# The balance of copyright

## Dutch report

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## 1. To what extent does national law differentiate in terms of the effects of copyright law?

### a) According to the various work categories?

Generally speaking, Dutch copyright law does not differentiate in terms of the effects of copyright law according to various work categories. The Dutch Copyright Act protects "works of literature, science or art", as exemplified in the non-exhaustive list of work categories of Article 10(1) which is modelled after Article 2(1) Berne Convention. Article 10(2) clarifies that the Act protects "every production in the domain of literature, science or art, whatever may be the mode or form of its expression". Following the adoption of the two European directives on the protection of computer programs and databases, article 10 was modified to expressly cover these among the categories of works protected by the Act. Special provisions for cinematographic works are contained in Articles 37–42 of the Act.[1]

Protection is conferred under Dutch copyright law on literary, scientific and artistic works, including adaptations thereof (Article 13 DCA), provided they meet the requirement of originality. This requirement is not specified in the Act but has been recognised according to settled case law as a condition for protection.[2] "Originality" (or "*oorsponkelijkheid*") is in Dutch practice a catch-all term referring to the fact that a work must have an "own, individual character" and "bear the personal stamp of the author".[3]

Dutch copyright law contains special provisions for two categories of works: *geschriften* (written works) and posthumous works.

The regime on written works is based on Article 10(1)(1) of the Copyright Act, which states that the subject matter protected under this Act includes "books, brochures, newspapers, periodicals and all other writings". The special regime for written works is not laid down as such in the Copyright Act, but is derived from the case law of the Supreme Court, who interpreted the expression "other writings" as including texts devoid of original character. Not all non-original writings fall under this regime: to be protected, a non-original writing must be published or destined to be published.[4] The protection conferred is more limited in scope than under the normal copyright regime, however; it is more akin to a unfair competition regime, for a claim for infringement of the regime on written works is admissible only against direct and (almost) complete copying. To limit the bounds of this regime, the Copyright Act specifies that computer programs and *sui generis* databases are not "writings" within the meaning of Article 10(1)(1) of the Copyright Act. Therefore, non-original software does not fall under this protection regime. By contrast, non-original databases have been recognised as impersonal writings, but only if they do not qualify for *sui generis* protection due to a lack of substantial investment in the obtaining, verification or presentation of the contents.

Posthumous works are protected pursuant to Article 45(o) of the Act, according to which 'any person who, after the expiry of the term of copyright protection, for the first

time lawfully communicates to the public a previously unpublished work shall enjoy the exclusive right referred to in article 1'. This protection lasts for 25 years after 1 January of the year following that in which the work concerned was lawfully communicated to the public for the first time. This protection also applies to previously unpublished works, which have never been protected by copyright, the author of which died more than 70 years ago.

Neighbouring rights and the *sui generis* database right fall outside the scope of the Copyright Act and are covered by separate legislation, namely the *Wet Naburige Rechten* and the *Databankenwet*, respectively. For this reason, this questionnaire does not deal with these rights any further.

### *b) According to factual aspects*

#### Different markets

The general rule is that Dutch copyright law does not differentiate according to different markets within the work categories (Article 10 DCA). Hence, the law does not provide for different treatment of literary works according to whether they are works of fictions or academic works. Nevertheless, there are a few provisions in which limitations differentiate regarding the use of the work on different markets.

#### Differentiations according to factual aspects such as different markets and competitive conditions

Article 15 of the Dutch Copyright Act allows the reproduction of articles from newspapers and periodicals to take place under certain conditions without the prior authorisation of the right owner. This measure was officially adopted in the interest of the free flow of information but, at some point in history, it also reflected industry practice. Today, depending on its formulation and judicial interpretation, this provision may equally serve to prevent acts of unfair competition between members of the news publishing industry. Hence, according to Article 15 of the Act, it is not an infringement of copyright to reproduce news reports, miscellaneous reports or articles concerning current economic, political or religious topics that have appeared in a daily or weekly newspaper, weekly or other periodical or works of the same nature that have been broadcast in a radio or television programme. In principle, such reproduction is only possible if it is made by a daily or weekly newspaper, or radio or television broadcast if the moral rights of the author are taken into account, if the source is clearly indicated, together with the indication of the author, if it appears in the source and if the copyright is not explicitly reserved.[5] In the case of periodicals, a generally worded reservation placed at the head of each issue shall also be deemed an explicit reservation of the copyright. However, no reservation can be made in respect of news items and miscellaneous reports.[6]

The interpretation given to the limitation therefore has a definite impact on the shape of the information market. Article 15 of the Dutch Copyright Act received for several years a rather broad interpretation which gave rise to severe criticism. For example, the term "news" appearing in Article 15 of the Dutch Copyright Act has been construed as encompassing not only general news items that daily newspapers bring to the attention of the public, but also specific creations, findings and opinions. Technical and scientific journals have also been interpreted as falling under the expression "news reports, miscellaneous reports or articles", on the ground that 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. Whereas the exemption would normally only allow the use of articles or broadcast commentaries by the press or by broadcasting entities of the same nature, the Dutch Supreme Court applied the provision 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 (*Knipselkranten* decision).[7] The Foundation for Reprography Rights (Stichting Reprorecht) sued the Association of Dutch Libraries and Reading Centers (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 "journal" in the sense of Article 15(1) of the Act includes an intermittently issued publication, made in the interest of the free flow of information, even if it consists of nothing else than contributions on selected subjects taken from a collection of dayly, news - or magazines or periodicals. The exception of Article 15 of the Copyright Act also applies to the production of newspaper cuttings including when this only involves selection work by an institution that cannot be regarded as 'press organ' in the everyday sense of that term. As a consequence of this flexible interpretation of Article 15 of the Copyright Act, 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.[8]

The Court of Rotterdam applied the exception of Article 15 of the Copyright Act to press reviews that were made available over the internet.[9] 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 of these claims. Assuming that titles and lists were copyrightable subject matter, the Court held that the defendant, Eureka, qualified as a press organisation, the press reviews of which were covered by the exemption of Article 15 of the Act.

The interpretation of Article 15 was later narrowed down in a case between the newspaper publisher (Nederlandse Dadblad Pers) and the State of the Netherlands, in which the publishers sued the State for copyright infringement for scanning and communicating electronic copies of the 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 has 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 Directive 2001/29/EC on Copyright in the Information Society.[10]

More recently, the scope of Article 15 was further narrowed down, as a result of a decision from the Court of appeal of Leeuwarden.[11] The Court ruled that the

unauthorized making of paper clippings of newspaper and magazine articles for which the rights were expressly reserved amounts 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. Defendants, all publishers of daily and weekly papers and magazines, sued for copyright infringement on the ground that the exception is not applicable since all rights in the publications had been expressly reserved. The plaintiff 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 Directive 2001/29/EC on copyright in the information society. 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 an equitable remuneration for the use of their works, and noting the exhaustive character of the list of limitations in Article 5 of the Directive.

Considering the above, the Court of appeal opined that, should the Dutch 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 equitable remuneration 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 neither the issue of the reservation of rights or the interpretation of 'news reports and miscellaneous reports' had been considered by the Supreme Court. The Court of appeal added that the need to promote the free flow of information never implied that the right owners cannot 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.

**Regulation of competition**

***b) According to factual aspects***

N/A

**2. Which of the following legal instruments are used by national *copyright law* in order to achieve a "balance" of interests and to what extent are they used?**

***a) Specific preconditions or thresholds allowing a work's protection only when it surpasses a particular degree of creativity:***

As already mentioned above in answer to question 1, copyright protection is conferred provided that the work meets a certain amount of originality. A work is considered original under Dutch law if it bares the personal stamp of the author and

manifests an original character. In other words, a work cannot merely be of a trivial nature but has to comprise a sufficient degree of creativity.[12]

The notion of "originality" was discussed in a landmark decision, the *Endstra* case, which dealt with the question of whether copyright subsists in (transcripts of taped) conversations.[13] These conversations took place on the back seat of a car during a series of secret meetings between police officers and Endstra, a real estate agent who was later murdered. The police asked Endstra some questions but predominantly listened to him talking of his dealings with a suspected criminal. The tapes were transcribed into official police reports, a copy of which found its way to crime reporters who published the transcripts with minor editing as a book. The sons of the real estate agent sought to stop publication by claiming copyright in the conversations. The Supreme Court held that the "own, original character" and "personal stamp" must be evident from the work itself, clarifying that the law does no require an intent to create or a conscious choice on the part of the author. According to the Court, an item so ordinary or trivial that it is devoid of any creative labour of any kind cannot benefit from copyright protection. This interpretation of the concept of originality has since then been followed by the lower courts.[14]

***b) Period of protection***

In line with most European countries the period of protection for copyright is restricted to 70 years *post mortem auctoris* (p.m.a.). See Question 5 for further details.

***c) Specific user rights, free of charge, granted by the law in favour of third parties***

The DCA contains a number of exceptions to the exclusive rights of copyright holders that are free of charge but are subject to some conditions:

Article 15 (use by the press)
Article 15a (quotation)
Article 15b (published works of public authorities)
Article 15h (closed networks)
Article 15b (work of public authorities)
Article 16a (use in a report current event)
Article 16n (reproductions by libraries, museums and archives)
Article 16n (reproductions by libraries, museums and archives)
Article 16b (private copy)
Article 17c (congregational singing during a religious service)
Article 18 (pictures of works located in public places)
Article 18a (incidental use)
Article 18b (parody)

***d) Specific user rights granted by the law in favor of third parties, subject to the payment of a remuneration to the rightholder(s)***

Dutch copyright law has a system in which a number of limitations are subject to the payment of remuneration. In this system, remuneration is either achieved in the form of a levy on blank recording material/equipment (see Question 10) or via negotiations between collecting societies and users who avail themselves of

particular copyright limitations or exceptions:

Article 15c (lending)
Article 15i (exploitation for the benefit of handicapped individuals)
Article 16 (education)
Article 16c (digital private copy)
Article 16h (reprographic reproduction)

***e) Obligations to conclude a contract established by law to grant a third party specific user rights in return for payment of a fee (mandatory licenses)***

Mandatory licensing plays little to no role in the DCA. There is only one provision that indirectly deals with a mandatory licence, Article 17a DCA:

> Government orders may prescribe rules concerning the rights of an author of a work or his successors in title in relation to the publication of a work by means of radio or television broadcast by means of radio, television or some other medium fulfilling the same purpose (eg. internet). Government orders, specified in the first sentence hereof, may provide that such a work may be published in the Netherlands without prior consent from the author or his successors in title if the broadcast is made from the Netherlands (…) or outside of the EEA. Whoever is entitled to publish a work without prior consent shall nonetheless be obliged to honour the author's rights as specified in Article 25 DCA, and to make a fair payment to the author or his right-holders.

However, up to this day there has been no Government order that has provided such a mandatory licence.

***f) Rules on misuse***

The Dutch Copyright Act makes no explicit reference to the doctrine of abuse of rights. Moreover, the application of the doctrine of abuse of rights to copyright matters has not led to a significant amount of jurisprudence in the Netherlands. The Supreme Court's decision in *Dior v. Evora*[15] is one of the rare instances where the civil law doctrine of abuse of rights was expressly invoked as a defence to a copyright infringement action. Unfortunately, the defendant's argument, according to which Dior had abused its copyright in the sense of Article 3:13 of the Dutch Civil Code, by making use of it for a purpose other than that for which it was granted, was rejected without further explanation. Copyright scholars like Spoor, Verkade and Visser have suggested that certain copyright infringement cases should be put to the test of the doctrine of abuse of rights, and particularly to the requirement of proportionality that is incorporated in Article 3:13 of the Dutch Civil Code.[16] This doctrine has been invoked in cases involving allegedly abusive practices by collecting societies.[17] Also the rule of fairness and reasonableness codified in Article 6:248 Dutch Civil Code may serve as a remedy against excessive copyright claims.[18]

**3. Does national law regulate the user rights pursuant to Questions 2c) to e)**

**abstractly (for instance using general clauses), concretely (for instance in the form of an enumeration), by means of a combination of the two?**

The Dutch Copyright Act does not provide a doctrine of fair use but contains a list of exceptions and limitations in Chapter 6 of the Act.

The closest example of a fair use doctrine can be found in the *Dior/Evora* case.[19] In this case, the Court found that the unique circumstances called for the exoneration of the defendant from copyright infringement liability, notwithstanding the fact that the situation did not fall under the scope of any existing statutory limitation.[20] This case involved the reproduction by a retailer (Evora) of copyright protected perfume bottles in advertising material without the consent of the right holder (Dior). Although Section 6 of Chapter I of the Copyright Act contains a number of limitations of copyright, none of them were directly applicable to the facts of the case. An analogy was drawn with Article 23 of the Copyright Act, dealing with the non-commercial reproduction of an artistic work for public exhibition or public sale of that work, otherwise known as the "catalogue exception". Noting that the statutory limitations on copyright presuppose a balancing of the interests of the copyright holder with the social or economic interests of others, including the public interest, the Court ruled that this express exception did not preclude that, in certain cases, other limits on copyright could be recognised on the basis of a comparative assessment, especially when the need for the relevant limitation by the legislature has been recognised and fits in the legal system in the light of the evolution of copyright as a means of protecting commercial interests.

