931 for the reproduction of national and foreign articles, but they also modernized the provision in the light of the advent of radio and television broadcasting. The traditional scope of application of the press exception, ‘from the press, in the press’, was therefore extended to cover news reports and articles communicated by radio and television broadcasting organizations. These modifications brought Article 15 of the Dutch Act in compliance with Article 10*bis* (1) of the Paris Act of 1971 of the Berne Convention. Article 15 of the Act stated:

It shall not be regarded as an infringement to take over news reports, miscellaneous reports or articles concerning current economic, political or religious topics published in a daily or weekly newspaper or weekly or other periodical, or works of the same nature that have been broadcast by radio or television or transmitted by cable through a cable broadcasting installation as referred to in the Telegraph and Telephone Act 1904 (Gazette nr. 7), if:

- 1° the adoption is made by a daily or weekly newspaper or weekly or other periodical in a radio or television programme or transmitted by cable through a cable

²¹ H. Pfeffer, *Kort commentaar op de auteurswet 1912*, 2nd ed., entirely reworked by Gerbrandy, Haarlem, De Erven Bohn, 1973, p. 149-150.

broadcasting installation as referred to in the Telegraph and Telephone Act 1904 (Gazette nr. 7);

2° the provisions in Article 25 are observed;

3° the source is clearly indicated, including the name of the author, if it appears in the source; and

4° copyright is not expressly reserved.

In the case of periodicals it shall be sufficient if such prohibition is indicated in general terms at the beginning of a number.

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

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

When revising the press exception, the Dutch lawmaker also made an effort to make this provision more consistent with other limitations contained in the Dutch Act, namely with the quotation right (Article 15a) and the educational use exception (Article 16). This explains why subparagraph 2° was added to the first paragraph requiring the news entity using another entity's articles to take account of the latter's moral rights. Further attempts during the legislative debates to modify the requirement to indicate the source of the article and the name of its author, and to make some changes to the rule regarding the reservation of rights were rejected.

Recent amendments

Article 15 of the Act underwent two rather technical amendments in 1988 and 1993: the first one, to substitute the two references to the Telegraph and Telephone Act 1904 by that of the Telecommunications Act 1988; and the second, to eliminate the two references to the Telecommunications Act 1988 and replace them with the sentence: 'broadcast in a radio or television programme'. These two modifications are a clear illustration of the inevitable technical evolution in the means of communication and dissemination of news and the wish of making the provision as technology-neutral as possible. The most recent modification took place in 2004 when the Information Society Directive was implemented in Dutch law. Current Article 15 of the Dutch Copyright Act states that:

1. It shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work to use news items, miscellaneous items or articles on current economic, political or religious topics or works of the same nature which have been published in a daily or weekly newspaper or weekly or other periodical, radio or television programme or other medium that has the same function, if:

- 1° the use is made by a daily or weekly newspaper, a weekly or other periodical, a radio or television programme or other medium that has the same function;
 - 2° the provisions of Article 25 are observed;
 - 3° the source, including the name of the maker, is stated clearly; and
 - 4° the copyright is not expressly reserved.
2. The reservation meant in the first paragraph sub 4° cannot be made with respect to news items and miscellaneous items.
 3. This Article shall also apply to use in a language other than the original.

The implementation of the Information Society Directive brought two main changes to the provision: 1) the addition of the words ‘or other medium that has the same function’ in the opening paragraph of the provision; and 2) the abrogation of the then second paragraph concerning the making of a reservation of rights.²² The Explanatory Memorandum to the Implementation Act of 2004 specifies that the then existing Article 15 on the reproduction of articles by the press is media-specific since it refers to newspapers, periodicals, and radio and television programmes. However, Article 5(3)(c) of the Directive not only leaves member states free to decide whether to implement the exception or not, but it also allows the national legislator to provide for a technology-neutral formulation of the provision. Moreover, countries enjoy sufficient leeway to give the term ‘press’ their own interpretation. Indeed, this term is no well-defined concept. Although the terminology used at the time could be extensively interpreted, as applicable to subscription television, hospital-broadcast, services as Viditel and teletext, or ‘the newspaper on the Internet’, there is no reason to assume that the acts of reproduction guaranteed by this article could not also be applied to other news media with the same features, such as news services on mobile telephone and web pages on the Internet. Hence, the determination that the scope of this article be extended to ‘any other medium that has the same function’.

The Explanatory Memorandum also explains that the recommendation put forward by the Commissie Auteursrecht (Copyright Commission)²³ should be followed, making it possible for a news publisher to make a general reservation of rights. Hence, the abrogation of the relevant paragraph of the Act. The separate rule pertaining to the making of a reservation of rights in the case of periodicals, according to which the reservation could be made in general terms at the top of an issue, is abolished. The government agrees with the Copyright Commission

22 House of representatives (Tweede Kamer), Document 2003-2004, 28482, No. 3, p. 40.

23 The Copyright Commission is composed of renowned scholars and experts in the field who have received the mandate to give advice to the government on matters of copyright law.

that such special provision is arbitrary and in fact forces the legislator to check whether or not special rules are also needed for other types of publications. The need is not proven. However, the law requires that the proviso be ‘express’, which is also allowed by the Directive. The user must clearly understand that a reservation is being made. The Act no longer contains any special requirements regarding the place where the reservation must be made. Such notice may, for example, be placed in a well visible location on the publication or posted on the website.

Note that the Copyright Commission’s recommendation of allowing a reservation to be made for ‘news items’ and ‘miscellaneous reports’ was rejected by the government without further mention or explanation. This is the proper outcome since accepting the Commission’s recommendation would have contravened Article 2(8) of the Berne Convention.

