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# Works of Literature, Science and Art<sup>1</sup>

*Bernt Hugenholtz\**

### 1. Introduction

Even though Dutch copyright law has a history of awarding protection to artefacts of minimal originality, it would be hard to say that Article 10 of the Dutch Copyright Act, the provision that deals with works of authorship, constitutes an original work of authorship itself. As the Dutch legislature readily admitted during the parliamentary debates that preceded the adoption of the Act (*Auteurswet*) in 1912, much of the text of Article 10(1) – the main section of this provision – was reproduced from Article 2 of the Berne Convention (Berlin Act) that was ratified by the Dutch legislature in the previous year. The Dutch law's Berne origin does not however make an analysis of the concept of a 'work of literature, science and art' – the Dutch term of art – any less interesting. As this chapter will reveal, Dutch law on copyright subject matter has largely followed its own course over the last century. Despite its roots in the Berne Convention and notwithstanding more than 20 years of European harmonization, the law in this area – both case law and doctrine – is rich, intriguing, idiosyncratic and occasionally far afield from the law in other countries of the author's right tradition.

This chapter traces the development of the Dutch concept of 'works of literature, science and art' from its adoption in the Act of 1912 (section 3.1) and in subsequent amendments (section 3.2), through its interpretation in legal doctrine (section 3.3) to its application by the courts (section 3.4) and the impact thereon of European harmonization (section 3.5).

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1 Minor parts of this chapter are derived from M.M.M. van Eechoud, S.J. van Gompel, L. Guibault, P.B. Hugenholtz & B. van der Sloot (IViR), 'Report of the Netherlands', ALAI 2011 Study Days (Dublin).

## 2. Works and the contours of copyright

The notion of a ‘work’ is a core concept in any legal system of copyright. Without a ‘work’ there is no author and there are no exclusive rights. More than any other instrument in the law on copyright (such as rules on scope, duration, limitations, exceptions and remedies) the notion of a work draws the borderline between intellectual productions that are exclusive to their author(s) and those that may be freely used by all. While public concerns on overprotection are commonly seen as symptoms of a contemporary ‘crisis in copyright’, similar concerns were already expressed during the parliamentary debates that preceded the adoption of the Dutch Act.

For example, the new bill’s extension to works of architecture, a category of works not previously covered by the old 1881 Act, led to a vigorous debate in the Second Chamber of the Dutch Parliament. Several members expressed their concern that copyright protection of buildings might lead to an allegedly undesirable ‘hunt for diversity’ in architecture. According to the government, however, such fears were unwarranted, since countless famous and beautiful buildings were already in the public domain and could therefore freely be copied.<sup>2</sup>

In defining the border between private and public domain the requirement of originality of course plays a crucial role. Surprisingly, but in line with the Berne Convention, the Dutch Act fails to expressly mention this prerequisite in Article 10,<sup>3</sup> leaving it to the Dutch courts to draw the contours of the concept of a ‘work of literature, science and art’. As section 3.4 of this chapter will reveal, this may have been asking too much from a civil law trained judiciary more used to applying intuitive notions of fairness and reasonableness<sup>4</sup> than to solving matters of information policy or fundamental freedoms that sometimes underlie copyright subject matter cases. As we shall see, even the highest Dutch civil court – the Hoge Raad (Supreme Court) – has on occasion turned a blind eye towards the greater public interest that is at stake in borderline cases involving ‘works of literature, science and art’.

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2 F.W.J.G. Snijder van Wissenkerke, *Het auteursrecht in Nederland*, Gouda: Van Goor 1913, p. 172.

3 The only reference to ‘originality’ as a prerequisite to copyright protection can be found in Article 13, which extends the exclusive right of *verveelvoudiging* to any adaptation ‘which cannot be regarded as a new, original work’.