When implementing Directive 2001/29/EC in Dutch law, the legislature revised the text of Article 23 of the Copyright Act. Pursuant to the official language versions of the Directive other than Dutch, it appeared that the reproduction and communication to the public of certain works are not permitted insofar as this occurs for advertising purposes. In the opinion of the Minister, this did not prevent the ruling of the Court of Justice of the European Communities on 4 November 1997 in Case C-337/95 (*Dior/Evora*, Jur. 1997, I-6013) from remaining valid notwithstanding. This means that it is permissible to advertise what may be offered and sold, even if an image of a product is used.[21]

**4. What is the role played by the "three-step test" in national law in connection with the user rights pursuant to Question 3? In particular:**

***Has the "three-step test" been explicitly implemented in national law (legislation)?***

The three-step test has not been explicitly implemented in national law. Of course, Dutch law must be applied in conformity with Directive 2001/29, including the three-step test in Article 5(5). As evidenced in the Explanatory Memorandum of the Proposed Act relating to the Implementation of Directive 2001/29/EC, the Dutch Government believed that Article 5(5) of the Directive did not need to be codified as it would only have led to more open-ended limitations, and thus to a loss of legal certainty. This would have contradicted the objectives pursued by the Community legislature. In the Government's view, the three-step test creates a general framework within which the legislature must examine the exceptions to and limitations on the economic rights, and an instrument for the courts for the interpretation and practical application of a given exception or limitation.[22]

However, the legislature also stressed that "at the same time it offers a framework for guidance to the courts regarding the interpretation of a particular restriction, and

in particular its application in practice. Judicial decisions in this regard may lead the legislature to amend the current rules".[23]

***Has it played a specific role in the determination of the legal standards (limitations or exceptions)?***

When implementing Directive 2001/29/EC, the Dutch legislature expressly discussed the impact of the three-step test and the conformity of the Dutch Act with Article 5(5) of the Directive in relation to only a limited number of limitations and exceptions provided in the Dutch Copyright Act.[24] One of them is Article 13a of the Act which implements Article 5(1) of the Directive on transient and incidental acts of reproduction (the only mandatory limitation in the Directive). Article 5(1)(a) of the Directive, according to which certain temporary acts of reproduction do not constitute an infringement of the right of reproduction, has been transposed in a new Article 13a DCA, which reads as follows:

> The reproduction of a literary, scientific, or artistic work does not include temporary reproduction of a passing or incidental nature and forming an integral and essential part of a technical process whose sole purpose is to enable the transmission in a network passing between third parties by an intermediary, or a lawful use, and if it has no independent economic value.

In contrast to the structure of the Directive and the implementation acts of most Member States, this provision has therefore not been incorporated in the section of the DCA on exceptions and limitations, but is rather carved out from the definition of the reproduction right. This triggered a debate among Dutch copyright experts, but most academics now agree that in practice it does not really matter whether the temporary reproduction should be an exception to the reproduction right or fall outside the scope of the notion of reproduction altogether. The condition that the acts have no independent economic significance makes it explicitly possible for the courts to consider on a case-by-case basis the question whether a copyright-relevant reproduction has taken place, in line with the condition expressed in the three-step test that the act should not conflict with normal exploitation nor unreasonably prejudice the legitimate interests of right holders.[25]

One of the few controversial changes to the Dutch Act concerns Article 18. Prior to the revision, this provision allowed for reproduction or communication to the public of works of architecture and sculptures placed on, or visible from, public roads, on condition that the reproduced work should not be the main object represented. The former Article typically applied to situations where persons were depicted in front of a statue in a public square.

The new Article 18 DCA reads as follows:

> Reproduction or publication of pictures made in order to be put on permanent display in public places, of a work such as is normally found in such places, will not be regarded as an infringement of the copyright of the author in a [drawing, painting, sculpture, work of architecture, etc]. Where incorporation into a compilation work is involved, no more than a few works by the same author may be incorporated.

Thus, the scope of the revised Article is broader in several ways. First, the "main representation" requirement has been abandoned. Second, it applies to all works in "public places", provided that the work "has been made to be permanently placed in public places" and is being reproduced "as is". According to the Government, such works are, to a certain extent, dedicated to the public domain. Therefore, publishing postcards of a sculpture in a public park is now permitted without the right holder's authorisation. Note further that "where incorporation into a compilation work is involved, no more than a few works by the same author may be incorporated". When debated in Parliament, the legislators discussed the conformity of this revision with the three-step test and concluded that, according to the new text of the exception, a use of a work displayed in a public place did not conflict with its normal exploitation nor did it unreasonably prejudice the legitimate interests of the rights holder.[26]

A later proposed amendment to the private copying exception was rejected by the Minister of Justice on the ground that such an amendment would conflict with the normal exploitation of the work, contrary to the three-step test as laid down in the Directive, the Berne Convention and the TRIPS Agreement.[27]

### *Is it directly applied by judicial practice?*

Despite the fact that the test has not been implemented in the DCA, Dutch courts do apply it in case of doubt concerning the extent of a copyright limitation.[28] Although, initially, the three-step test seemed to be applied in such a way as to restrict the application of a limitation or to qualify a prior interpretation of the courts, there seems to be a tendency to apply the three-step test in a way that is favourable to the user.

One decision rendered by the Court of Appeal of The Hague is worth mentioning.[29] In this case, the Foundation NORMA (representing literary authors) and other beneficiaries of the home-taping levy lodged a complaint against the State of the Netherlands for failure to expand the fair compensation paid for home-taping activities to MP3 players and hard disc recorders. According to NORMA and others, the Decree establishing the media subject to payment violates the third step of the three-step test of Article 5(5) of the Directive. Since no compensation is made for the loss that is suffered as a result of the private copying onto MP3 players and hard disk recorders authorised by the legislature, NORMA contends that the legitimate interests of right holders are unreasonably prejudiced. Leaving aside whether this provision has a direct effect, which the State disputes, the Court of Appeal ruled that this argument could not succeed because there was no evidence that the total compensation received must be regarded as unfair. Assuming that the right holders receive fair compensation for the limitations on their rights, it cannot be held nevertheless that their rights are unreasonably prejudiced.[30]

Another case in which the three-step test was analysed concerns the public lending right. In this case, the Foundation for Public Lending sued the Association of Public Libraries for the payment of compensation for the renewal of a book loan, for which there is no separate payment. The Foundation has not disputed that the public lending scheme as such is a permissible limitation. It only argued that denying payment for the renewal of a book loan was contrary to the three-step test. The District Court of The Hague rejected the argument because such decision did not mean that extensions are excluded from fair compensation altogether and the possible unfairness of the current price cannot lead to a different interpretation of the

term lending.[31]

In an even more recent case, the District Court of Haarlem ruled that it is not in conflict with the three-step test to uphold the position adopted by the Government allowing the individual download of copyright-protected material via peer-to-peer file sharing sites even if it is from illegal sources.[32]

***Is the "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" well known and if so what role does it play (legislation, judicial practice, academic discussion, etc.)?***

The Declaration is known among Dutch scholars and was published in Tijdschrift voor Auteurs, Media en Informatierecht (AMI) 2009-1, pp. 8–11 but has yet to be invoked in a judicial dispute.

**5. If categories of works are distinguished according to Question 1, to what extent do the legal instruments in Question 2a) to f) differentiate according to these categories?**

***Specific preconditions or thresholds allowing a work's protection only if it surpasses a particular degree of creativity***

The general rule is that the degree of creativity does not differentiate for works mentioned in Article 10 DCA. The provision for non-original writings (*geschriftenbescherming*) does differ from the general copyright regime, as it applies only when two conditions are met: 1) the text has to be written down, including electronic documentation; and 2) the text is communicated to the public or is destined to be communicated to the public. With respect to short works, like a title or slogan, copyright protection depends on the degree of originality. In such cases, courts tend to take account of the wider context, such as the coherence between a title and the work of which it is part, the context in which a slogan is used, the public's perception of it, and its function.[33] With respect to single words as works, case law reveals that protection is not easily recognised, either on the ground that copyright does not extend to names and single words, or that the word is not original enough to qualify for protection.[34]

The Supreme Court rendered a surprising decision in 2006, when it ruled in the *Kecofa v. Lancôme* case that the scent of a perfume can be a work in the meaning of the Dutch Copyright Act. It emphasised that the definition of "work" in Article 10 of the Act is put in general wording and does not exclude scents. According to the Court, a scent can be protected if it is perceptible to human senses (i.e. here olfactory senses), has an own, individual character and bears the personal stamp of the author.[35]

***Period of protection:***

The period of protection under Dutch copyright law for all copyright-protected works is 70 years after the death of the author (Article 37 DCA) and in the case of joint authorship 70 years after the death of the longest surviving author (Article 37 and specified for cinematographic works in Article 40 DCA).

***Specific user rights, free of charge, granted by the law in favor of third parties***

The DCA contains a number of exceptions to the exclusive rights of copyright

holders that are free of charge but subject to some conditions of application.

Article 15 (use by the press)

1. It shall not be regarded as an infringement of copyright in a literary, scientific or artistic work to adopt news reports, miscellaneous reports or articles concerning current economic, political or religious topics or works of the same nature that have been published in a daily or weekly newspaper or weekly or other periodical, radio or television program or other medium fulfilling the same purpose, if:
    1. the adoption is made by a daily or weekly newspaper or weekly or other periodical in a radio or television program or other medium fulfilling the same purpose;
    2. the provisions in Article 25 are observed;
    3. the source, including the name of the author, is clearly indicated; and
    4. copyright is not expressly reserved.
2. A reservation as specified in paragraph 1 at point 4 may not be made in relation to news reports and miscellaneous reports.
3. This Article shall also apply to adoption into a language other than the original.

Article 15a (quotation)

1. Quotations from a literary, scientific or artistic work in an announcement, criticism or scientific treatise or publication for a comparable purpose shall not be regarded as an infringement of copyright, provided that:
    1. the work quoted from has been published lawfully;
    2. the quotation is commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved;
    3. the provisions of Article 25 are observed; and
    4. so far as reasonably possible the source, including the author's name, is clearly indicated.
2. In this Article the term "quotations" shall also include quotations in the form of press summaries from articles appearing in a daily or weekly newspaper or other periodical.
3. This Article shall also apply to quotations in a language other than the original.

Before the implementation of the Directive, Article 15a of the Copyright Act 1912 stated that *quotations* were allowed in "an announcement, criticism, polemic or scientific treatise" as long as the conditions set out in the Article were met. For many authors, the circumstances listed in the Act are the most controversial element of the provision. Such restriction on the scope of the limitation appeared strange not only in light of the neutral concept of "quotation", but also in light of social reality. The quotation right of Article 15a has therefore been updated. A quotation is now permissible not only in "an announcement, criticism or scientific treatise", but also in a "publication for a comparable purpose". The scope of the quotation exception is restricted under Article 5(3)(d) in the following ways:

1) the work quoted from must have been published lawfully;
2) the quotation is to be commensurate with what might reasonably be accepted in

accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved;
3) as far as reasonably possible the source, including the author's name, is to be clearly indicated.

This was already stipulated as such in the DCA. The requirement that moral rights are to be observed, not prescribed by the Directive, was maintained as well. According to Article 15a(2) the term "quotations" shall also include quotations in the form of press summaries from articles appearing in a daily or weekly newspaper or other periodical.

Article 15b (published works of public authorities)

> The further communication to the public or reproduction of a literary, scientific or artistic work communicated to the public by or on behalf of the public authorities shall not be deemed an infringement of the copyright in such a work, unless the copyright has been explicitly reserved, either in a general manner by law, decree or ordinance, or in a specific case by a notice on the work itself or at the communication to the public. Even if no such reservation has been made, the author shall retain the exclusive right to have appear, in the form of a collection, his works which have been communicated to the public by or on behalf of the public authorities.

Article 15h (closed networks)

> Unless otherwise agreed, the provision of access to a literary, scientific or artistic work forming part of the collections of libraries accessible to the public, and museums or archives which are not attempting to achieve a direct or indirect economic or commercial benefit, by means of a closed network through dedicated terminals in the buildings of those institutions for individual members of the public, for purposes of research or private study, will not constitute an infringement of copyright.

Article 16a (use in a report current event)

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

Article 16b (private copy)

> 1. Reproduction shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work if it is restricted to a few specimens intended exclusively for personal exercise, study or use by the natural person who has carried out the reproduction without any direct or indirect commercial motivation or has caused it to be carried out exclusively for his own benefit.
> 2. In the case of a work as referred to in article 10, paragraph 1, sub 1°., including the score or parts of a musical work, the reproduction shall furthermore be limited to a small portion of the work, except in the case of:
> a. works of which it may reasonably be assumed that no new copies will be made available to third parties for payment of any kind;

b. short articles, news items or other texts, which have appeared in a daily or weekly newspaper or weekly or other periodical.

3. In the case of a work as referred to in article 10, paragraph 1, sub 6°., the reproduction must differ considerably in size or process of manufacture from the original work.

4. If reproduction permitted under this Article has taken place, the copies may not be issued to any third parties without the consent of the author or his right-holders, unless that issue takes place because of any judicial or administrative proceedings.

5. Government orders may specify that a fair payment should be made to the author or his right-holders for the reproduction specified in paragraph 1. The orders may issue more detailed rules and impose more detailed conditions.

6. This Article shall not apply to reproduction as specified in Article 16c, or to the imitation of works of architecture.

Most exceptions make no distinction between categories of works, save the provisions on private copying. Article 16b(1) Copyright Act lays down the *basic rule on private copying*. It grants the right for everyone to reproduce a work, in a limited number of copies, for the sole purpose of private practice, study or use by the person who makes the copies or orders the copies to be made exclusively for himself. This means that, in principle, all means of reproduction are covered by the exception: in other words, digital reproductions may also be made without the consent of the right owner. Although the Act contains no mention of this, the number of copies is limited to two or three copies according to the literature.[36] Legal persons making reproductions are considered covered by the exception.[37] The basic rule on private copying essentially allows anyone, whether a natural or legal person, to make any reproduction for the sole purpose of private practice, study or use of the person who makes the copies or orders the copies to be made exclusively for himself that is not covered by the specific rules on home taping and reprography. Such private copies may include the manual transcription of a literary work or the making of a photocopy in a home environment.

In Article 16b(2) a special rule is laid down with the aim to prevent works on paper (daily or weekly newspapers, periodicals, books or the score or parts of the score of musical works) to be copied in entirety.[38] It is stated that reproductions of these works can only be limited to a small portion of the work, with the exception of some specially described works in Article 16(2)(a) and (b). According to Article 16b(4), copies of a sound or image cannot be made on order: only the person who intends to use these copies is allowed under the exception to make them. Article 16b(5) states that a reproduction permitted under Article 16b may not be given to third parties without the consent of the copyright owner, except in connection with judicial or administrative proceedings.