3.3 *Developments in case law and doctrine*

Not only the wording of the press exception in the Copyright Act, but also its interpretation by the courts have an impact on the shape of the information market.²⁴ Indeed, the courts’ interpretation of the different elements of the exception has at times stretched the boundaries of the press exception, while at other times it has shrunk them. Two elements contribute to the delineation of the exception’s scope: the content covered and the beneficiary of the exception. A narrow interpretation of the news report exception in principle restricts the possibility to reproduce newspaper articles and broadcast commentaries only to press or broadcasting entities of the same nature, provided that the copyright is not explicitly reserved. By contrast, a broad interpretation of this limitation extends the privilege to institutions and enterprises that offer second-hand information on selected topics to their subscribers or employees in the form of collections of newspaper clippings, provided that the copyright is not explicitly reserved. The space available for the re-use of articles, news reports and miscellaneous information published in print or broadcast by competing news organizations has over the years been contingent on the wind blowing in the jurisprudence. The following subsections describe how jurisprudence and literature have interpreted the provision, with respect to its subject matter (i.e. what can be reproduced) and to the beneficiaries of the exception (i.e. who can reproduce), which led to the rise and fall of the free newspaper clipping services. A last section shortly describes the current practice.

²⁴ Van Engelen, *Prestatiebescherming*, p. 226.

From news of the day to miscellaneous information and articles

The first element contributing to the delineation of the scope of the press exception is the determination of the types of content covered by the provision, for only a limited spectrum of copyright protected works actually falls within the scope of the exception. Article 15 of the Act applies to ‘news items, miscellaneous items or articles on current economic, political or religious topics or works of the same nature’.²⁵ These can be classified into three categories:

- 1 Content that may *always* be taken over (even if the rights are explicitly reserved): news items and miscellaneous items;
- 2 Content that may *only* be taken over provided that no reservation of rights has been made (in such a case, prior authorization of the rights owner is required): articles on current economic, political or religious topics or works of the same nature published in a daily or weekly newspaper or weekly or other periodical, radio or television programme or other medium that has the same function;
- 3 Content that may *never* be taken over without the prior authorization of the rights owner: everything that does not fall under 1. or 2. above, including for example works of art, illustrations, photographs etc.²⁶

The scope of the press exception has generally been construed as encompassing not only the general news items that daily newspapers bring to the attention of the public, but also specific creations, findings and opinions, the terms ‘news items’ and ‘miscellaneous items’. However, the manner in which these two concepts differ from each other and from articles, has given rise throughout the years to its fair share of speculation and interpretation by courts and commentaries. The question is not merely theoretical since ‘news items’ and ‘miscellaneous items’ occupy a special place in the provision, for no reservation of rights is permitted in respect of these two types of writings.²⁷

Early commentators already debated as to the proper meaning to give to the two terms of ‘news items’ (*nouvelles du jour*) and ‘miscellaneous items’ (*faits divers qui ont le caractère de simples informations de presse*). In the course of the years, news items have come to be defined as the simple announcement of a fact of potential interest to the general public, while miscellaneous items are to be construed as trivial notices about fires, robberies, skirmishes and other

²⁵ Hugenholtz, *Auteursrecht op informatie*, p. 84.

²⁶ De Beaufort, *Het Auteursrecht in het Nederlandsche en Internationale Recht*, p. 384; N. Van Lingen, *Auteursrecht in hoofdlijnen*, 5th ed., Groningen: Martinus Nijhoff 2002, p. 127; J.H. Spoor, F.W. Verkade and D.J.G. Visser, *Auteursrecht*, 3rd ed. Deventer: Kluwer 2005, p. 231-232.

²⁷ S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Arnhem, Gouda: Quint B.V. 1988, p. 216.

less important facts.²⁸ Whether or not news of the day and miscellaneous information are protectable by copyright raises in Dutch law an important issue knowing that, inasmuch as the news reports are communicated to the public in the written form, they are eligible for protection under the catalogue rule ('geschriftenbescherming').²⁹ This undoubtedly explains why the Copyright Act still follows the pre-1967 Berne Convention model by prohibiting any reservation of rights to be made in respect of such news of the day and miscellaneous information, rather than expressly excluding them from copyright protection.

Apart from the rule contained in the Copyright Act, Article 5(4) of the Media Act 2008 essentially provides that 'providers of broadcasting services that have acquired exclusive rights in relation to events of high interest, shall make short fragments available for a fee to other providers of broadcasting services in the European Community that so request. The requesting provider of a broadcasting service is free to choose fragments of events of high interest'. This provision implements Article 15 of the Directive on Audiovisual Media Services into Dutch law.³⁰

The co-existence of the copyright and the media law rules was examined in a case opposing the organizer of football competitions, 'Eredivisie Media & Marketing', to the Stichting Regionale Omroep Overleg en Samenwerking (ROOS), which concerned the broadcast of Premier League matches. Undisputed was the fact that these matches are to be regarded as events of high interest. The requests of regional broadcasters for fragments of Premier League matches were therefore covered by the scope of Article 5(4) Media Act 2008. Eredivisie Media & Marketing is in principle obliged to provide, upon the request of regional broadcasters, fragments of images of Premier League football matches broadcast by it, through 'www.eredivisie.nl' and 'Eredivisie Live,' against payment of the fee specified in paragraph 6 of Article 5(4) of the Media Act 2008. The District Court of Utrecht observed, however, that the obligatory disclosure of news fragments according to the Media Act constitutes a regulation of access to the fragments, but not a licence to use. In the court's opinion, the provision of the Media Act does not constitute a limitation on copyright. In the present case, the programmes

28 H. Pfeffer, *Kort commentaar op de auteurswet 1912*, 2nd ed., entirely reworked by Gerbrandy, Haarlem: De Erven Bohn 1973, p. 153 ; see: Supreme Court of the Netherlands, 17 April 1953, *NJ* 1954, 211. The carefully prepared report about a major disaster certainly does not fall under the definition of news report.