4 See D.J.G. Visser, ‘Beslissen in IE-zaken’, *Nederlands Juristenblad* 12 September 2008, p. 1918-1926.

### 3. Works of literature, science and art in the Act of 1912

The Dutch Copyright Act protects ‘literary, scientific or artistic works’, as exemplified in the list of work categories of Article 10(1) that reads as follows:

#### Article 10

1. For the purposes of this Act, literary, scientific or artistic works are:
  - 1° books, brochures, newspapers, periodicals and all other writings;
  - 2° dramatic and dramatico-musical works;
  - 3° recitations;
  - 4° choreographic works and entertainments in dumb show;
  - 5° musical works, with or without words;
  - 6° drawings, paintings, works of architecture and sculpture, lithographs, engravings and other graphic works;
  - 7° geographical maps;
  - 8° plans, sketches and three-dimensional works relating to architecture, geography, topography or other sciences;
  - 9° photographic works;
  - 10° film works;
  - 11° works of applied art and industrial designs and models;
  - 12° computer programs and preparatory materials;

and generally any creation in the literary, scientific or artistic domain, regardless of the manner or form in which it has been expressed.

The ‘work list’, which immediately reveals its origin in Article 2(1) BC, presently comprises 12 categories – two more than were enumerated in the Act of 1912. In addition, Article 10(2) mentions translations, adaptations, musical arrangements and other adaptations as separately protected works. Article 10(1) *in fine* clarifies that the list is merely enumerative by adding that the Act generally protects ‘any creation in the literary, scientific or artistic domain, regardless of the manner or form in which it has been expressed.’ In other words, the ‘work of literature, science and art’ is a flexible and open-ended concept, allowing all sorts of intellectual productions never contemplated by the Dutch legislature (or, for that matter, by the drafters of the Berne Convention) to qualify for copyright protection.

While Dutch case law has interpreted the requirement of originality as the essence of the concept of a work, the Act does not expressly require originality or, for that matter, creativity. On the contrary, and in manifest deviation from continental-

European *droit d'auteur*, the Dutch Act actually protects 'writings' that do not meet the test of originality, as is apparent from the very first item of the Article 10 work catalogue: 'books, brochures, newspapers, periodicals and *all other writings*.'<sup>5</sup> Over the years, the words 'all other writings' have caused lively debates in Dutch copyright circles. Eventually, in a series of landmark decisions concerning the protection of radio and television programme listings, the Hoge Raad decided that these three words were to be taken literally. According to the Court even the most banal or trivial writings are protected by copyright, provided they have been published or are intended for publication.<sup>6</sup> This so-called 'geschriftenbescherming' (protection of non-original writings) – possibly a remnant of an ancient 18th-century printer's right – is extensively treated elsewhere in this book.<sup>7</sup>

The Act does not impose any additional substantive or formal requirements. Dutch copyright law does not require fixation<sup>8</sup> nor does it generally impose formalities.<sup>9</sup> For a creation to qualify as a protected work, it suffices that it be expressed in a manner perceptible to the senses.<sup>10</sup>

Although the Act nowhere expressly excludes performances as subject matter eligible for copyright protection, such exclusion has always been assumed and rarely cast in doubt in Dutch legal doctrine and case law. According to the Explanatory Memorandum accompanying the Bill, reciting an existing work or performing a play cannot, by itself, qualify as copyright subject matter.<sup>11</sup> Neighbouring rights protecting such performances, as well as sound recordings and broadcasts, were given statutory protection in the Netherlands only in 1993 with the entry into force of the Dutch Neighbouring Rights Act.

### 3.1 *Legislative history and relationship to Berne Convention*

Like many other parts of the 1912 Act the provisions on protected subject matter were profoundly influenced by the Berne Convention. Having declined to participate in the diplomatic conference that led to its adoption in Berne in 1886, the Dutch Government had decided to despatch to the 1908 revision conference

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5 Emphasis added.

6 Supreme Court 17 April 1953, *NJ* 1954, 211 (Het Radioprogramma); Supreme Court 27 January 1961, *NJ* 1962, 355 (Explicator); Supreme Court 25 June 1965, *NJ* 1966, 116 (Televizier).

7 See Chapter 3.

8 A requirement of fixation for works of choreography and pantomime was stricken from the Act in 1985; Act of 30 May 1985, *Stb.* 307.

9 However, Articles 15 and 15(b) DCA do require a copyright notice for reservation of full copyright protection of news reports and government works respectively; see Chapter 6 (government works) and Chapter 15 (news reports).