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

1. Reproduction by libraries, museums or archives accessible to the public whose purpose does not include the attainment of a direct or indirect economic or commercial benefit will not be regarded as an infringement of copyright in a literary, scientific or artistic work, provided that the sole purpose of the reproduction is:

1. the restoration of the specimen of the work;

2. retention of a reproduction of the work for the institution if the specimen is threatening to fall into disrepair;
3. to keep the work in a condition in which it can be consulted if there is no technology available to render it accessible.

2. Reproduction as specified in paragraph 1 shall only be authorized if:
1. the specimen of the work forms part of the collection held by the library, museum or archive accessible to the public relying on this limitation; and
2. the provisions in article 25 are taken into account.

Article 17a (ephemeral recordings by broadcasting organisations)

1 Unless otherwise agreed, authority to publish by broadcasting a radio or television program by means of radio, television or some other medium fulfilling the same function does not include authorization to record the work.

2 The broadcasting organization authorized to publish, as specified in paragraph 1, shall however be entitled to record the work temporarily with its own equipment and exclusively for broadcasting its own radio or television programs. The broadcasting organization with this recording authority is nonetheless obliged to honour the rights of the author of the work as specified in article 25.

3 Recordings that are made subject to the provisions of paragraph 2, above, and containing a separate documentary value may be kept in an official archive.

Article 17c (congregational singing during a religious service)

Congregational singing and the instrumental accompaniment thereof during a religious service shall not be deemed an infringement of the copyright in a literary or artistic work.

Article 18 (pictures of works located in public places)

Reproduction or publication of pictures made in order to be put on permanent display in public places, of a work such as is normally found in such places, will not be regarded as an infringement of the copyright of the author in a work as specified in article 10, paragraph 1, at point 6°, or a work relating to architecture as specified in article 10, paragraph 1, at point 8°. Where incorporation into a compilation work is involved, no more than a few works by the same author may be incorporated.

Article 18a (incidental use)

Incidental processing of a literary, scientific or artistic work as a component of subordinate significance in another work will not be regarded as an infringement of copyright.

Article 18b (parody)

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

This provision has been introduced in the Copyright Act as a result of the implementation of Article 5(3)(k) of Directive 2001/29/EC. Since then, it has given rise to a number of cases in which the courts have had to examine whether the reproduction was "in accordance with what would normally be sanctioned under the rules of social custom".[39]

Article 22 (public security and administration)

> 1 In the interests of public security as well as the detection of criminal activity, pictures of any nature whatever may be reproduced or published by or on behalf of the judicial authorities.
>
> 2 Adoption of a literary or scientific work in the context of public security, or to safeguard the proper progression of administrative, parliamentary or judicial proceedings or media coverage thereof will not be regarded as an infringement of copyright in that work.

Article 23 (catalogue exception)

> Unless otherwise agreed, the owner, possessor or holder of a drawn, painted, built or sculpted work or a work of applied art shall be authorized to reproduce or publish that work so far as necessary for public exhibition or public sale of that work, all subject to the exclusion of any other commercial use.

The DCA's *catalogue exemption* in Article 23 has been revised with the implementation of Directive 2001/29/EC. It provides that, unless otherwise agreed, the owner, possessor or holder of a drawn, painted, built or sculpted work or a work of applied art shall be authorized to reproduce or publish that work so far as necessary for public exhibition or public sale of that work, all subject to the exclusion of any other commercial use. The provision's most striking aspects when compared to Article 5(3)(j) are the explicit recognition that parties may agree otherwise and rule out the application of the limitation, and the restriction to specified types of artistic works. Advertising as such is not mentioned in Article 23 DCA. In line with Article 5(3)(j) of the Directive – but contrary to the former Article 23 DCA – the uses covered by the provision must be necessary for the public exhibition or sale.

***Specific user rights granted by the law in favor of third parties subject to the payment of a remuneration to the right holder(s); obligations to conclude a contract established by law to grant a third party specific user rights in return for payment of a fee (mandatory license)***

Dutch copyright law has a system in which a number of limitations are subject to the payment of remuneration. In this system, remuneration is either achieved in the form of a levy on blank recording material and equipment (see Question 10) or via negotiations between collecting societies and users who avail themselves of a particular copyright limitation or exception.

Articles 15c–15g (lending)
Article 15i (exploitation for the benefit of handicapped individuals)
Article 16 (education)
Article 16c (digital private copy)

Article 16h (reprographic reproduction)

**Article 15c**

1. The lending as referred to in article 12, paragraph 1, sub 3., of the whole or part of a specimen of the work or a reproduction thereof brought into circulation by or with the consent of the right-holder shall not be deemed an infringement of copyright, provided the person doing or arranging the lending pays an equitable remuneration. The first sentence shall not apply to a work referred to in article 10, paragraph 1, sub 12., unless that work is part of a data carrier containing data and serves exclusively to make the said data accessible.
2. Educational establishments and research institutes, the libraries attached to them, and the Koninklijke Bibliotheek are exempt from payment of a lending remuneration as referred to in paragraph 1.
3. Libraries funded by the Libraries for the Blind and Visually Impaired Fund are exempt from payment of a remuneration as referred to in paragraph 1 in respect of items lent to blind and visually impaired persons registered with the libraries in question.
4. Payment of the remuneration referred to in paragraph 1 shall not be required if the person liable for payment can demonstrate that the author or his successor in title has waived the right to an equitable remuneration. The author or his successor in title should notify the legal persons referred to in articles 15d and 15f of the waiver in writing.

**Article 15d**

The level of the remuneration referred to in article 15c, paragraph 1, shall be determined by a foundation to be designated by Our Minister of Justice in agreement with Our Minister of Education, Culture and Science, the board of which shall be so composed as to represent in a balanced manner the interests of the authors or the successors in title and the persons liable for payment pursuant to article 15c, paragraph 1. The chair of the board of this foundation shall be appointed by Our Minister of Justice in agreement with Our Minister of Education, Culture and Science. The number of members of this board shall be uneven.

**Article 15e**

Disputes concerning the remuneration referred to in article 15c, paragraph 1, shall be exclusively decided at first instance by the Arrondissementsrechtbank at The Hague.

**Article 15f**

1. The remuneration referred to in article 15c should be paid to a legal person to be designated by Our Minister of Justice in agreement with Our Minister of Education, Culture and Science who is, in their opinion, representative and who shall be exclusively entrusted with the collection and distribution of such remunerations. The legal person referred to in the preceding sentence shall represent the right-holder at law and otherwise in matters relating to the level and collection of the remuneration and the exercise of the exclusive right.

2. The legal person referred to in paragraph 1 shall be supervised by the Supervisory Board specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights.
3. Distribution of the remuneration collected shall be made on the basis of a scheme prepared by the legal person specified in paragraph 1 and approved by the Supervisory Board specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights.

**Article 15g**
Persons required to pay the remuneration referred to in article 15c, paragraph 1, shall be obliged to submit, by 1 April of every calendar year unless otherwise agreed, to the legal person referred to in article 15f, paragraph 1, the number of juristic acts as referred to in article 15c. They shall also be obliged to give the said legal person, on request, immediate access to the documents and other data carriers needed to establish liability and the level of the remuneration.

**Exception to the benefit of handicapped persons**

The Dutch legislature introduced in Article 15i of the Dutch Copyright Act a limitation for the benefit of handicapped people as a result of the implementation of Article 5(3)(b) of Directive 2001/29/EC on Copyright and Related Rights in the Information Society.[40] This provision reads as follows:

**Article 15i**
The reproduction or communication to the public of a literary, scientific or artistic work shall not be deemed an infringement of the copyright in such a work provided such reproduction or communication to the public is exclusively dedicated to people with a disability, to the extent required by the specific disability, and provided it is directly related to the disability, and of a non-commercial nature.
For the *reproduction or the communication to the public* referred to in the first paragraph, the author or his successors in title shall receive fair compensation.

As the wording of the provision suggests, the exception for the benefit of persons with a handicap is applicable to all categories of works protected under the Copyright Act and covers both acts of reproduction and communication to the public. The provision also foresees the payment of fair compensation to the author or his successor in title.[41] A similar provision has been incorporated in Article 10i of the Dutch Neighbouring Rights Act. This limitation applies to the rights granted to the four categories of rights owners under the Act, namely performing artists, phonogram producers, film producers and broadcasting organisations.

The Parliamentary history of this provision shows that the underlying idea is to promote access to works for people with a disability (visual or hearing disability) who are unable to use the works themselves, with particular attention to accessible formats (recital 43 of the preamble to the Directive). Examples in the case of the visually impaired are audio books, works printed in a large font or publications in Braille. With respect to audio books, it was observed during the Parliamentary process that such books are not exclusively aimed at visually handicapped people but that there is a demand for such a format in the normal commercial market.

Discussion arose in Parliament concerning the scope of the limitation and whether

it should serve as a basis for a limitation to the benefit of persons who have mobility problems, like long-term wheelchair users. Given the specific nature of this limitation, both in the Directive and Article 15i of the Act, lawmakers believed that there was insufficient basis to give all persons with mobility problems, whether or not these are based on a handicap, general access to library collections by means of a home connection to a private network. Neither the Directive nor the Act precludes it, but this would require the cooperation of the right holder(s).[42]

Given the fact that the provision in the Copyright Act contains no definition of the "disability" covered, Article 15i seems to have been applied so far only in relation to works made available to persons with a visual handicap. One possible explanation for this could be the fact that, long before the entry into force of Article 15i of the Copyright Act, Dedicon Netherlands[43] had been producing alternative format material under an agreement with the Federation of Dutch Publishers (NUV). Dedicon Netherlands is the organisation responsible for the production and development of accessible information for people with a visual impairment in the Netherlands.[44]

**Use for educational purposes**

**Article 16**

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

Long before the implementation of the Directive, the Dutch Copyright Act allowed the "taking over of parts of works" for teaching purposes, pursuant to Article 16. Article 16(1)(a) gave examples of possible acts falling under the scope of the exception, such as the taking over in publications and sound or visual recordings and according to Article 16(1)(b) in radio or television programmes. Whether these means of reproduction included digital reproduction or online communication was highly uncertain. As a result of the implementation of the Directive, Article 16 of the DCA

has been made technology-neutral/independent, so that digital reproductions are also covered, as well as acts of making a work available to the public. Accordingly, all reproductions and communications that comply with the conditions set out in the Article are in principle covered. Notably, Article 16 of the DCA contains three additional criteria that do not appear in Article 5(3)(a) of the Directive: the work from which the part is taken must have been published lawfully; the adoption must be in accordance with what might reasonably be accepted under the rules of social custom; and moral rights have to be observed.

In addition, educational use requires that the source of the work used be indicated. Furthermore, and in contrast to the Directive, educational uses have always been and remain permissible under Dutch law provided that an equitable remuneration is paid to the right owners. It has been and still is up to the user (the institution) to offer equitable compensation to the right holder in a timely manner; equitability is estimated in terms of what is accepted in the line of business at hand.

Before the implementation of the Directive, all institutions that provided materials made for use as illustrations for teaching purposes could benefit from the teaching exception. This included commercial institutions, for instance companies that published educational books. “Teaching” was to be interpreted broadly. To comply with the requirements of the Directive, Article 16 of the DCA has been modified to specify that the taking over of parts of a work shall not be deemed an infringement of copyright only to the extent justified by the intended, non-commercial purposes. The meaning of non-commercial is not quite clear yet, but according to the Minister of Justice the nature of the activity of taking over the protected material is decisive. If this activity only takes place with the intention of using the material exclusively for teaching purposes, it will be covered by the exception in Article 16. Recital 42 of the Directive stresses that the organisation and means of funding of the educational institute is *not* decisive. Agreements between right owners themselves and between right owners and users of copyright-protected material will have to determine the line between commercial and non-commercial use according to the Minister.

**Home taping**

**Article 16c**

1. Reproduction of the work or any part thereof shall not be regarded as an infringement of the copyright in a literary, scientific or artistic work provided that the reproduction is carried out without any direct or indirect commercial motivation and is intended exclusively for personal exercise, study or use by the natural person who made the reproduction.
2. The manufacturer or the importer of any object intended to allow a work such as specified in paragraph 1 to be heard, to show it or to relate it will be due to make a fair payment to the author or his successor in title.
3. The manufacturer’s obligation to make the payment will arise at the point when the manufactured object is ready to be put into circulation. The importer will become subject to this obligation at the time of importing.
4. The obligation to pay shall lapse if the person obliged to make the payment under paragraph 3 exports the object as specified in paragraph 1.
5. The payment shall be due only one time per object.
6. Government orders may prescribe more detailed regulations in relation to the objects giving rise to the obligation for payment as specified in paragraph 2. Government orders may also provide more detailed regulations and

impose more detailed conditions as regards the implementation of this Article in relation to the level, indebtedness and format of the fair payment.
7. If a reproduction permitted by this Article has taken place, objects as defined in paragraph 1 may not be issued to third parties without consent from the author or his successors in title unless the issuance occurs for judicial or administrative proceedings.
8. This Article shall not apply to reproduction of a collection accessible by electronic means, as specified in article 10, paragraph 3.

**Article 16d**
1. The payment referred to in article 16c shall be made to a legal person appointed and considered to be representative by Our Minister of Justice, who will be charged with collection and distribution of this payment in accordance with a scheme prepared by that legal person and approved by the Supervisory Board as specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights.
This legal person shall represent the authors or their successors in title in matters pertaining to the collection and distribution of payments, both at law and otherwise.
2. The legal person specified in paragraph 1 will be supervised by the Supervisory Board specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights.
3. Further regulations regarding the exercise of supervision over the legal person referred to in paragraph 1 may be laid down by order in council.