29 Dutch Copyright Act, Art. 10(1)^{1°}; see Chapter 3.

30 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), O.J.E.U., L 95/1, 15 April 2010, Art. 15.

reproduced integrally were mainly intended to amuse and entertain viewers and therefore could not be described as 'news'. Since the programmes broadcast by defendant ROOS did not take place inside a 'news' radio or television programme or in another medium having the same function, the press exception did not apply.³¹

Beyond paper articles

A second element contributing to the circumscription of the exception's scope consists in defining the types of media from which and by which news reports, miscellaneous information and articles may be taken over. Article 15 of the Act allows the use of news reports, miscellaneous items and articles 'which have been published in a daily or weekly newspaper or weekly or other periodical, radio or television programme or other medium that has the same function'. For commentators and courts, the press exception essentially covers services having as main objective to present news to the public on a periodically recurring basis, irrespective of the dissemination method used.³² The last legislative amendment of 6 July 2004 was partly intended to give Article 15 of the Copyright Act a technology-neutral formulation by adding 'or other medium that has the same function'.³³ The free flow of information would not be served adequately if the news reports, miscellaneous facts of information and current articles on specific subjects were only made available provided they were disseminated with a particular technology.

An important, if not decisive, factor in assessing whether an information service falls within the scope of the exception consists in looking at what is accepted in accordance with social custom.³⁴ An incidental publication, even if labeled 'newspaper', will not meet this criterion, just as the periodical publication of certain types of writings (e.g. annual reports of companies) will never result in their qualification as a newspaper or other periodical. Technical and scientific journals have been recognized as falling under the exception, since it is difficult to distinguish between a newspaper and a periodical on the one hand, and other types of writings that are published on a more or less regular basis, on the other hand.

Since the legislative amendments of 2004, several cases have reached the courts regarding the use of news reports by other services on the Internet. One

31 District Court of Utrecht, 12 May 2010, (Roos v. Eredivisie) IEPT20100512, Rb Utrecht, ROOS v. Eredivisie.

32 Pfeffer, *Kort commentaar op de Auteurswet 1912*, p. 150.

33 Spoor/Verkade/Visser, *Auteursrecht*, p. 227.

34 *Id.*, p. 228.

of them involved the use of the digital version of a newspaper article by a news organization aimed at offering a digital news service via the website *GeenStijl*. According to the District Court of Amsterdam, the reproduction of an interview on defendant's website could qualify as a reproduction made by another medium that fulfills the same function, so that it was not an infringement.³⁵ In another dispute, the entity using the news articles could not be said to have the same function as a daily, or weekly newspaper, but rather one of archive. Upon ruling that the exception did not apply, the District Court of Breda stressed that at the time of adopting the 2004 amendment, the legislator observed 'that this provision does not apply, as in the present case, to the storage or presentation of a more permanent character, where a timeless element of sustainable exploitation plays a dominant role, such as archival functions.'³⁶

Similarly, the District Court of Breda concluded in a case involving the website *Webliciation* that it had infringed *Cozzmoss*' copyright and that the press exception was not applicable. In the opinion of the court, the website *www.aroundtheglobe.nl* could not be regarded as a medium that fulfills the same function as a daily, or weekly newspaper, magazine, radio or television programme within the meaning of Article 15. The website of the defendant did not have as primary goal to bring daily news on various topics, but rather, as the defendants themselves asserted, to offer a platform where anyone can post his own story for free. Information could be found on the website on product testing, hostels, or travel insurance. Only a small section of the website pertained to news and the exception of Article 15 of the Copyright Act could therefore find no application.³⁷

Finally, another case heard by the District Court of Amsterdam stranded on the first of the four conditions of application of the press exception. The first condition requires that the reproduction of a work must take place by a daily, or weekly newspaper or periodical or a radio or television programme or other media (collectively, shortly referred to as 'the media') that fulfills the same function. Plaintiff argued that the website, *nuijij.nl*, did not comply with this requirement, because its purpose and main objective was not to generate news. The fact that on the website (some) news is generated did not mean that the site could therefore be counted as 'the media'. Nor did the fact that defendant wrote articles on *www.nuijij.nl* and any other digital newspapers entail that the site was therefore a press

35 District Court of Amsterdam, 12 May 2010, IEPT20100512 (*Nijmeegse Stadskrant v. Geen Stijl*).

36 District Court of Dordrecht, 21 July 2011, LJN: BR2517 (*Cozzmoss B.V. v. Belangen Vereniging Funderings Problematiek*).

37 District Court of Breda, 14 September 2011, LJN: BT2326 (*Cozzmoss v. Webliciation*); the District Court of Breda, kanton Tilburg, came to a similar conclusion in a similar case of 29 June 2011 (*Cozzmoss B.V. v. Richards B.V.*) IEPT20110629.

organization. This meant that the first condition was not met and the exception was therefore not applicable.³⁸

The rise and fall of (free) newspaper clipping services

Article 15 received for a long time a very broad interpretation from the courts. This broad interpretation can be partly explained by the fact that in the Explanatory Memorandum to the legislative amendments of 1985, newspaper clipping services were explicitly declared to fall within the scope of the exception. Hence, whereas the press exception would literally only allow the use of articles or broadcast commentaries by the press or by broadcasting entities of the same nature, it has been applied over the years to institutions and enterprises that offer second-hand information on selected topics to their subscribers or employees in the form of collections of newspaper clippings.³⁹

The Dutch Supreme Court followed this line of interpretation and applied the provision to a governmental newspaper clippings service, in the landmark *Knipselkranten* case. The Foundation for Reprography Rights (Stichting Reprorecht) sued the Association of Dutch Libraries and Reading Centres (NBLC) and the Province of North-Brabant for failure to obtain a licence for the reproduction and dissemination of newspaper clippings among the employees of the Province. The Supreme Court considered that the notion of 'periodical' in the sense of Article 15(1) of the Act included an intermittently issued publication, made in the interest of the free flow of information, even if it consisted of nothing else than contributions on selected subjects taken from a collection of daily news in magazines or periodicals. In the Court's opinion, the exception of Article 15 of the Act also applied to the production of newspaper cuttings, including in cases where this only involved selection work by an institution that could not be regarded as a 'press organ' in the everyday sense of that term. The Supreme Court's decision met with strong critique in the commentaries. As a consequence of this flexible interpretation of Article 15, some commentators feared that the economic interests of newspaper publishers would increasingly be put at risk because it basically encouraged second-comers to free ride on the creative efforts of others.⁴⁰

Following the *Knipselkranten* decision, the District Court of Rotterdam also applied the press exception to a press review service made available over the

38 District Court of Amsterdam, 17 August 2011, LJN: BT6885

39 Supreme Court of the Netherlands (Hoge Raad), 10 November 1995, No. 15.761, *IER* 1996, p. 20, (*Knipselkranten*), with note by Hugenholtz, p. 28.