10 Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 110.

11 Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 169.

in Berlin no fewer than four delegates – all copyright experts in favour of long-overdue adherence to the Convention.<sup>12</sup> This implicit commitment to the Convention was converted into a ratification bill that was introduced in the Dutch Parliament in August 1910 and adopted on 26 June 1911, paving the way for the 1912 Act. Consequently, the Dutch Act mirrors many of the Berlin Act's provisions.<sup>13</sup>

Indeed, Article 10(1) of the Act, which defines literary, scientific or artistic works, can be seen as a – albeit somewhat liberal – translation of Article 2(1) of the Berlin Act.<sup>14</sup> Its single major deviation, already noted, concerns the protection of non-original writings – a regime that the Dutch legislature did not wish to relinquish. Another difference is the treatment in the Dutch law of two formerly novel types of artistic creation: works of photography and cinematographic works. Instead of the Berlin Act's rather reluctant special mentioning of these categories,<sup>15</sup> the Dutch Act fully integrated these in its general catalogue of works.

Compared to the Dutch Act of 1881 the 1912 Act was a giant leap forward into the early-20th century era of modern copyright. As Henri Louis de Beaufort, one of the leading copyright scholars of the day, commented (on the bill): 'Compared to the current copyright law of 1881 the bill brings such important improvements, once become law it will make us leap forward (much like the transition from patent oil to electric light, or from barge (*trekschuit*) to automobile) [...]'.<sup>16</sup>

Like other early copyright laws in Europe, the old 1881 Act protected only a handful of distinct categories of works, notably writings, engravings, maps, musical works, theatrical works and oral recitations, and did not define works of authorship in a general, abstract manner. The old law's failure to protect, in particular, works of visual art had been severely criticized in doctrine<sup>17</sup> and was one of the main reasons for copyright reform.<sup>18</sup>

The new law also went further than the Berne Convention minimum standard by protecting works of applied art (industrial designs) as copyright subject matter

12 H.L. de Beaufort, 'Het ontwerp voor een nieuwe auteurswet', *De Gids*, vol. 76 (1912), p. 131.

13 Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 103.

14 Memorie van Toelichting. The legislative history of the DCA is compiled in L. de Vries, *Parlementaire Geschiedenis van de Auteurswet 1912, zoals sedertdien gewijzigd*, (looseleaf edition) SDU: Den Haag from 1989 on. See for the documents relating to this paragraph, p. 25.3-10.

15 Berne Convention (Berlin Act), Articles 3 and 14 respectively. For this reason the Dutch law's equal treatment of works of photography and cinematography was criticized, see De Beaufort, 'Het ontwerp voor een nieuwe auteurswet', p. 151-152. See also Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 175-178.

16 De Beaufort, 'Het ontwerp voor een nieuwe auteurswet', p. 131.

17 Henri Louis de Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht* (Copyright in Dutch and International Law), Utrecht: P. den Boer 1909, p. 130.

18 Snijder van Wissenkerke, *Het auteursrecht in Nederland*, p. 55.

– something left to members of the Berne Union as a matter of discretion.<sup>19</sup> Here, as elsewhere, the examples of France and Belgium – countries embracing the principle of *unité d'art* (unity of art) – undoubtedly inspired the Dutch legislature.

Another alleged shortcoming of the old 1881 Act, as compared to modern codifications elsewhere in Europe, was its insistence on formalities. According to the old Act copyright in a published work was forfeited if the author, publisher or printer failed to deposit two copies of the work with the Department of Justice within one month of publication.<sup>20</sup> In addition, the old Act required express copyright notices for the rights of translation and performance to have effect. While the bill's abolition of formalities was generally applauded by authors, publishers and commentators, and largely inevitable given the text of the Berne Convention (Berlin Act),<sup>21</sup> the end of the legal deposit requirement was sharply criticized by the Dutch Royal Library (Koninklijke Bibliotheek) that owed a large part of its impressive holdings to this statutory obligation.<sup>22</sup>