**Article 16e**
1. The level of the remuneration referred to in article 16c shall be determined by a foundation to be designated by Our Minister of Justice, the board of which shall be so composed as to represent in a balanced manner the interests of the authors or their successors in title and the persons liable for payment pursuant to article 16c, paragraph 2. The chair of the board of the said foundation shall be appointed by Our Minister of Justice.

**Article 16f**
Persons required to pay the remuneration referred to in article 16c shall be obliged to submit to the legal person referred to in article 16d, paragraph 1, either immediately or within a period agreed with the said legal person, the number of the objects imported or manufactured by him as referred to in article 16c, paragraph 1. They shall also be obliged to give the said legal person, at the latter’s request, immediate access to the documents needed to establish indebtedness and the level of the remuneration.

**Article 16g**
Disputes in relation to the payment specified in articles 15i, paragraph 2, 16b and 16c shall be determined in the first instance exclusively by the District Court in The Hague.

**Article 16ga**
1. Whoever sells the objects specified in article 16c, paragraph 2, shall be obliged to furnish to the legal person specified in article 16d, first paragraph,

immediately on request, the documents necessary to establish whether the payment specified in article 16c, paragraph 1 has been paid by the manufacturer or importer.
2. If the seller cannot demonstrate that the payment has been paid by the manufacturer or the importer, he will be obliged to make the payment to the legal person specified in article 16d, paragraph 1, unless the documents mentioned in paragraph 1, above, show who the manufacturer or importer is.

Articles 16c–16g deal with the specific issue of *home taping* and provide for a remuneration system for reproduction of a work by fixing it on an object used for the purpose of showing the images or playing the sounds recorded upon it. The manufacturer or importer of the recording media will be liable for payment of the remuneration. Important is that, in article 16c, the concept of reproduction does not include transformation. This is because, in the Dutch version of article 16c, the term *reproductie* is used, meaning reproduction in a narrow sense (see also Part I, answer to Question 1a/b, last paragraph).

**Reprographic reproduction**

**Article 16h**

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

**Article 16i**

The payment specified in article 16h will be calculated for each page of a work that has been reprographically reproduced as specified in the first and second paragraphs of that article. Government orders may prescribe the level of the payment and may make more detailed rules and impose more detailed conditions.

**Article 16j**

A reprographic reproduction, falling within the provisions of article 16h, may only be issued to individuals employed in the same business, organization or institution without the author or his successor in title having given consent, unless the issuance occurs for the sake of legal or administrative proceedings.

**Article 16k**

The obligation to make payment, as specified in article 16h, shall lapse after the expiry of three years from the time when the reproduction is made. The payment will not be due if the person obliged to make that payment demonstrates that the author or his right-holder has waived the right to payment.

**Article 16l**

1. The payment specified in article 16h should be made to a legal person appointed and considered to be representative by Our Minister of Justice, who will be charged to the exclusion of others with collection and distribution of this payment
2. The legal person specified in paragraph 1 hereof shall represent the authors or their right-holders in all matters pertaining to the collection and distribution of the payments.
3. The legal person specified in paragraph 1 hereof shall use a scheme for the collected payments. The scheme shall require the approval of the Supervisory Board specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights.
4. The legal person specified in paragraph 1 hereof shall be supervised by the Supervisory Board specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights.
5. Paragraphs 1 and 2 hereof shall not apply to the extent that those who are under an obligation to make payment can demonstrate that they have agreed with the author or his right-holders to make the payment directly to him or them.

**Article 16m**

Whoever is obliged to make the payment specified in article 16 h to the legal person specified in article 16l, paragraph 1, shall be obliged to submit a return to the legal person of the total number of reprographic reproductions he has made per year. The return specified in paragraph 1 will not require to be submitted if the number of reprographic reproductions made each year is less than such number as may be fixed by government order.

The law on reproductions by means of reprography was amended by the Act of 2002. Articles 16h–16m provide for a remuneration system for the *reprographic reproduction* of an article in a daily or weekly newspaper or periodical, or of a small portion of a book and of other works that are reproduced in these works. A reprographic reproduction is described as “reproduction techniques that lead directly to a readable copy of a writing on paper or microfiche”. Examples mentioned are copying by hand, copying by typewriter, photocopying and faxing.[45] It is explicitly said that saving works on a computer is not covered by this exception. This has remained unchanged since the implementation of the Directive.[46]

***Rules on misuse***

N/A

**6. Please cite and/or describe as completely as possible:**

***a) The legal instruments and/or the relevant judicial practice concerning Question 2a)***

See Question 2a above.

***b) The provisions covered by Question 2c) to e)***

Please see answers to Questions 2 and 5.

***c) Where appropriate, the relevant judicial practice concerning Question 2c) to e)***

***d) The rules on abuse according to Question 2f)***

**7. Have certain legal instruments according to Question 2a) to f) only been introduced in the course of time; been repealed in the course of time; and if so why?**

***Specific preconditions or thresholds allowing a work's protection only if it surpasses a particular degree of creativity***

The DCA dates back to 1912; the preconditions or threshold for copyright protection cannot be found in the law itself but have been developed in case law over the years. In the Supreme Court case *Van Dale/Romme* it was decided that "every original creation with a personal stamp of the author is protected under copyright law".[47] These requirements for protection were confirmed in the *Endstra* case.[48] However, the scope of protection of a product may depend on the breadth of originality of a work, as was decided in case law. In principle only the elements of a work that provide its original character are protected by copyright; banal and trivial elements are not protected and may be reproduced or made public without the consent of the copyright holder.[49] In the *De la Haye v Shell* case, the Court of Appeal of The Hague ruled that the scope of protection of the author's moral rights is related to the character of the work. Works that have a utilitarian character and function enjoy a lower level of protection of moral rights.[50]

***Period of protection***

Until 1995 the period of protection for copyright was 50 years p.m.a. In 1995 this period was extended to 70 years p.m.a. as a result of the implementation of Directive 93/98/EU.

***Limitations/exceptions and mandatory licenses***

The Dutch Copyright Act has continuously been subject to change. In 2002 the Dutch Copyright Act was amended in order to extend the existing photocopying regime, which formerly applied only to the public sector, to commercial enterprise. As a result, private companies are now under an obligation to report to the *Stichting Reprorecht* (the reprography rights society) the number of photocopies annually made, and to pay a levy of 4.5 euro cents per photocopy of copyright-protected text.

Furthermore, the implementation of Directive 2001/29/EC on Copyright and the Information Society added the following limitations and exceptions:

– Article 15h (access to a literary, scientific or artistic work forming part of the collections of libraries accessible to the public, and museums or archives)
– Article 16n (restoration of works by libraries, museums or archives accessible to

the public for non-commercial purposes)
- Article 18a (incidental processing of literary, scientific or artistic works)
- Article 18b (publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche).

Other legislative changes, in chronological order:
1991 Private copy remuneration, levy for carriers and discs
1992 New Dutch Civil Code
1994 Special provision for the protection of computer programs
1995 Extension of copyright protection from 50 to 70 years p.m.a.
1996 Introduction of special provisions for passing on copyright-protected works via satellite and cable broadcasting
1998 Anti-Piracy Directive
1999 Special provision for copyright protection of databases
2003 Introduction of concentrated collective rights management.

**8. Are there rules that restrict the scope of the user rights according to Question 2c) to e)? In particular:**

***By laying down specific preconditions for the applicability of individual user rights***

Before the implementation of the Directive 2001/29/EC, Article 15a of the Copyright Act stated that quotations were allowed in "an announcement, criticism, polemic or scientific treatise" as long as the conditions set out in the Article were met. For many authors, the circumstances listed in the Act are the most controversial element of the provision. Such restriction on the scope of the limitation appeared strange not only in light of the neutral concept of "quotation", but also in light of social reality. The quotation right in Article 15a has therefore been updated. A quotation is now permissible not only in "an announcement, criticism or scientific treatise", but also in a "publication for a comparable purpose". The scope of the quotation exception is restricted in conformity with Article 5(3)(d) in the following ways:

1) the work quoted from must have been published lawfully;
2) the quotation is to be commensurate with what might reasonably be accepted in accordance with social custom and the number and size of the quoted passages are justified by the purpose to be achieved;
3) as far as reasonably possible the source, including the author's name, is to be clearly indicated.

This was already stipulated as such in the DCA. The requirement that moral rights are to be observed, not prescribed by the Directive, is maintained as well. According to Article 15a(2) the term "quotations" shall also include quotations in the form of press summaries from articles appearing in a daily or weekly newspaper or other periodical.

Article 5(2)(c) has been transposed by the Dutch legislature in Article 16n DCA. The provision is new to Dutch copyright law. It allows public libraries, museums and archives to make archival copies of works in their collection, subject to strict conditions. The purpose must be merely archival (not commercial), (1) with the aim of restoring the work, (2) of replacing it in case of imminent destruction or (3) of keeping

it in a condition in which it can be consulted if there is no technology available to render it accessible. In contrast to Article 5(2)(c) of the Directive, the Dutch provision subjects the application of this exception to two additional conditions: first, that the specimen of the work forms part of the collection held by the library, museum or archive accessible to the public relying on this limitation; and second, that the provisions in Article 25 on moral rights be taken into account.

Since its 2004 revision, the Dutch Copyright Act now also expressly permits parody. This had been a disputed issue for many years – not because parody was considered a restricted act (the Dutch are proud of their sense of humour), but because it was difficult to conceptualise a parody defence absent an express exemption. In line with Article 5(3)(k) of the Directive, the new Article 18b legalises "caricature, parody or pastiche" on condition that "the use is in accordance with the normal rules of social custom".

***By laying down abstract preconditions for the applicability of individual user rights***

The limitations and exceptions in Dutch copyright law all address a specific use of copyright works. Each limitation or exception describes the purpose of the work and the categories to which the work applies as well as the conditions. Furthermore, the more abstract three-step test has been applied by the courts to copyright protected works.

**9. Are there rules to protect the existence of the user rights according to Question 2c) to e)? In particular:**

***What kinds of binding rules are there to prohibit the undermining of statutory user rights?***

In the Netherlands, the provisions of the Copyright Act vary slightly from those of the Computer Program Directive, giving the lawful user of a copy of a computer program a small advantage. For instance, Article 5(1) of the Directive provides that: "in the absence of specific contractual provisions, the acts (…) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction". In comparison, the implementing Article in the Dutch Copyright Act reads as follows:

> Unless otherwise agreed, the reproduction of a work as referred to in article 10, paragraph 1, sub 12 by the lawful acquirer of a copy of said work, where this is necessary for the use of the work for its intended purpose, shall not be deemed an infringement of copyright. Reproduction, as referred to in the first sentence, in connection with loading, displaying or correcting errors cannot be prohibited by contract.[51]

Thus, while right owners are free to regulate by contract the running, transmitting or storing of a computer program, they may not prohibit lawful acquirers from performing such acts as loading, displaying or correcting of errors. The last sentence makes it clear that, in view of the unprecedented expansion of copyright protection, the Dutch legislature wanted to guarantee the lawful acquirer of a copy of a computer

program a minimum right to perform those acts that are necessary for the normal use of the computer program. In this sense, it is somewhat surprising to note that the Dutch Implementation Act has not transposed Article 9(1) of the Computer Program Directive, which expressly proclaims the mandatory character of the provisions permitting the lawful user to conduct a black-box analysis or a decompilation of the computer program. In the Explanatory Memorandum to the Implementation Act, the Dutch Government did indicate that the limitations on the exclusive right, such as those laid down in Articles 45k, 45l, and 45m of the Act, were imperative. However, according to the Government, there was no need to specify this in the Act.[52] Although it would certainly have been clearer to spell it out in the Act, the mandatory character of these provisions cannot be ignored by the Dutch courts, since they too must interpret these provisions in compliance with the Directive. By contrast, the mandatory limitations of the Database Directive have been incorporated into the Dutch Copyright Act without any variation.[53]

There is little but important case law in the Netherlands on the mandatory character of certain user rights inside contracts. The Dutch Supreme Court, in the *Leesportefeuille* case[54] offers one example of a court's assessment of a restrictive contractual clause relating to the exhaustion doctrine. In this case, a magazine publisher had put a notice in his publications prohibiting the legal acquirer from re-using the printed material in subsequent 'reading portfolios', known as *leesportefeuilles*. The defendant disregarded the notice, published a portfolio and distributed it to his clients. The plaintiff filed suit on the grounds of copyright infringement. The Supreme Court found in favour of the defendant, considering that the plaintiff's copyrights were exhausted as soon as he had made his magazines available to the public and had therefore no right to restrict the user's subsequent actions. The notice prohibiting further reproduction was contrary to the exhaustion doctrine found under the Dutch Copyright Act.

Relying on its ruling in the *Leesportefeuille* case, the Dutch Supreme Court rendered a similar decision in *Stemra v. Free Record Shop*.[55] Like in the earlier case, the producers of sound recordings, whose interests were represented by the collective society Stemra, had printed a notice on each CD that forbade purchasers from further transferring the CD to others. The Court reiterated the principle expressed in its earlier decision, saying that once a work is lawfully made available to the public, the further distribution of the work to third parties, through rental for example, does not constitute an act of making available to the public in the sense of the Copyright Act.

The District Court of The Hague rendered one of the few known European decisions where the relationship between a contractual restriction on use and a statutory limitation on copyright is briefly analysed.[56] The case involved the posting on a student's website of parts of a commercial CD-ROM containing Dutch legislation. The plaintiff, a Dutch publisher, sued for copyright infringement. In support of his claim, the publisher argued that the student had breached the contract that was clearly printed on the product's packaging and that prohibited 'any unauthorised downloading or any other kind of copying of the CD-ROM'. The District Court admitted as a common practice the fact that producers of data and sound supports inscribe such statements on their products (as producers of gramophones did in the past) and that the restrictions included therein are usually broader, sometimes much broader, than what the law provides.[57] The Court considered that there is for the buyer of a CD-ROM little reason to see in such a statement anything more than a warning about the existence statutory limitations on use. The defendant could and might therefore have understood the

statement in such a way that the word ‘unauthorised’ meant nothing else than ‘legally unauthorised’. In other words, the Court interpreted the contract clause as aiming only at the limitations provided under the Dutch Copyright Act, rather than at any other broader limitation flowing from the contract.