40 C.A. Alberdingk Thijm, 'Fair use: het auteursrechtelijk evenwicht hersteld', *Informatierecht/AMI* 1998/9, p. 145-153, p. 145.

Internet.⁴¹ In this case, several newspaper publishers brought action against the makers of a website, www.kranten.com, which presented a selection of news items and links to articles from the plaintiffs' newspapers. The defendant's website contained the names of the plaintiffs' national newspapers, accompanied by a list, updated daily, of titles of news items and articles that appeared on the websites of the respective newspapers. When clicking on the titles or the lists, the user was directly linked to the corresponding news item or article on the newspaper's website, thereby bypassing the newspaper's respective homepage and advertisements. The plaintiffs argued that the defendant's activities constituted an infringement of their copyright in the articles and of their *sui generis* right in the database, as well as an act of unfair competition. The court rejected all claims. Assuming that titles and lists were copyrightable subject matter, the court held that the defendant, Eureka, qualified as a press organization, the press reviews of which were covered by the exemption of Article 15 of the Act.

With the emergence of digital networked technology, the wind started to turn for the providers of newspaper clipping services. The ease with which articles from electronic newspapers can now be reproduced became a serious threat for the publishers' interests and spurred courts more recently to reassess the interpretation given to the exception. In a first dispute, a number of newspaper publishers instituted proceedings against the newspaper clipping service, known as Euroclip.⁴² Euroclip offered its clients a service of digital newspaper clippings tailored to their individual needs – scanning and sending clients a selection of articles on specific topics. The District Court of Amsterdam distinguished this case from the *Knipselkranten* case, and rejected the defendant's argument based on the press exception. According to the court, Euroclip's service was not eligible for the press exception because of its commercial purpose. The court ruled that given the substantial commercial interests of the defendant, the newspaper clipping service could not qualify as publications issued for the promotion of the free flow of information. In this light, the interests of the defendant did not weigh more than those of the plaintiffs to protect their copyright. This judgment gave rise to critique: while commentators agreed with its outcome, they strongly disapproved the motives. Newspapers and periodicals are also published for commercial purposes; and these are precisely the media covered by Article 15 of the Act and the underlying Article 10bis of the Berne Convention.⁴³ The court's

41 District Court of Rotterdam, 22 August 2000, *Informatierecht/AMI* 2000/10, p. 205 (Kranten.com).

42 District Court of Amsterdam, 4 September 2002, *MediaForum* 2002-10, p. 329, para. 6.2, *AMI* 2003-1, p. 22 (Uitgevers en Freelancers v. Knipselkranten).

43 District Court of Amsterdam, 4 September 2002 *AMI* 2003-1, p. 22 (Uitgevers en Freelancers v.

argument, if followed, would have excluded the vast majority of newspapers and periodicals from the application of the press exception.

A subsequent case opposed the newspaper publishers association (Nederlandse Dagblad Pers – NDP) to the State of the Netherlands, in which the publishers sued the state for copyright infringement for scanning and communicating electronic copies of newspaper articles. The District Court of The Hague ruled in favour of the newspaper publishers and ordered the state *inter alia* to stop scanning, reproducing and communicating, whether or not through an internal network, the copyright works that appeared in the newspapers of the claimants, except for non-original messages, and to cease to do so as long as no permission had been obtained from the publishers. The court considered that the scanning conflicted with the normal exploitation of the newspapers and unreasonably prejudiced the legitimate interests of the publishers, in contravention of the three-step test in Article 5(5) of the Information Society Directive.⁴⁴

More recently, the scope of Article 15 was further narrowed down, as a result of a decision by the Court of Appeal of Leeuwarden.⁴⁵ The court ruled that the unauthorized making of paper clippings of newspaper and periodical articles for which the rights were expressly reserved amounted to copyright infringement. In this case, the department of communications and administrative support of the Province of Flevoland periodically produced and distributed paper versions of newspaper clippings to the employees of the Province. These paper clippings contained a selection of articles from national and regional daily and weekly publications. The plaintiffs, all publishers of daily and weekly newspapers and magazines, sued for copyright infringement on the ground that the exception was not applicable since all rights in the publications had been expressly reserved. The defendant contested this, relying on the Supreme Court's decision in the *Knipselkranten* case. The Court of Appeal of Leeuwarden observed that Article 15 of the Act must be interpreted in the light of the Berne Convention and in conformity with the Information Society Directive. The court then quoted recitals 9, 10 and 32 of the Directive, emphasizing the aim of the European legislator of granting strong protection to authors and securing them fair compensation for the use of their works, and noting the exhaustive character of the list of limitations in Article 5 of the Directive. The defendant's argument that the production and

Knipselkranten), with annotation from J.H. Spoor, p. 26.

44 District Court of The Hague, 2 March 2005, *NJF* 2005, 165. See: Judica Krikke, '(Case Comment) Netherlands: copyright: electronic press clippings services', *E.I.P.R.* 2003, 25(1), N5. On the European context, see section 4 below.

45 Court of Appeal of Leeuwarden, 26 July 2011, LJN: BR3119, *AMI* 2011-6, p. 232-235 (NDP v. Provincie Flevoland), with annotation from K.J. Koelman.

distribution of the newspaper clipping service pursued no commercial purpose was deemed irrelevant. What the court did consider relevant was that the plaintiffs would miss income should the Province of Flevoland continue using NDP's articles without paying remuneration.