***How is the relationship between technical protection measures/DRM (digital rights management) and statutory user rights regulated?***

Article 6(4) of the EU Copyright Directive 2001/29/EC on the obligation of the right holder to provide users with appropriate measures to exercise certain limitations with respect to a work protected by a TPM has been implemented in paragraph 4 of Article 29a DCA, which reads as follows.[58]

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

The anti-circumvention provision in Article 29a(4) of the DCA is noteworthy only for its reluctance to directly transpose Article 6(4) of the Directive, the notoriously opaque “facilitation” requirement. Instead, the provision delegates the power to the Government to provide for such an obligation by way of government ordinance, if right holders fail voluntarily to facilitate the exercise of copyright exemptions. The instrument of an ordinance will allow a flexible and timely response, according to the Government. Interestingly, Article 29a(4) of the DCA refers not only to the obligatory exceptions of Article 6(4)(1) of the Directive, but also to the optional private copying exemption mentioned in Article 6(4)(2).

Moreover, the revised provision on home taping (Article 16c *et seq*. DCA) contains no express requirement to take into account the application or non-application of technological measures. However the Explanatory Memorandum speculates at some length on a future phasing out of levies, as required by Article 5(2)(b) of the Directive. According to the Dutch Government, account must be taken not only of the actual application of technical protection measures, but also of their being available. If technical protection measures are available in practice, i.e. if they can be used on an economical basis, levies should not become a bonus for right holders who make no use of technical protection measures.

***Is there a decision (explicit or implicit) on the extent to which exclusivity rules to the benefit of the right holder, or access possibilities in favor of third parties, should enjoy priority in the event of doubt?***

The Dutch courts have not been called upon to rule on this point yet.

## 10. Questions concerning user rights subject to remuneration or mandatory license

### *a) How is the amount of the fee determined for cases covered by Question 2d) or 2e), namely: basically; and in the event of conflict?*

**Private Copy (Articles 16c–16g DCA)**[59]

The applicable rules on remuneration to authors for private copies can be found in Articles 16c–16g DCA. The principle is set out in Article 16c:

> 1. A remuneration is owed to the author or his successor in title for the reproduction in accordance with article 16b, paragraph 1, for personal practice, study or use, of a work or part thereof by fixing it on an object which is intended to show the images or play the sounds recorded upon it.
> 2. The manufacturer or importer of the objects referred to in paragraph 1 shall be liable for payment of the remuneration.
> 3. The manufacturer shall be obliged to pay the remuneration at the time that the objects manufactured by him can be brought into circulation. The importer shall be obliged to pay the remuneration at the time of import.
> 4. The obligation to pay the remuneration shall lapse if the person liable for payment pursuant to paragraph 2 exports the objects referred to in paragraph 1.
> 5. The remuneration shall be paid only once for each object.

On the basis of Article 16d, the remuneration referred to in Article 16c shall be paid to a legal person to be designated by the Minister of Justice. The legal person that has been designated is the Stichting de Thuiskopie, which represents the authors and collects and distributes remunerations. The tariff of remuneration is decided upon by a special foundation (SONT) in which both authors and manufacturers and importers are represented. The most recent tariffs are: [60]

| **Type of remuneration** | **Tariff** |
|---|---|
| Data CD-R/RW: | €0.14 per disc |
| Blank DVD-R/RW: | €0.60 per 4.7 gigabyte* |
| Blank DVD+R/RW: | €0.40 per 4.7 gigabyte* |
| Audio CD-R/RW: | €0,42 per hour (€ 0,52 per 74 minutes) |
| HI MD | €1.10 per unit |
| Blank DVD-RAM | -- |
| Video analogue (videotapes) | €0.33 per hour |
| Audio analogue (cassettes) | €0.23 per hour |
| MiniDisc | €0.32 per hour |

In the event of conflict the user may start proceedings at the Court of First Instance in The Hague, which is solely authorised to rule on tariff disputes (Article 16g DCA). Furthermore, since 2004 the court is authorised to rule on cases regarding the grounds for equitable remuneration.[61]

**Reproduction right (Articles 16h–16i DCA)**

The level of remuneration for reprographic reproductions (Article 16h Reproduction Directive) shall be calculated for every page upon which a work is reproduced.

Currently the tariff is 0.045 euro per copied page; for educational institutions the reduced tariff of 0,011 euro applies. However, the level of remuneration for businesses is agreed upon by negotiation and depends on the sector and the number of employees. In principle the fees are paid to the Stichting Reprorecht (Article 16l Reproduction Directive), however, the user can also agree to pay the right holder directly. There is no special arrangement in the event of conflict.

> **Article 16h DCA**
> 1. The reprographic reproduction of an article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works that are reproduced in these works shall not be deemed an infringement of the copyright in the works, provided that remuneration is paid.
> 2. The reprographic reproduction of an entire work shall not be deemed an infringement of the copyright in the works, in the case of a book of which it may reasonably be assumed that no new copies will be made available to third parties for payment of any kind, in any form, provided that remuneration is paid.

**Lending right (Articles 15c–15e DCA)**

The StOL foundation sets the tariff after negotiations with the relevant parties. Article 15e DCA provides that disputes concerning the remuneration referred to in Article 15c(1) shall be exclusively decided at first instance by the Arrondissementsrechtbank at The Hague.

> **Article 15c**
> 1. The lending as referred to in article 12, paragraph 1, sub 3°, of the whole or part of a work or a reproduction thereof brought into circulation by or with the consent of the rightholder shall not be deemed an infringement of copyright, provided the person doing or arranging the lending pays an equitable remuneration. The first sentence shall not apply to a work referred to in article 10, paragraph 1, sub 12°., unless that work is part of a data carrier containing data and serves exclusively to make the said data accessible.
> 2. Educational establishments and research institutes, the libraries attached to them, and the Royal Library are exempt from payment of a lending remuneration as referred to in paragraph 1.
> 3. Libraries funded by the Libraries for the Blind and Visually Impaired Fund are exempt from payment of a remuneration as referred to in paragraph 1 in respect of items lent to blind and visually impaired persons registered with the libraries in question.
> 4. Payment of the remuneration referred to in paragraph 1 shall not be required if the person liable for payment can demonstrate that the author or his successor in title has waived the right to an equitable remuneration. The author or his successor in title should notify the legal persons referred to in articles 15d and 15f of the waiver in writing.

***b) Are there particular procedural rules: for cases covered by Question 2d), 2e) or 2f), e.g. concerning the distribution of the burden of proof; provisional measures; other aspects?***

In the specific case of the levy on reprographic reproductions, because it is near impossible to determine the actual amount of copies, the collecting societies and representatives of businesses have decided on a system where undertakings pay an annual flat fee. The fee is related to the number of employees of the company.

***c) How is the fee paid to the right holders by the party entitled to use: for cases covered by Questions 2d) and 2e)?***

In most cases the fee is paid to the right holders via collecting societies. However, in some cases (e.g. the limitation for educational use of sound and audiovisual material) users have signed agreements with undertakings, whereby the fees are directly paid to the right holders.

***d) Does national law contain rules that regulate the distribution of fees for cases covered by Questions 2d, and 2e) between the various categories of right holders? If so, which? If not, how are such distributions determined?***

Most rules that regulate the distribution of fees can be found in the DCA and NR. There are a few special provisions, for instance the Reprography Decree for reprographic reproductions. The most common way in which the fees are distributed is via collecting societies.

**11. Does national law contain general rules based on a differentiation between different categories of right holders? In particular:**

***a) Binding rules on contractual relationships between different categories of right holders (copyright contract)***[62]

The basic principle in Dutch contract law is the freedom of contract. Copyright can also be subject to contract according to Article 2 DCA:

> 1. Copyright passes by succession and is assignable wholly or in part.
> 2. The delivery required by whole or partial assignment shall be effected by means of a deed of assignment. The assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title.
> 3. The copyright belonging to the author of a work and, after his death, to the person having acquired any unpublished work as successor or legatee of the author shall not be liable to seizure.

Under Dutch copyright law, an assignment can only be *effectuated* by means of a deed, i.e. a written instrument intended for this purpose, signed by the author. For licensing contracts, the Copyright Act imposes no formal requirements. These requirements do not state that a deed is, in any case, the only means to prove the transfer of rights. With respect to audiovisual works, Articles 45d and 45f of the Copyright Act provide that if the parties' intention is that the rights in the work remain wholly or partially with the author, this should be done in writing. Besides Article 2(2)

of the Act, the Copyright Act contains no further provision requiring that transfers of rights be limited in scope, time or place. In practice, however, the parties to a copyright contract generally regulate the scope of the transfer of rights within their agreement

Moral rights, however, cannot be transferred (Article 25 DCA) and rest with the original right holder or his/her successors in title or the person designated by the deceased author.

**Article 25**

1. Even after assignment of his copyright, the author of a work has the following rights:
   a. the right to oppose the communication to the public of the work without acknowledgement of his name or other indication as author, unless such opposition would be unreasonable;
   b. the right to oppose the communication to the public of the work under a name other than his own, and any alteration in the name of the work or the indication of the author, in so far as it appears on or in the work or has been communicated to the public in connection with the work;
   c. the right to oppose any other alteration of the work, unless the nature of the alteration is such that opposition would be unreasonable;
   d. the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such.
2. Upon the death of the author, the rights referred to in paragraph 1 shall belong, until the expiry of the copyright, to the person designated by the author in his last will and testament or in a codicil thereto.
3. The right referred to in paragraph 1, sub a, may be waived. The rights referred to in sub b and c may be waived in so far as alterations to the work or its title are concerned.
4. If the author of the work has assigned his copyright, he shall continue to be entitled to make such alterations to the work as he may make in good faith in accordance with social custom. As long as copyright subsists, the same right shall belong to the person designated by the author in his last will and testament or in a codicil thereto, if it may reasonably be assumed that the author would have approved such alterations.

The author may not relinquish his right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to his name or reputation or to his dignity as such. In other words, the possibility for an author to renounce by contract certain components of her moral right would be limited by the general principles of law. If a waiver of right were prejudicial to the author's name, reputation or dignity, such waiver would most likely be invalidated for running afoul of the general principles of objective good faith, and of public order and good morals. With respect to the authors of an audiovisual work, Article 45e provides some detailed rules on the author's right to be named. According to Article 45f, the authors of an audiovisual work are assumed to have waived their right to oppose alterations in their contributions *vis-à-vis* the exploiter, unless otherwise agreed in writing. These articles apply likewise to the performances incorporated in the work (Article 4 Dutch Copyright Act).

### *b) Differences with respect to the scope of statutory user rights*

N/A

## 12. Which of the following legal instruments or mechanisms are used in national law outside copyright in order to achieve a "balance of interests"?

### *a) Fundamental rights*

Freedom of expression can be considered as an external limitation to copyright. In that case, Article 10 ECHR is usually applied since it has a broader scope than Article 7 of the Dutch Constitution. Article 7 of the Constitution only deals with freedom of expression, and does not guarantee a freedom to impart and receive information. A more important reason is that, under Dutch constitutional law, courts cannot review the constitutionality of acts of Parliament and treaties; there is no constitutional scrutiny.[63] Moreover there is no constitutional court in the Netherlands.

Although courts in the Netherlands have long been hesitant to apply Article 10 ECHR in copyright cases, the District Court of Amsterdam has ruled in a conflict between a copyright owner's exercise of the right to prohibit the reproduction of his artistic work and a newspaper's unauthorised publication of a photograph of that work.[64] In this case, the newspaper *De Volkskrant* published the text of an interview with a Dutch businessman along with a photograph taken in the interviewee's office. Prominent in the picture was one of the many works of art on display in the office, namely the statuette of an archer, which was still protected by copyright vested in the copyright collective society, *Stichting Beeldrecht*. The society brought a copyright infringement action against the newspaper. Since no other statutory limitation could be applied in the circumstances, the newspaper argued that the publication of the photograph was covered by freedom of expression, which also includes the right to gather and impart information, as described in Article 10 of the ECHR. Applying each of the criteria developed under Article 10(2) of the ECHR, the court proceeded to balance the interests of the copyright owner against those of the newspaper. In doing so, the court admitted that the right to prohibit granted under copyright law could, in certain circumstances, constitute a restriction on freedom of expression of another. However, in the case at hand, the court believed that the statuette did not appear in the photograph "by coincidence" or "because it was practically impossible to avoid it", but was rather photographed on purpose and made to look bigger than it did in reality. Consequently, the court ruled that the exercise of the exclusive right by the copyright owner did not constitute an unlawful restriction of the newspaper's freedom to gather and impart information as guaranteed under Article 10 of the ECHR.[65]

The landmark case of *Dior v. Evora* also acknowledged the conflict between copyright and freedom of expression. Having concluded that no statutory copyright exemption applied to the facts of the case, the Supreme Court accepted that there was room to move outside the existing system of exemptions, on the basis of a balancing of interests similar to the rationale underlying the existing exemptions.[66] Having found sufficient room to accommodate the users' interests by construing such an extra-statutory exemption, the Court saw no need for direct application of Article 10 ECHR.