Considering the above, the Court of Appeal opined that, should the Copyright Act be interpreted as preventing a reservation of rights on copyright protected articles, this would be in conflict with the letter and intent of the Directive, in particular with the need to grant strong protection to right owners and to secure fair compensation for the use of their works. Consequently, the only interpretation of Article 15 paragraph 2 of the Dutch Act that is in conformity with the Directive consists in saying that the prohibition on the reservation of rights can only be made with respect to non-original news items. The court distinguished the present case from the Supreme Court's *Knipselkranten* decision, saying that the Supreme Court had considered neither the issue of the reservation of rights nor the interpretation of 'news of the day and miscellaneous information'. The Court of Appeal added that the need to promote the free flow of information never implied that the right owners could not reserve their rights. Finally, to the plaintiff's objection that paragraph 2 of Article 15 of the Dutch Copyright Act is devoid of any purpose, the Court of Appeal replied that this provision is indeed necessary for otherwise, a publisher would be able to claim the unique protection granted in the Netherlands to non-original writings by simply reserving all rights.

The Court of Appeal concluded that the production and distribution of paper clippings of newspapers constitute a violation of the rights in the copyrighted articles published in the daily and weekly papers of NDP, with the exception of the non-original writings, whenever the rights have been explicitly reserved and a fee has not been paid to the rights owner. This is a very interesting conclusion indeed, for Article 15 of the Copyright Act does not foresee the payment of fair compensation to the rights owners and no court has ever ruled exactly in this sense before. Of course, too strict a prohibition on the making of newspaper clippings would have risked receiving bad press because of its inevitable encroachment on the free flow of information.

3.4 *Current practice*

Admittedly, the possibility given to rights owners to place a reservation of rights appreciably weakens the practical significance of the press exception. Indeed, most if not all, Dutch news organizations explicitly reserve the rights in their copyrighted articles and programmes. As explained by the Court of Appeal of Leeuwarden in the *Province of Flevoland* case, only non-original news of the

day and miscellaneous information are free for re-use, since they may not be subject to a reservation of rights. As a result, news organizations have developed, over the years, the practice of exchanging articles and programmes on current economic, political or religious topics or works of the same nature on the basis of (often reciprocal) contractual agreements. The essence of such arrangements is a form of *quid pro quo* between organizations. However, even in view of such a long-standing contractual practice, technological developments and changes in market conditions force news enterprises to innovate in order to find new ways of sharing news and keeping their competitive advantage.

One illustration of this new trend is the recent launch by the Dutch Broadcasting Foundation (NOS) in cooperation with the Dutch Public Broadcasting (NPO) of an experimental on-demand news fragments channel,⁴⁶ where websites of newspapers and more general news websites can now add for free NOS video footage to their own content. Existing video content from the NOS can thus be placed and played on other news sites. The news clips are available for all sites of newspapers and more general news websites. According to the NOS, the competitive relationship will not be upset because everyone will have the same material at its disposal. In addition, the NOS sets as a condition that only part of the news websites' online video offerings consist of existing NOS material. In this way the market for online video content is not unnecessarily disturbed. According to the NOS, this project can only yield a win-win situation: the free online news sector is facilitated in its need for video content, while the NOS reaches new and additional audiences with its video material. The latter contributes to the achievement of the NOS' mission to serve the highest possible proportion of the Dutch population. The availability of news videos of the NOS is partly the result of recommendations of the Brinkman Committee, the Council for Culture and the Media Commission, alleging that public broadcasting should intensify its cooperation with the newspaper industry.⁴⁷ The newspapers had indicated that the problems they encounter weaken their competitive offering of video material on the Internet compared to public broadcasters.

When articles on current topics are reproduced and distributed by newspaper clippings services, there is from the perspective of the original news service no direct *quid pro quo* to speak of, compared to the exchange that can take place between news organizations of the same nature. Nevertheless, these services play an increasingly important role in today's information society: they aggregate

46 'NOS deelt videocontent met dagbladen en nieuwssites', 13 January 2012, available at: <http://over.nos.nl/voor-de-pers/nos-persberichten/detail/7>

47 Raad voor Cultuur, Tijdelijke Commissie Innovatie en Toekomst Pers, The Hague, 2009, p. 55.

and re-package the news according to their clients' individual preferences, using the full potential offered by the digital networked technology. Such services can monitor the news, create word indexes, forward headlines and summaries, allow for key word searches and set out hyperlinks to each relevant article. The value of these added features is unmistakable for any client keen on holding a close watch on the news.

In the light of the most recent jurisprudence and public policy documents, such second-comers in the information industry should at least pay rights owners a fair compensation for the use of their articles. The number of contractual arrangements for the limited internal use of articles within the public and the private sector is growing steadily. To facilitate the grant of licences and the payment of fair compensation by newspaper clipping services, a majority of Dutch newspaper publishers have joined in the new 'Copyright Licentie- en Incassobureau PRO' (CLIP) created under the auspices and with the support of the Dutch Publishers Association (NUV).⁴⁸ CLIP collects on behalf of and distributes fees to publishers and freelance journalists who have entrusted it with the right to grant licences to suppliers of newspaper clipping services. The collective arrangement set out by CLIP governs the use of articles from daily and weekly newspapers and magazines by clipping services. Although photographs, illustrations, drawings and the like have never fallen under the scope of the press exception, it is worthwhile noting that the Dutch copyright organization for visual artists, Pictoright, recently announced having reached an agreement with a number of newspaper clipping services, such as Antal Clipping, Clipping Clip and Euro Info Service.⁴⁹ An important part of the agreement is that the newspaper clipping services now have permission from the visual artists to include published artistic works, like photographs, drawings, illustrations and the like, in their clipping services and to deliver these to business customers at a reasonable fee.