Another conflict of rights arose more recently in the context of the publication by the newspaper *Het Parool* of the "missing pages" of Anne Frank's diary.[67] During

trial, the newspaper admitted that its reproduction of the "missing pages" did not fall under any of the limitations listed in the Dutch Copyright Act 1912, but based its defence on the public's right to information guaranteed under Article 10 ECHR. This defence was accepted at first instance, but reversed on appeal.[68] The Court of Appeal of Amsterdam reiterated that copyrights granted under the Dutch Copyright Act 1912 and the Berne Convention constitute a "right of others" on the basis of which the freedom of information can be limited pursuant to Article 10(2) ECHR. The Court had to decide whether, under the circumstances, the exercise by the Anne Frank Foundation of its right to prohibit publication amounted to a limitation on the newspaper's freedom of expression that was "prescribed by law" and "necessary in a democratic society". The newspaper based its defence on Article 10 ECHR and on the significant newsworthiness of Anne Frank's annotations made on 8 February 1944. *Het Parool* was thus referring to the public interest in gaining knowledge about the unpublished annotations in the diary of such an important public figure as Anne Frank. This argument was rejected. In doing so, the Court declared that, all things considered, the interest of *Het Parool* was not predominant enough that it should prevail over the copyrights owned by the Anne Frank Foundation.[69]

The most recent case dealing with the subject is the case of *Scientology v. XS4all*.[70] Author Karin Spaink had posted large portions of confidential Scientology documents on her website, which contained extensive criticism of the Scientology Church. The Church sued a number of internet service providers and Karin Spaink. Defendants argued their case *inter alia* on the basis of free speech, with success. The Court of Appeal of The Hague held that in the absence of a statutory limitation that might cover Spaink's extensive postings, Scientology's copyright was trumped by the freedom of expression enshrined in Article 10 ECRM. The Court underscored the non–profit and informative character of Karin Spaink's website and the contribution of her postings to the public democratic debate. The general interest of having a public debate on Scientology outweighed the interest of the Scientology Church in enforcing its exclusive rights. Before the Dutch Supreme Court, the case was eventually dropped by the Church at the very last minute, robbing the law of a potentially groundbreaking decision.[71]

### *b) Competition law*

A refusal to license a copyright-protected work may constitute an abuse of a dominant position, contrary to Article 24 of the Dutch Competition Act. Cases of abuse of a dominant position in relation to the refusal to license an intellectual property right have reached the Dutch courts as well as the Dutch Competition Authority (Nederlandse Mededingingsautoriteit).[72] In the presence of exceptional circumstances calling for it, even the Supreme Court of the Netherlands did conclude that such refusal to license constituted an abuse of a dominant position and ordered the grant of a compulsory licence.[73] In reaching their decisions, the Dutch courts closely follow the jurisprudence of the European Court of Justice (ECJ).[74]

The District Court of The Hague examined the so-called Fair Reasonable and Non-Discriminatory Standards (FRAND standards). FRAND standards are used in the standard-setting process to ensure compatibility and interoperability. Standard-setting organisations involved in this process obligate their members to license according to FRAND standards. Although the case from the Court in The Hague was about patent law, it could be interesting for future case law in the Netherlands relating

to competition law and intellectual property law. The case involved CD and DVD technology which Philips patented. The opposite party argued that they did not infringe the patent of Philips because, according to the FRAND standards, they were entitled to a licence. The Court did not agree with this line of reasoning. The opposing party did not obtain a licence and therefore infringed the patent right of Philips. The Court did not exclude the possibility that, in special circumstances, a party that is entitled to a licence according to the FRAND standards, but did not obtain one, could be exonerated from infringement. However, in this case there were no such special circumstances and there was therefore no abuse of a dominant position. The opposing party knew Philips had patented the technology in question and even then decided not to obtain a licence according to the FRAND standards. Therefore, they infringed the patent right of Philips. The Court acknowledged that this judgement differs from the German case law in FRAND-defence cases (for example the *Orange Book* case). According to the Bundesgerichtshof, a FRAND defence succeeds when a licence is not actually obtained if the opposing party unconditionally offered to obtain a FRAND licence and to already comply with the conditions in the licence (for example, to already pay royalties). The Dutch Court disagreed because this did not conform to the rules of patent law; it created legal uncertainty and was unnecessary for the protection of the legitimate interests of the opposing party.[75]

### *c) Contract law*

Another legal instrument that on occasion might serve as an extra-statutory limitation is Article 6:168(1) of the Civil Code, which states that “the judge may reject an action to obtain an order prohibiting unlawful conduct on the ground that such conduct should be tolerated for reasons of important social interests. The victim retains his right to reparation of damage, according to this title”. This provision has served at least on one occasion to limit the rights of a copyright owner. In this case, the court rejected an architect’s petition for an injunction on the grounds that the halt of building activities would constitute a disproportionate means of redress, considering all interests at hand.[76] The rule of fairness and reasonableness, laid down in Article 6:248 of the Dutch Civil Code, may serve as a remedy against excessive copyright claims.[77]

### *d) General rules on misuse*

Article 3:13 of the Dutch Civil Code provides the general civil law doctrine of misuse of rights. This doctrine was once invoked in a case involving allegedly abusive practices by collecting societies.[78] Unlike the damage and purpose criteria, the requirement of disproportionality has been invoked with some success in copyright. This involved a particular case where an architect relied on his moral rights to protest against demolition or alteration of his works.[79] Some scholars have written about the possible use of the doctrine of abuse of rights by owners of intellectual property rights.[80]

### *d) Media law*

The Mediawet (Media Act) contains a few provisions which aim at balancing the interests that affect copyright. Section 5.4 deals with events of great (public) importance, the exclusive rights of which are owned by broadcasting organisations. According to this provision, these broadcasting organisations must make these rights available to other providers of broadcasting services. These broadcasters may broadcast short extracts of no more than 90 seconds for events concerning sports. When the fragments are longer than 90 seconds, the extracts may be no longer than 180 seconds.[81]

## Bibliography


**Alberdingk Thijm 1998**
C. Alberdingk Thijm, "Fair Use: het auteursrechtelijk evenwicht hersteld", *Informatierecht/AMI* 1998/22, pp. 145–154.

**Alberdingk Thijm 1999**
C.A. Alberdingk Thijm 1999, *Brief naar het front: nieuws en fair use, Informatierecht/AMI* 1999/9, pp. 143–147.

**Bechtold 2003**
S. Bechtold, "Reconciling DRM Technology With Copyright Limitations", paper presented at the IVIR-BUMA Conference, Amsterdam, 1 July 2003.

**Bechtold 2004**
S. Bechtold, "Digital Rights Management in the United States and Europe", *American Journal of Comparative Law* 2004/52, pp. 323–382.

**Bechtold 2006**
S. Bechtold, "Comment on Directive 2001/29/EC", in T. Dreier & P.B. Hugenholtz (eds.), *Concise Commentary on European Copyright Law*, Alphen aan den Rijn, Kluwer Law International, 2006.

**Van Engelen 1994**
T.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, Zwolle, Tjeenk Willink 1994.

**Gasser/Ernst 2006**
U. Gasser & S. Ernst, *Best Practice Guide – Implementing the EU Copyright Directive in the Digital Age*, s.l., Open Society Institute, December 2006.

**Gielen 1994**
Ch. Gielen, *Volghendeh et rechteo ordeel v an redene: intellectuele eigendom en aspecten van burgerlijk recht: de invloed van de redelijkheid en billijkheid en van zwaarwegende maatschappelijke belangen op de uitoefening van intellectuele eigendomsrechten en is Boek 9 echt nodig*?, W.E.J. Tjeenk Willink, Zwolle 1994

**Gompel 2006**
S. van Gompel, *De vaststelling van de Thuiskopievergoeding*, *AMI* 2006/2, p. 61.

**Grosheide 1986**
F.W. Grosheide, *Auteursrecht op maat: beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context*, Deventer, Kluwer 1986.

**Guibault 2002**
L.M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague, London, Boston, Kluwer Law International, 2002, Information Law Series No. 9.

**Guibault 2003**
L. Guibault, "Le tir manqué de la Directive européenne sur le droit d'auteur dans la société de l'information", *Cahiers de Propriété Intellectuelle* 2003/15, 537–573.

**Guibault 2003a**
L. Guibault, "The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment", UNESCO, *e-Copyright Bulletin*, October–December 2003.

**Guibault 2004**
L. Guibault, "Copyright limitations and 'click-wrap' licences: What is becoming of the copyright bargain?", in Reto M. Hilty & Alexander Peukert (eds.): *Interessenausgleich im Urheberrecht*, Nomos Verlagsgesellschaft Baden-Baden, 2004, pp. 221–251.

**Guibault/Hugenholtz 2002**
L.M.C.R. Guibault & P.B. Hugenholtz, "Study on the conditions applicable to contracts relating to intellectual property in the European Union", study commissioned by the European Commission (May 2002), <http://europa.eu.int/comm/internal_market/copyright/docs/studies/etd2000b53001e69_en.pdf>.

**Guibault/Van Daalen 2006**
L. Guibault & O. van Daalen, *Unravelling the Myth Around Open Source Licences – An Analysis from a Dutch and European Law Perspective*, The Hague, T.M.C. Asser Press, 2006.

**Guibault/Hugenholtz 2006**
L. Guibault & P.B. Hugenholtz, *The Future of the Public Domain – Identifying the Commons in Information*, Alphen a/d Rijn, Kluwer Law International, 2006, Information Law Series No. 16.

**Helberger 1999**
N. Helberger, *Neighbouring rights protection of broadcasting organisation: Current problems and possible lines of action*, Council of Europe, Strasbourg, 15 November 1999, Doc. No. MM-S-PR(1999)009 def.

**Helberger 2005**
N. Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting*, The Hague, Kluwer Law International, 2005, Information Law Series No. 15.

**Helberger 2005b**
N. Helberger, “Digital Rights Management from a Consumer’s Perspective”, *IRiS Plus* 2005/8, pp. 1–8.

**Helberger 2006**
N. Helberger, “The Sony BMG rootkit scandal. Consumers in the US finally wake up. And march to courts…”, INDICARE Monitor 2(2006)11, 27 January 2006, <http://www.INDICARE.org/tikiread_article.php?articleId=165>.

**Houtdijk 2005**
J. Houtdijk, *De strijd om de programmagegevens in Nederland: een nieuwe episode in een bekend omroepfeuilleton*, *Mediaforum* 2005, No. 11/12, pp. 356–365.

**Hugenholtz 1989**
P.B. Hugenholtz, *Auteursrecht op informatie (diss. Amsterdam)*, Deventer 1989.

**Hugenholtz 1996**
P.B. Hugenholtz, “Adapting copyright to the information superhighway”, in: P.B. Hugenholtz (ed.), *The future of copyright in a digital environment,* The Hague, Kluwer Law International 1996, pp. 81–102.

**Hugenholtz 1997**
P.B. Hugenholtz, “Fierce Creatures – Copyright exemptions: towards extinction?”, IMPRIMATUR Consensus Forum, Amsterdam 1997.

**Hugenholtz 2000a**
P.B. Hugenholtz, “Caching and Copyright. The Right of Temporary Copying”, *E.I.P.R*. 2000, 482.

**Hugenholtz 2000b**
P.B. Hugenholtz, “Copyright, Contract and Code: What Will Remain of the Public Domain?”,*Brooklyn Journal of International Law* 2000/26, pp. 77–90.

**Hugenholtz 2000c**
P.B. Hugenholtz, “Why the Copyright Directive is Unimportant, and Possibly Invalid”, *E.I.P.R*. 2000/11, pp. 501–502.

**Hugenholtz 2000d**
P.B. Hugenholtz, “Copyright and Freedom of Expression in Europe”, in: R. Cooper Dreyfuss, D. Leenheer Zimmerman & H. First (eds.), *Innovation Policy in an Information Age*, Oxford: Oxford University Press, 2000, pp. 343–363.

**Hugenholtz 2007**
P.B. Hugenholtz, Auteursrecht op alles?, NJB

**Hugenholtz 2011**
P.B. Bernt Hugenholtz et al., “Dutch report”, ALAI Study Days, Dublin, June 2011, p. 1.

**Hugenholtz/Guibault/Van Geffen 2003**
P.B. Hugenholtz, L. Guibault & S. Van Geffen, *The Future of Levies in a Digital Environment*, Institute for Information Law, March 2003.

**Hugenholtz/Koelman 1999**
P.B. Hugenholtz & K. Koelman, *Copyright Aspects of Caching, Digital Intellectual Property Practice Economic Report*, Institute for Information Law, Amsterdam 30 September 1999.

**Janssens 2005**
M.-C. Janssens, "De uitzonderingen op het auteursrecht *anno* 2005 – Een eerste analyse", *Auteurs & Media* 2005/6, pp. 482–511.

**Koelman 2000a**
K.J. Koelman, "Hoe een koe een haas vangt. De bescherming van technologische voorzieningen", *Computerrecht* 2000/1, pp. 30–36.

**Koelman 2001**
K.J. Koelman, "De derde laag: bescherming van technische voorzieningen", *Auteurs & Media* 2001/1, pp. 82–89.

**Koelman 2003**
K.J. Koelman, *Auteursrecht en technische voorzieningen: juridische en rechtseconomische aspecten van de bescherming van technische voorzieningen*, The Hague, Sdu Uitgevers, 2003.

**Koelman/Helberger 2000**
K.J. Koelman & N. Helberger, "Protection of technological measures", in P.B. Hugenholtz (ed.), *Copyright and electronic commerce*, The Hague, Kluwer Law International, 2000, pp. 165–227.

**Krikke 1995**
J.I. Krikke, *Auteursrecht in de maat*, *AMI* 1995/6, pp. 103–110.

**Krikke 2000**
J.I. Krikke, *Het bibliotheekprivilege in de digitale omgeving*, Deventer, Kluwer Law, 2000.

**Van Lingen 2007**
N. van Lingen, *Auteursrecht in hoofdlijnen*, Groningen Houten: Wolters Noordhoff 2007.

**Van Rooijen 2006**
A. van Rooijen, "Liever misbruikt dan misplaatst auteursrecht: Het doelcriterium ingezet tegen oneigenlijk auteursrechtgebruik"*, AMI* 2006, pp. 45–51.

**Senftleben 2003**
M. Senftleben, "Beperkingen à la carte: Waarom de Auteursrechtrichtlijn ruimte laat voor fair use", *AMI* 2003/27, pp. 10–14.

**Senftleben 2004**
M. Senftleben, *Copyright, limitations and the three-step test: an analysis of the three-step test in international and EC copyright law*, The Hague, Kluwer Law International 2004, Information law series 13.