4. European context

The Information Society Directive establishes the main legal framework at the European level for the copyright protection of works. Accordingly, authors enjoy the exclusive rights to reproduce and communicate their works to the public. Member states are allowed to introduce limitations to these rights, pursuant

⁴⁸ 'CLIP stelt auteursrecht veilig', 3 November 2008: <http://www.nuv.nl/nieuws/ezjz-nieuws/clip-stelt-auteursrecht-veilig.11638.lynkx>

⁴⁹ 'Pictoright en knipselbedrijven bereiken akkoord', 30 January 2012: <http://www.pictoright.nl/>

to Article 5 of the Directive, which contains an exhaustive list of permissible limitations. The regime established by the Directive leaves member states ample discretion to decide if and how they implement the limitations contained in Article 5 of the Directive. This latitude mainly follows from the fact that the text of the Directive does not lay down strict rules that member states are expected to transpose into their legal order. This also holds true with respect to Article 5(3)(c) of the Information Society Directive on the press exception. Since this provision is optional in the Directive, let us briefly examine how it relates to the Berne Convention and how Germany, France, Belgium and the United Kingdom have addressed the possibility for press organizations to borrow articles from one another.

4.1 *Information Society Directive*

Article 5(3)(c) of the Information Society Directive allows member states to provide for a limitation allowing reproduction of articles from newspapers and periodicals to take place under certain conditions without the prior authorization of the rights owner. This limitation is directly inspired by Article 10*bis* of the Berne Convention and has, in many member states, a long history. Article 5(3)(c) of the Directive actually combines both subparagraphs of Article 10*bis* of the Berne Convention on the making of press reviews and the reporting of current events. According to the first part of this provision, member states may provide for exceptions in respect of the ‘reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author’s name, is indicated (...)’. The wording of this part of Article 5(3)(c) corresponds roughly to the formulation of Article 10*bis*(1) of the Berne Convention. The second part of Article 5(3)(c) corresponds to Article 10*bis*(2) of the Berne Convention on the use of works in the context of news reporting.

The optional limitation provided in Article 5(3)(c) of the Directive has been implemented in different ways by the member states. The review of the implementation is made particularly difficult by the fact that Article 5(3)(c) of the Directive combines two distinct limitations which have different conditions of application, and which may or may not have been implemented separately by the member states. The most striking differences in the conditions of application relate to the fact that, contrary to the press review exception, the limitation on the reporting of current events makes no reference to the possibility for a rights owner

to reserve the rights on his work nor does it restrict the type of works that can be reproduced only to articles on current economic, political or religious topics. In principle, the reproduction of articles, pursuant to the first part of Article 5(3)(c), is only possible if it is made by a daily or weekly newspaper, under certain conditions: if the source is clearly indicated, together with the indication of the author if it appears in the source, and provided that the copyright is not explicitly reserved. Important variations exist in the way member states have implemented the first part of Article 5(3)(c), even though the text of the provision would seem to be rather explicit. Some member states have failed to require the mention of the source or of the author's name; others have attached the obligation to pay fair compensation; while others have included translations within the scope of the provision.⁵⁰ Moreover, although courts are bound to interpret the provisions in their law in conformity with the text of the Directive, it is important to point out that important differences can still arise in the judicial interpretation of the provision throughout the member states.

The application of Article 5(3)(c) of the Directive has so far reached the European Court of Justice only in passing, in relation to the activities of the Danish newspaper clipping service Infopaq.⁵¹ A dispute between this service and the professional association of Danish daily newspaper publishers (DDF) led to two decisions from the Court. Infopaq was scanning newspaper articles for commercial purposes without authorization from the relevant rights holders. Infopaq's data capture process involved two acts of reproduction: the creation of a TIFF file when the printed articles were scanned and the TIFF file converted into a text file, as well as the reproduction of parts of the scanned printed articles where extracts of 11 words were stored electronically and later on printed out on paper. Taking the view that consent was necessary for processing articles using the process in question, DDF complained to Infopaq about this procedure. The two rulings of the Court mainly focused on the level of originality necessary to confer copyright protection on news headlines and 11-word excerpts and the application of the exception for transient and incidental reproductions under Article 5(1) of the Directive.

Upon discussing whether Infopaq's process met the conditions of Article 5(1), the Court declared: 'In respect of the lawful or unlawful character of the use, it is not disputed that the drafting of a summary of newspaper articles is

⁵⁰ L. Guibault, G. Westkamp, T. Rieber-Mohn, et al., *Study on the Implementation and Effect in Member States' laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Informative Society*, report to the European Commission, DG Internal Market, February 2007.

⁵¹ CJEU, C-5/08, 16 July 2009 (Infopaq I), [2009] ECR I-6569; CJEU, C-302/10, 17 January 2012 (Infopaq II).

not, in the present case, authorised by the holders of the copyright over these articles. However, it should be noted that such an activity is not restricted by European Union legislation. Furthermore, it is apparent from the statements of both Infopaq and the DDF that the drafting of that summary is not an activity which is restricted by Danish legislation.⁵² Unfortunately, this sole mention of the lawfulness of Infopaq's drafting of summaries does not say much about the admissible scope of the press exception under European law. The whole case shows, however, that the emergence of digital news monitoring services constitutes a serious threat for traditional newspaper publishers.

4.2 Comparison with neighbouring countries

Germany

In Germany, the press exception is regulated by Article 49 of the German Copyright Act, which provides that:

- (1) It shall be permissible to reproduce and distribute individual broadcast commentaries and individual articles from newspapers and other information journals devoted solely to issues of the day in other newspapers or journals of like kind and to communicate such commentaries and articles to the public, if they concern political, economic or religious issues of the day and do not contain a statement reserving rights. The author shall be paid fair compensation for reproduction, distribution and public communication, unless short extracts from a number of commentaries or articles are reproduced, distributed or publicly communicated in the form of an overview. Claims may be asserted by a collecting society only.
- (2) It shall be permissible, without limitation, to reproduce, distribute and publicly communicate miscellaneous information relating to facts or news of the day which have been publicly disseminated by the press or by broadcasting; this provision shall not affect any protection afforded by other provisions of law.

One important difference between the Dutch and German provisions is that in Germany fair compensation must be paid to the rights owner for acts falling within the scope of the exception. Article 49(1) of the Copyright Act has generally received a rather strict interpretation.⁵³ Only single articles can be taken from a given newspaper or periodical and these may only be reproduced if they concern current economic, political, or religious topics. The reproduction of an article that

52 CJEU, C-302/10, 17 January 2012 (Infopaq II), para. 44.

53 Loewenheim, *Handbuch des Urheberrecht*, 2nd ed., Munich: Beck Verlag, 2010, para. 136.

is not ‘current’ or that concerns any other topic, such as science, technique, culture, or entertainment, is unacceptable. In addition, the article must be incorporated in a newspaper or periodical of a similar nature. In other words, contrary to the Netherlands where ‘knipselkranten’ are allowed under Article 15 of the Act, Article 49(1) of the German Act provides that the incorporating publication should contain original contributions of its own and should not consist solely of reproduced articles taken from other newspapers and periodicals.⁵⁴ In view of the strict interpretation traditionally given to these criteria, the question arose whether Article 49(1) of the German Copyright Act applied to ‘electronic press reviews’.⁵⁵

The Federal Court of Justice answered the question in the affirmative in a case involving a newspaper publisher and the collective rights management society, VG-Wort. The plaintiff, publisher of the newspaper ‘Berliner Zeitung’, brought action against the collective rights society VG-Wort, complaining that the society’s collection of remuneration for the compilation of electronic press reviews was unlawful. The complaint was based on the fact that the VG-Wort had concluded a contractual arrangement with a business corporation allowing it in return for the payment of a fee to scan, store, and distribute copyrighted articles to its employees in the context of an electronic news delivery service. The Federal Court of Justice considered that the electronic press review did not differ essentially from the one made on paper. Considering that authors and publishers were better off with a remuneration right than with an exclusive right that they could not effectively control, the Court concluded that the reproduction of newspaper articles in the form of electronic press reviews, although not expressly foreseen by the legislator at the time of enactment of the provision, could be covered by the limitation provided that remuneration was paid. Electronic press reviews are equal to their paper counterpart in their function and their potential utilization, so that they fall under the privilege of Article 49(1) German Copyright Act. Two conditions must be fulfilled, however. First, only transmissions inside a company or governmental department (so-called in-house press reviews) are allowed. Second, the external articles may only be transmitted in graphic files or files, in which the several articles are integrated as facsimile, for these formats allow just as little systematic searching possibilities in the transmitted documents as analogue documents do.⁵⁶

54 OLG Düsseldorf, 10 July 1990, in *GRUR* 1991/12, p. 908 (Pressespiegel).

55 H. Eidenmüller, ‘Elektronischer Pressespiegel – Urheberrechtlicher Schutz von Zeitungen und Fachzeitschriften’, *Computer und Recht* 1992, 321/323, p. 324.

56 German Federal Supreme Court 11 July 2002, I ZR 255/00, *GRUR* 2002, 963 (Elektronisch Pressespiegel); see: J.H. Spoor, ‘Elektronische knipselkranten in Duitsland’, 2003-1 *AMI*, p. 27. T. Hoeren, ‘Besprechung

France

Under the French Code de la propriété intellectuelle (CPI), once a work has been disclosed, the author may not prohibit the making of press reviews, provided that her name and the source are indicated.⁵⁷ Contrary to Article 10bis(1) of the Berne Convention, according to which countries of the Union may ‘permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, *in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved*’ (emphasis added), Article L. 122-5, 3° (c) of the CPI does not provide for the possible reservation of rights by their owner. Furthermore, the Code gives no definition of the expression ‘press reviews’. Courts have interpreted this article quite restrictively as a joint and comparative presentation of several commentaries from different journalists concerning a common topic or a single event.⁵⁸ The topic or event dealt with in the press review must also be current, as suggested by the word ‘press’. In view of the strict interpretation given to this provision, the exemption for press reviews has remained of rather limited significance in jurisprudence and academic literature. Agence France Press instituted proceedings in the United States against Google, claiming copyright infringement in its news articles.⁵⁹ As a result of this, Google abandoned the project of republishing news items (headlines, introductions and photographs) taken from the Agence France Presse.⁶⁰

Belgium

In Belgium, Article 22(1)(1) of the Copyright and Related Rights Act of 1994 allows the reproduction and communication to the public for purposes of information, of short fragments of works or artistic works in their entirety at the time of reporting current events. This provision actually implements Article 10bis(2) of the Berne Convention, rather than the press exception of Article 10bis(1). This means that the making of press reviews in the sense of Article 10bis(1) of the Berne Convention is not exempted under the Belgian Act and falls under the

des BGH-Urteils „Elektronischer Pressespiegel“; *GRUR* 2002, 1022; G. Spindler, ‘Die Archivierung elektronischer Pressespiegel’, *AfP* 2006, 408.

57 French CPI, Art. L. 122-5, 3° (c).

58 A. Lucas and H.-J. Lucas, *Traité de la propriété littéraire et artistique*, 2nd ed., Paris: Litec 2001, p. 287; P.-Y. Gautier, *Propriété littéraire et artistique*, 3rd ed., Paris: PUF 1999, p. 299.

59 J. Oates, ‘AFP sues Google News’, *The Register*, 21 March 2005, available at: http://www.theregister.co.uk/2005/03/21/afp_sues_google/.