**Spoor 1996**
J.H. Spoor, "The copyright approach to copying on the internet: (over)stretching the reproduction right?", in: P.B. Hugenholtz (ed.), *The future of copyright in a digital environment,* The Hague, Kluwer Law International 1996, pp. 67–79.

**Spoorbundel 2007**
D.J.G. Visser & D.W.F. Verkade (eds.), *Een eigen oorspronkelijk karakter: Opstellen aangeboden aan prof. mr. Jaap H. Spoor*, Amsterdam, DeLex 2007.

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

**Stein 1993**
P.A. Stein, "Misbruik van Auteursrecht", *AMI* 1993/7, pp. 123–126.

**Vecht 1992**
R.A. Vecht, "Artikel 15 Auteurswet 1912 en de bescherming van nieuwsberichten", *Informatierecht/AMI*, 1992/6, pp. 103–109.

**Verkade 1992**
D.W.F. Verkade, *Misleidende reclame, Monografieen NBW*, No. B49, Deventer 1992.

**Zimmerman & First 2001**
Diane Leenheer Zimmerman & Harry First (eds.), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society*, Oxford, Oxford University Press 2001.

**Studies**

**ALAI**
ALAI Study Days, Barcelona (2006): *Copyright and Freedom of Expression*, Report of the Netherlands ALAI Group, Prepared by Eveline Rethmeier & P. Bernt Hugenholtz.

**IViR**
IViR, *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 Information Society*, report to the European Commission, DG Internal Market, February 2007.

**Case Law**

**European Court of Justice**

ECJ 17 September 2007, case T-201/04 (*Microsoft Corporation v. Commission of the European Communities*).

ECJ 29 April 2004, case C-418/01 (*IMS / NDC Health*); ECJ 6 April 1995, joint cases C-241/91 and C-242/91 (*Magill*).

**Dutch Supreme Court (Hoge Raad)**

Supreme Court (*Hoge Raad*), 23 May 1952, *NJ* 1952, No. 438 (*Stemra/NRU*).

Supreme Court (*Hoge Raad*), 25 January 1952, *NJ* 1952, No. 95 (*De N.V Drukkerij «de Spaarnestad» v. Leesinrichting 'Favoriet'*).

Supreme Court (*Hoge Raad*), 17 April 1953, *Het Radioprogramma*, *NJ* 1954, 211, note by D.J. Veegens.

Supreme Court (*Hoge Raad*), 27 January 1961, *Explicator*, *NJ* 1962, 355, note by Hijmans van den Bergh.

Supreme Court (*Hoge Raad*), 25 June 1965, *Televizier*, *NJ* 1966, 116, note by Hijmans van den Bergh.

Supreme Court (*Hoge Raad*), 24 May 1968, *NJ* 1968, 252 (*BUMA v Brinkmann*); P. Stein, *AMI* 1993, pp. 123–126.

Supreme Court (*Hoge Raad*), 5 January 1979, *NJ* 1997, 339 (*Heertje v Hollebrand*).

Supreme Court (*Hoge Raad*), 20 November 1987, *NJ* 1988 (*Stichting Stemra v. Free Record Shop B.V.*)

Supreme Court (*Hoge Raad*), January 1991, *NJ* 1991, 608, note by D.W.F. Verkade, *AA* 1992, 31, note by H. Cohen Jehoram, *IER* 1991, 96, note by F.W. Grosheide, *AMI* 1991, 177, note by J.H. Spoor, *CR* 1991, 84, note by Hugenholtz (*Van Dale/Romme I*).

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

Supreme Court (*Hoge Raad*), 10 November 1995, *IER* 1996, p. 20, with note by Hugenholtz, p. 28 (*Knipselkranten*).

Supreme Court (*Hoge Raad*), 8 February 2002, *NJ* 2002, 515 (*EP Controls/Regulateurs*).

Supreme Court (*Hoge Raad*), 22 March 2002, *NJ* 2003,149 (*El Cheapo*).

Supreme Court (*Hoge Raad*), 6 June 2003, *AMI* 2003, 141, note by K.J. Koelman; *AA Katern* 2003, 89, p. 4801, note by M.S.C. Bakker & A.A. Quaedvlieg; *Mediaforum* 2003, 247–256. Court of Appeals The Hague, 30 January 2001, [2001] *Mediaforum* 90, affirmed by the Supreme Court (*Hoge Raad*), 6 June 2003, [2003] *AMI* 141 (*NOS v De Telegraaf)*.

Supreme Court (*Hoge Raad*), 16 December 2005 Nr. C04/020HR / JMH/RM LJN AT2056 (*Scientology/Spaink*) AMI 2006-6, p. 202.

Supreme Court (*Hoge Raad*), 16 June 2006, *Kecofa v. Lancôme*, LJN: AU8940, *NJ* 2006, 585, note by J.H. Spoor, at 3.3.2.
Supreme Court (*Hoge Raad*), 30 May 2008, *AMI* 2008, 12 p. 136, note by Senftleben and *IER* 2008, 58 p. 227, note by Seignette (*Endstra Tapes*).

**Courts of Appeal**

**Amsterdam**

Court of Appeal The Hague (Gerechtshof Amsterdam) 22 June 1989, *BIE* 1990, 146.
Court of Appeal The Hague (Gerechtshof Amsterdam), 8 July 1999, No. 44 (*Anne Frank Fonds v. Het Parool*), in *Informatierecht/AMI* 1999, 116, note by Hugenholtz.

**The Hague**

Court of Appeal The Hague (Gerechtshof Amsterdam), 26 November 1987, *BIE* 1989, No. 3, p. 10 (*Raymond Leduc)*.
Court of Appeal The Hague (Gerechtshof 's-Gravenhage) 11 November 1999, *AMI* 2000/1 p. 15, note by Quaedvlieg (*De La Haye v Shell*).
Court of Appeal The Hague (Gerechtshof 's-Gravenhage) 30 January 2000, *AMI* 2000, 73, note by H. Cohen Jehoram; CBB, 8 January 2003, LJN AF2794 (*KPN / Denda*).
Court of Appeal The Hague (Gerechtshof Amsterdam) 26 July 2001, BR 2002, 536 (*Concertgebouw Haarlem*).
Court of Appeal The Hague (Gerechtshof 's-Gravenhage)*,* 4 September 2003, *Informatierecht/AMI* August/September 1999, pp. 113–115. (*Scientology v. XS4ALL).*
Court of Appeal The Hague (Gerechtshof 's-Gravenhage), 11 November 2008, zaaknr. 299597 (*Stichting NORMA, Pieter Blok, Carel Kraayenhof, Ricky Koole, Caroline de Bruijn, NTB & FNV tegen Stichting Onderhandelingen Thuiskopievergoeding, De Staat der Nederlanden, STOBI & FAIR*).
Court of Appeal The Hague (Gerechtshof 's-Gravenhage), 15 November 2010, LJN: BO3982, *ACI c.s. tegen Stichting De Thuiskopie & SONT*.

**Leeuwarden**

Court of Appeal (Gerechtshof Leeuwarden), 17 March 1999, BR 2000, 71 (*De Golfslag*).
Court of Appeal (Gerechtshof Leeuwarden), 26 July 2011, LJN: BR3119 (*NDP v. Provincie Flevoland*).

**District Courts**

**Amsterdam**

District Court (*Rechtbank Amsterdam*), 18 October 1979, *Spaarbank Rotterdam v. ABN (Junior Sparen en Junior Spaarrekening)*, *BIE* 1980, No. 47, p. 176.

District Court (*Rechtbank* Amsterdam), 19 January 1994, *Informatierecht/AMI* 1994, 51 (*De Volkskrant v. M.A. van Dijk en de Stichting Beeldrecht*).

District Court (*Rechtbank* Amsterdam), 12 November 1998, No. 6 (*Anne Frank Fonds v. Het Parool*), in *Mediaforum* 1999, 39 note by Hugenholtz.

District Court (*Rechtbank* Amsterdam), 10 June 2002, *No meat today*, *IER* 2002, No. 41, p. 249.

**Assen**

District Court (*Rechtbank* Assen) 17 November 1992, *AMI* 1993, 191 (*Jelle Abma/Gemeente Ruinen*).

District Court (*Rechtbank* Assen), 11 January 2001, LJN: AA9426, *AMI* 2001, 44 (*Actium v. Woonconcept (Wonerije)*).

**Haarlem**

District Court (*Rechtbank* Haarlem), 9 February 2011, LJN: BP3757 (*FTD B.V. versus Stichting Brein*).

**The Hague**

District Court (*Rechtbank* 's-Gravenhage), March 20, 1998, in Informatierecht/ AMI 1998, pp. 65-67 (*Vermande v. Bojkovski*).

District Court (*Rechtbank* 's-Gravenhage), 4 October 2000, *IER* 2000, No. 67, p. 319 (*Tripp Trapp stoel).*

District Court (*Rechtbank* 's-Gravenhage), 2 March 2005 [2005] Computerrecht 143 (*NPD v De Staat*).

District Court (*Rechtbank* 's-Gravenhage), 6 March 2009, KG ZA 08-1667 (*Noordwand B.V. tegen Spits Wallcovering B.V.*).

District Court (*Rechtbank* 's-Gravenhage), 24 March 2010, HA ZA 08-1225 (*Vereniging van Openbare Bibliotheken in Nederland (VOB) tegen Stichting Leenrecht)*.

District Court (*Rechtbank* 's-Gravenhage), 17 March 2010, HA ZA 08-2522 and HA ZA 08-2524 (*Koninklijke Philips Electronics N.V. tegen SK Kassetten GmbH & Co. KG*).

**'s-Hertogenbosch**

District Court (*Rechtbank* 's-Hertogenbosch), 6 November 2009, LJN: BK2290 (*Boek*

*Herculesramp*).

**Leeuwarden**

Pres. Rb. Leeuwarden, 29 November 1994, *BR* 1995, 443 (*Bankgebouw Leeuwarden*).

**Middelburg**

Pres. Rb. Middelburg 28 August 1992, *KG* 1992, 307 (*Van den Pauwert/Bell-Man*).

**Rotterdam**

District Court (*Rechtbank* Rotterdam), 26 January 1983, *BIE* 1984, No. 43, p. 145 (*Compactluiers*).

District Court (*Rechtbank* Rotterdam), 22 August 2000, *Informatierecht/AMI* 2000/10, p. 205 note by Koelman (*Kranten.com)*.

**Utrecht**

District Court Utrecht in Preliminary Relief Proceedings of 12 May 2010, LJN: BM4200; EC Directive 2007/65 regarding Audiovisual Media.

**Zwolle**

District Court in summary proceedings (*Pres. Rechtbank* Zwolle), 3 June 1982, *BIE* 1984, No. 7, p. 26 (*Bakkerskwaliteit).*

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[1] *See* M. van Eechoud, P. Bernt Hugenholtz, S. van Gompel, L.Guibault, & B. van der Sloot, "Dutch report" 1 (ALAI Study Days, Dublin, June 2011).

[2] Dutch Supreme Court, January 1991, *NJ* 1991, 608, with note by Verkade, *AA* 1992, 31, with note by Cohen Jehoram, *IER* 1991, 96, with note by Grosheide, *AMI* 1991, 177, with note by Spoor, *CR* 1991, 84, with note by Hugenholtz (*Van Dale/Romme I*).

[3] M. van Eechoud et al (2011), *supra* note 1, p. 1.

[4] Supreme Court (*Hoge Raad*), 17 April 1953, *Het Radioprogramma*, *NJ* 1954, 211, with note by D.J. Veegens; Supreme Court (*Hoge Raad*), 27 January 1961, *Explicator*, *NJ* 1962, 355, with note Hijmans van den Bergh; and Supreme Court (*Hoge Raad*), 25 June 1965, *Televizier*, *NJ* 1966, 116, with note by Hijmans van den Bergh. *See also* Supreme Court (*Hoge Raad*) 25 June 1965, *NJ* 1966, 116 (*Televizier*), Supreme Court (*Hoge Raad*) 8 February 2002, *NJ* 2002, 515 (*EP Controls/Regulateurs*) and Supreme Court (*Hoge Raad*) 22 March 2002, *NJ* 2003,149 (*El Cheapo*).

[5] Hugenholtz 1989, p. 84.

[6] Van Engelen 1994, p. 226.

[7] Supreme Court (*Hoge Raad*), 10 November 1995, No. 15.761 (*Knipselkranten*), *IER* 1996, p. 20, with note by Hugenholtz, p. 28.

[8] Alberdingk Thijm 1999, p. 145.

[9] President Rechtbank Rotterdam, 22 August 2000 (*Kranten.com*), *Informatierecht/AMI* 2000/10, p. 205 with note by Koelman.

[10] Rechtbank 's-Gravenhage, 2 March 2005, *NJF* 2005, 165.