60 C. Manara, ‘Référéncement en droit d’auteur’, *Propriétés Intellectuelles* 2006/19, 147-154, p. 149; <http://www.njuris.com/ShowBreve.aspx?IDBreve=752>

exclusive right of the rights owner. Copiepresse, the collective rights management society entrusted with the rights of the French and German newspaper publishers on the Belgian territory, usually grants licences for the making of press reviews in Belgium. Copiepresse instituted an action against Google Inc., claiming that Google infringed the copyright in the articles of its members, by republishing newspaper excerpts without permission. The Tribunal of First Instance of Brussels ruled in favour of the collective rights management society, and ordered Google to remove all Copiepresse articles from its service.⁶¹ The court appointed expert in the case concluded that Google News ‘must be considered to be an information portal and not a search engine’. Consequently the court ruled that Google could not exercise any limitation provided for in the Belgian Copyright and Related Rights Act of 1994 or in the Database Act of 1998 and that the activities of Google News and in particular the use of the Google ‘cache’ infringed the rights of the newspaper publishers in their articles.⁶²

The case went on appeal. Google invoked the current news reporting exception, which normally covers the reproduction of short fragments of works when made for reports on recent events. The court stressed that this exception was created in order to cover situations where the urgency to publish a copyrighted element renders impossible to ask for prior permission from the rights owner in a timely manner. The court deemed that Google did not meet the conditions of the exception, as it noticed that some articles remained listed during more than 30 days, and that it had always been possible for Google to contact the collecting societies to sign a prior general agreement. The Court of Appeal of Brussels confirmed the lower court decision, saying that Google had reproduced and communicated copyright protected parts of the original works in its Google News service, for which Google would have needed the copyright owners’ authorization.

United Kingdom

In the United Kingdom, Section 30 paragraph 2 of the Copyright, Designs and Patents Act provides for a fair dealing defence for purposes of criticism, review and news reporting: ‘Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement’. Paragraph 3 specifies that ‘no acknowledgement is required in

61 Court of First Instance of Brussels, 5 September 2006 (Copiepresse v. Google, Inc.), available at: http://www.droit-technologie.org/jurisprudences/commerce_bruxelles_050906.pdf

62 M. Boribon, ‘Google doit respecter les créateurs et les producteurs de contenus’, *Légipresse* 2006/236, p. 165-66.

connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise'. This provision, like its Belgian counterpart, implements Article 10bis(2) of the Berne Convention, rather than the press exception of Article 10bis(1). Moreover, for the fair dealing defence to apply four conditions must be met: the use has to be 'fair'; it must be done for the purpose of reporting a current event; it must give sufficient acknowledgment and concern a work that has been made available to the public. As Torremans explains parts of reports can be copied on the basis of this fair dealing defence, but 'the nature and the extent of the copying should not go beyond what is reasonable and appropriate to report these current events'.⁶³ And, as Bently and Sherman point out, the dealing must take place in relation to an *event* that is *current*, which means that the defence will not cover any dealing that takes place outside of the current event in question.⁶⁴

The making of newspaper clippings in the UK is therefore an act that in principle falls within the scope of the copyright holder's rights and for which authorization must be gained.⁶⁵ Two agencies are competent to license material for the purpose of press cuttings services: the Copyright Licensing Agency (CLA), for magazines, journals or books; and the Newspaper Licensing Agency (NLA) for newspapers. Both agencies have developed a licence for press cuttings to enable press cuttings agencies to make copies and supply them to their clients in paper or electronic format. In addition to enabling agencies to send hard copy and digital press cuttings to their clients, the new licence recognizes the increased use of the web and ensures that digital delivery is licensed. All clients of press cuttings agencies that engage in multiple access to electronic clippings from newspapers, magazines, journals or books, either through a web-based portal or receipt by other methods of electronic delivery, must hold a valid licence from either agency or other appropriate authority to ensure that copying is legal.⁶⁶

5. Conclusion and future developments

Article 15 has a long, but at times turbulent, history in the Dutch Copyright Act, marked by the dramatic changes brought about in the communications

63 P. Torremans, *Holyoak & Torremans Intellectual Property*, 6th ed., Oxford: Oxford University Press 2010, p. 277-278.

64 L. Bently and B. Sherman, *Intellectual Property Law*, Oxford: Oxford University Press, p. 204.

65 *The Newspaper Licensing Agency v. Meltwater Holdings*, Meltwater News, The Public Relations Consultants Association [2011] EWCA Civ. 890 Court of Appeal for England and Wales, 27 July 2011; see: M. Shillito and R. Montagnon, 'Copyright in headlines and infringement through receipt of extracts and use of hyperlinks', 2011/6 *Journal of Intellectual Property Law & Practice*, p. 857-860.

66 See: http://www.cla.co.uk/PCA_clients/ and <http://www.nla.co.uk/default.aspx?tabId=40>

technology and the ensuing market conditions. Through the years the Dutch legislator reacted to these changes and to the revised international obligations under the Berne Convention. Accordingly, the press exception was modified in order to clarify the scope of the provision with regard to the nature of the articles and reports that can be taken over, the category of organizations or individuals who can benefit from the exception, and the means of communication and conditions under which articles can be borrowed. The limits set by the legislator have received different interpretations by the courts, which have at times stretched the boundaries of the press exception, while at other times shrunk them.

Two main elements contribute to the delineation of the exception's scope: the content covered and the beneficiary of the exception. A narrow interpretation of the news report exception in principle restricts the possibility to reproduce newspaper articles and broadcast commentaries only to press or broadcasting entities of the same nature, provided that the copyright is not explicitly reserved. By contrast, a broad interpretation of this limitation extends the privilege to institutions and enterprises that offer second-hand information on selected topics to their subscribers or employees in the form of collections of newspaper clippings, provided that the copyright is not explicitly reserved. The space available for the re-use of articles, news reports and miscellaneous information published in print or broadcast by competing news organizations has over the years been contingent on the wind blowing in the jurisprudence.

In view of the most recent case law on the press exception in the Netherlands, newspaper clipping services can hardly be offered anymore without the permission of the rights holders. This new line of interpretation actually brings the Dutch press exception closer to the regimes in force in the neighbouring countries, including Belgium, France, Germany and the United Kingdom. In these countries, newspaper clipping services are subject to either a voluntary or a statutory licensing system, for which equitable remuneration must be paid to the rights holders. As a result of the new jurisprudential trend in the Netherlands, most newspaper publishers have joined in the new 'Copyright Licentie- en Incassobureau PRO' (CLIP), which is entrusted with the right to grant licences to suppliers of newspaper clipping services.