[11] Court of appeal of Leeuwarden, 26 July 2011, LJN: BR3119 (*NDP v. Provincie Flevoland*)

[12] January 1991, *NJ* 1991, 608, with note by Verkade, *AA* 1992, 31, with note by Cohen Jehoram, *IER* 1991, 96, with note by Grosheide, *AMI* 1991, 177, with note by Spoor, *CR* 1991, 84, with note by

Hugenholtz (*Van Dale/Romme I*); Dutch Supreme Court, 30 May 2008, *AMI* 2008, 12 p. 136, with note by Senftleben and *IER* 2008, 58 p. 227, with note by Seignette (*Endstra Tapes*).
[13] Supreme Court (Civil Chamber), 30 May 2008, *AMI* 2008, 12 p. 136 (*Endstra Tapes*).
[14] (Interlocutory proceedings) Rechtbank 's-Hertogenbosch, 6 November 2009, LJN: BK2290 (Boek Herculesramp); Rechtbank 's-Gravenhage, 6 March 2009, KG ZA 08-1667, *Noordwand B.V. tegen Spits Wallcovering B.V.*
[15] Supreme Court (*Hoge Raad*), 20 December 1995, *NJ* 1996, p. 682, § 3.10.
[16] Spoor, Verkade & Visser, "Auteursrecht" (Deventer, Kluwer, 2005)
[17] Supreme Court (*Hoge Raad*), 24 May 1968, *NJ* 1968, 252 (*BUMA v Brinkmann*); P. Stein, *AMI* 1993, 123–126; A. van Rooijen, *AMI* 2006, 45–51.
[18] A. van Rooijen, "Liever misbruikt dan misplaatst auteursrecht: Het doelcriterium ingezet tegen oneigenlijk auteursrechtgebruik", AMI 2006-2, 45–51; L.M.C.R. Guibault, "Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright" 281 *et seq*. (The Hague, Kluwer Law International, 2002); J. Krikke, "Auteursrecht in de maat", [1995] *AMI* 1995, 103–110.
[19] Supreme Court (*Hoge Raad*), 20 October 1995, *NJ* 1996, 682 (*Dior v Evora*).
[20] *Parfums Christian Dior SA v Evora BV*, Supreme Court (*Hoge Raad*), 20 October 1995, reproduced in *Nederlandse Jurisprudentie* 1996, No. 682.
[21] Tweede Kamer, vergaderjaar 2003–2004, 28 482, No. 24.
[22] Memorie van Toelichting, Tweede Kamer, vergaderjaar 2001–2002, 28 482, No. 3, p. 20.
[23] Tweede Kamer, vergaderjaar 2001–2002, 28 482, B, p. 3.
[24] J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, "Auteursrecht" 223–224 (Deventer, Kluwer, 2005).
[25] Memorie van Toelichting, Tweede Kamer, vergaderjaar 2001–2002, 28 482, No. 3, p. 38.
[26] Memorie van Toelichting, Tweede Kamer, vergaderjaar 2001–2002, 28 482, No. 3, p. 38.
[27] Tweede Kamer Auteurswet ,11 February 2004 TK 50 50-3347.
[28] *NPD v De Staat*, District Court of The Hague, 2 March 2005, [2005] Computerrecht 143.
[29] Gerechtshof 's-Gravenhage, 11 November 2008, zaaknr. 299597, *Stichting NORMA, Pieter Blok, Carel Kraayenhof, Ricky Koole, Caroline de Bruijn, NTB & FNV tegen Stichting Onderhandelingen Thuiskopievergoeding, De Staat der Nederlanden, STOBI & FAIR*.
[30] *Id*. para. 4.8.
[31] Rechtbank 's-Gravenhage, 24 March 2010, HA ZA 08-1225, *Vereniging van Openbare Bibliotheken in Nederland (VOB) tegen Stichting Leenrecht*.
[32] Rechtbank Haarlem, 9 February 2011, LJN: BP3757, *FTD B.V. tegen Stichting Brein*. Gerechtshof 's-Gravenhage, 15 November 2010, LJN: BO3982, *ACI c.s. tegen Stichting De Thuiskopie & SONT*.
[33] *See e.g*. District court in summary proceedings (*Pres. Rechtbank*) Rotterdam, 26 January 1983, *Compactluiers*, *BIE* 1984, No. 43, p. 145; District court (*Rechtbank*) 's-Gravenhage, 4 October 2000, *Tripp Trapp stoel*, *IER* 2000, No. 67, p. 319; and District court in summary proceedings (*Vzr. Rechtbank*) Amsterdam, 10 June 2002, *No meat today*, *IER* 2002, No. 41, p. 249.
[34] *See e.g*. District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 18 October 1979, *Spaarbank Rotterdam v. ABN (Junior Sparen en Junior Spaarrekening)*, *BIE* 1980, No. 47, p. 176; District court in summary proceedings (*Pres. Rechtbank*) Zwolle, 3 June 1982, *Bakkerskwaliteit*, *BIE* 1984, No. 7, p. 26; Court of Appeal (*Hof*) Amsterdam, 26 November 1987, *Raymond Leduc*, *BIE* 1989, No. 3, p. 10; District court in summary proceedings (*Pres. Rechtbank*) Zwolle, 3 June 1996, *Flevonet*, *IER* 1997, No. 9, p. 30; District court in summary proceedings (*Pres. Rechtbank*) Assen, 11 January 2001, *Actium v. Woonconcept (Wonerije)*, LJN: AA9426, *AMI* 2001, 44.
[35] Supreme Court (*Hoge Raad*), 16 June 2006, *Kecofa v. Lancôme*, LJN: AU8940, *NJ* 2006, 585, with note by J.H. Spoor, at 3.3.2.
[36] Spoor, Verkade & Visser 2005, p. 230.
[37] Spoor, Verkade & Visser 2005, p. 231; Supreme Court (*Hoge Raad*) , 23 May 1952, *NJ* 1952, No. 438 (*Stemra/NRU*).
[38] Van Lingen 2002, p. 139 *et seq*.
[39] Rechtbank Amsterdam (Voorzieningenrechter), 22 December 2009, 444877/KGZA09-2617 (*Bruna/Punt*); Hof Amsterdam, 06 November 2003, [2003-11-06/IER_132151] (*Byblos/Rowlings*); Hof Amsterdam, 30 January 2003, [2003-01-30/IER_78960] (*Bassie III*).
[40] Act modifying the Copyright Act 1912, the Neighbouring Rights Act and the Database Act implementing Directive 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 in relation to the harmonisation of certain aspects of copyright and related rights in the information society, Gazette (*Staatsblad*) 2004, 409.
[41] The obligation to pay fair compensation was introduced as an amendment to the original bill, *see*

Chamber of Representatives (Tweede Kamer), 2003–2004, 28 482, No. 25.
[42] Senate, 2003–2004, 28 482, C, p. 4.
[43] *See* website at http://www.dedicon.nl/catalogus.do?objectId=88084&parentId=71.
[44] Study on Copyright Limitations and Exceptions for the Visually Impaired, Geneva, WIPO, SCCR/15/7, 20 February 2007, pp. 75–76.
[45] Law proposal 22.600, Explanatory Memorandum, p. 8.
[46] IViR, "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 Information Society", report to the European Commission, DG Internal Market, February 2007.
[47] Supreme Court (*Hoge Raad*), 4 January 1991, *NJ* 1991, 608, with note by Verkade, *AA* 1992, 31, with note by Cohen Jehoram, *IER* 1991, 96, with note by Grosheide, *AMI* 1991, 177, with note by Spoor, *CR* 1991, 84, with note by Hugenholtz (*Van Dale/Romme I*).
[48] Hugenholtz, "Auteursrecht op alles?".
[49] Supreme Court (*Hoge Raad*), 5 January 1979, *NJ* 1997, 339 (*Heertje v Hollebrand*), Court of Appeal Amsterdam, 22 June 1989, *BIE* 1990, 146.
[50] Court of Appeal The Hague, 2000, *AMI* 2000, 1 (*De La Haye v Shell*).
[51] Dutch Copyright Act, Article 45j; *see* Spoor, Verkade & Visser 2005, p. 103; and Van Lingen 1998, p. 64.
[52] Verkade 1992, p. 95.
[53] "Wet van 8 juli 1999, houdende aanpassing van de Nederlandse wetgeving aan richtlijn 96/9/EG van het Europees Parlement en de Raad van 11 maart 1996 betreffende de rechtsbescherming van databanken", *Staatscourant* 1999, 303, Art. II. *See* Hugenholtz 1996b, p. 134; and Verkade & Visser 1999, p. 138.
[54] *De N.V Drukkerij «de Spaarnestad» v. Leesinrichting 'Favoriet',* HR, 25 January 1952, *NJ* 1952, No. 95.
[55] *Stichting Stemra v. Free Record Shop B.V.*, HR 20 November 1987, *NJ* 1988, p. 280, *AA* 1989/38, p. 941-948 with comment from H. Cohen Jehoram.
[56] *Vermande v. Bojkovski*, District Court of The Hague, decision of March 20, 1998, in *Informatierecht/ AMI* 1998, pp. 65-67.
[57] Id., p. 67; see: L.M.C.R. Guibault, "Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright" 222 *et seq.* (The Hague, Kluwer Law International, 2002)
[58] Explanatory Memorandum, 28482 No. 3, p. 59.
[59] On 11 April 2011, Fred Teeven, State Secretary for Public Safety and Justice, published a mission statement entitled "Speerpuntenbrief auteursrecht 20©20" in which he proposes to modernise the Dutch Copyright Act. One of the proposals is to abolish the levy on blank CDs and DVDs, http://www.rijksoverheid.nl/documenten-en-publicaties/brieven/2011/04/11/speerpuntenbrief-auteursrecht-20-20.html.
[60] Article 16[e] Aw jo. http://www.thuiskopie.nl/nl/tarieven.
[61] S. van Gompel, "De vaststelling van de Thuiskopievergoeding", *AMI* 2006-2, p. 61.
[62] For instance: non-transferability of certain rights, *e.g*. moral rights.
[63] Article 120: The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.
[64] Arrondissementsrechtbank Amsterdam, 19 January 1994 (*De Volkskrant v. M.A. van Dijk en de Stichting Beeldrecht*), reproduced in *Informatierecht/AMI* 1994, 51.
[65] Hugenholtz 2000e, p. 357.
[66] *Dior v. Evora*, Dutch Supreme Court (*Hoge Raad*) 20 October 1995, [1996] *Nederlandse Jurisprudentie* 682. *See supra* note 19.
[67] Arrondissementsrechtbank Amsterdam, 12 November 1998, No. 6 (*Anne Frank Fonds v. Het Parool*), *Mediaforum* 1999, 39, with note by Hugenholtz.
[68] Hof, Amsterdam, 8 July 1999, No. 44 (*Anne Frank Fonds v. Het Parool*), *Informatierecht/ AMI* 1999, 116, with comment by Hugenholtz.
[69] L.M.C.R. Guibault, "Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright" 35 *et seq.* (The Hague, Kluwer Law International, 2002).
[70] *Scientology v. XS4ALL,* Court of Appeal The Hague, 4 September 2003; Supreme Court (*Hoge Raad*), 16 December 2005 No. C04/020HR / JMH/RM LJN AT2056, (Scientology/Spaink) AMI 2006-6, p. 202.
[71] P.B. Hugenholtz, "Copyright and Freedom of Expression in Europe", in: Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First (eds.), "Expanding the Boundaries of Intellectual Property.

Innovation Policy for the Knowledge Society" (Oxford, Oxford University Press, 2001).

[72] Hof 's-Gravenhage, 30 January 2000, *AMI* 2000, p. 73; with note by H. Cohen Jehoram; CBB, 8 January 2003, LJN AF2794 (*KPN / Denda*); *See* J. Houtdijk, "De strijd om de programmagegevens in Nederland: een nieuwe episode in een bekend omroepfeuilleton", *Mediaforum* 2005, No. 11 /12, pp. 356–365.

[73] Supreme Court (*Hoge Raad*), 6 June 2003, *AMI* 2003, 141, with note by K.J. Koelman; *AA Katern* 2003, 89, p. 4801, with note by M.S.C. Bakker & A.A. Quaedvlieg; *Mediaforum* 2003, 247–256. Court of Appeals The Hague, 30 January 2001, [2001] Mediaforum 90, affirmed by the Supreme Court, 6 June 2003, [2003] AMI 141 (*NOS v De Telegraaf)*.

[74] ECJ, 17 September 2007, case T-201/04 (*Microsoft Corporation v. Commission of the European Communities*); ECJ, 29 April 2004, case C-418/01 (*IMS / NDC Health*); ECJ, 6 April 1995, joint cases C-241/91 and C-242/91 (*Magill*). ECJ, 17 September 2007, case T-201/04 (*Microsoft Corporation v. Commission of the European Communities*), para. 332.

[75] Rechtbank 's-Gravenhage, 17 March 2010, HA ZA 08-2522 and HA ZA 08-2524, (*Koninklijke Philips Electronics N.V. tegen SK Kassetten GmbH & Co. KG*) – r.o. 6.19-6.25.

[76] ALAI Study Days, Barcelona (2006): Copyright and Freedom of Expression, Report of the Netherlands ALAI Group, Prepared by Eveline Rethmeier & P. Bernt Hugenholtz.

[77] Explanatory Memorandum, 28482, No. 3, p. 59; J. Krikke, "Auteursrecht in de maat", [1995] *AMI* 1995, 103–110.

[78] Supreme Court (*Hoge Raad*), 24 May 1968, *NJ* 1968, 252 (*BUMA v Brinkmann*); P. Stein, *AMI* 1993, 123–126; A. van Rooijen, "Liever misbruikt dan misplaatst auteursrecht: Het doelcriterium ingezet tegen oneigenlijk auteursrechtgebruik"*, AMI* 2006, 45–51.

[79] Hof, Amsterdam, 26 July 2001, BR 2002, 536 (*Concertgebouw Haarlem*); Hof, Leeuwarden, 17 March 1999, BR 2000, 71; Hof, Leeuwarden, 17 March 1999, BR 2000, 71 (*De Golfslag*); Pres. Rb. Leeuwarden, 29 November 1994, BR 1995, 443 (*Bankgebouw Leeuwarden*); Rb. Assen, 17 November 1992, AMI 1993,191 (*Jelle Abma/Gemeente Ruinen*); Pres. Rb. Middelburg, 28 August 1992, KG 1992, 307 (*Van den Pauwert/Bell-Man*).

[80] C. Gielen, "Volghendeh et rechteo ordeelv an redene" (Zwolle 1994); A. van Rooijen, "Liever misbruikt dan misplaatst auteursrecht: Het doelcriterium ingezet tegen oneigenlijk auteursrechtgebruik", AMI 2006-2, pp 45–51; L.M.C.R. Guibault, "Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright" 281 *et seq*. (The Hague, Kluwer Law International, 2002); J. Krikke, "Auteursrecht in de maat", [1995] *AMI* 1995, 103–110.

[81] Court of Utrecht in Preliminary Relief Proceedings of 12 May 2010, *LJN: BM4200*; EC Directive 2007/65 regarding Audiovisual Media.