### 3.2 *The Act of 1912 and subsequent amendments*

Whereas Article 10 of the 1912 Act was amended several times in the course of the past century, its basic Berne Convention-based wording and structure have largely remained intact until today. The two most substantive amendments concerning copyright subject matter both were the result of European harmonization directives, concerning computer programs and databases respectively. A less important, earlier amendment concerned film. In 1985 a new Chapter V (Articles 45 a-g) containing special provisions regarding film production contracts was added to the Dutch Copyright Act.<sup>23</sup> As part of this amendment the Berne-inspired term 'cinematographic work' in Article 10(1)(9) of the original Act, was replaced by the supposedly broader and more modern term 'film work'. According to the Dutch legislature, this new term encompasses both traditional movies and television programmes as well as other audio-visual works.<sup>24</sup>

The European Computer Programs Directive (Council Directive 91/52/EEC) was implemented in the Netherlands by Act of 7 July 1994, amending the Dutch

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19 Berne Convention (Berlin Act), Article 2(4). See Chapter 4 by Kamperman Sanders.

20 Act of 1881, Article 10; see De Beaufort, 'Het ontwerp voor een nieuwe auteurswet', p. 135-136, and Stef van Gompel, *Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future*, Alphen aan den Rijn: Kluwer Law International 2011, p. 93.

21 Berne Convention (Berlin Act), Article 4(2).

22 De Beaufort, 'Het ontwerp voor een nieuwe auteurswet', p. 135.

23 Act of 30 May 1985, *Stb.* 307.

24 Explanatory Memorandum to Act of 1985, L. de Vries, *Parlementaire Geschiedenis van de Auteurswet 1912, zoals sedertdien gewijzigd*, p. 10.43.

Copyright Act.<sup>25</sup> The amendment added a 12th category to the ‘work list’ of Article 10 DCA: ‘computer programs and preparatory materials’. At the time, no real need for such amendment existed; computer software was already considered safely protected under the old Dutch copyright law, as several court decisions had made clear.<sup>26</sup> Ironically, the amendment actually led to a reduction of the level of protection for computer software. Implementing the Directive’s requirement that ‘[n]o other criteria shall be applied to determine its eligibility for protection’ (Article 1(3) of the Directive), the new law expressly excluded computer programs from the category of ‘writings’. Consequently, producers of computer programs could no longer enjoy the quick-and-easy protection of the quasi-copyright in non-original writings (*geschriftenbescherming*). The amendment, furthermore, introduced a new Chapter VI (Articles 45h-n), defining rights and limitations similar in scope but not in wording to the corresponding rules of the Directive.

The European Database Directive (Directive 96/9/EC) was transposed by Act of 8 July 1999.<sup>27</sup> As mentioned, Dutch copyright law already protected all sorts of non-original writings, including compilations of data and other databases that did not meet the test of originality. In practice, therefore, the new database right was of limited consequence. Implementation of the Directive occurred by way of revision of the Copyright Act and introduction of a new Database Act that established the database right. The amendments to the Copyright Act were relatively minor and mainly concern Article 10 that now mentions ‘collections of works, data or other independent materials’ (i.e. databases) as copyrightable subject matter (Article 10(3)). The originality standard prescribed by Article 3(1), 1st sentence of the Directive (‘the author’s own intellectual creation’) was not expressly transposed. Pursuant to Article 10(4), databases that qualify for *sui generis* database protection will not be (cumulatively) protected as non-original writings. A remarkable consequence of this rule is that producers of databases that do not meet the ‘substantial investment’ criterion of the *sui generis* right may still enjoy the much longer term of copyright protection that applies to non-original writings. As several commentators have pointed out,<sup>28</sup> this implementation is not in compliance with the Directive. According to Article 3(1), 2nd sentence of the

25 Act of 7 July 1994, *Stb.* 521. See D.W.F. Verkade, ‘Dutch implementation of the EEC Directive on computer programmes’, *EIPR* 1992, p. 289; A.A. Quaadvlieg, ‘The Netherlands’, in: M.M. Walter & S. von Lewinski (eds), *European Copyright Law. A Commentary*, Oxford: Oxford University Press, p. 229-233.

26 J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 589.

27 Act of 8 July 1999, *Stb.* 303.

28 P.B. Hugenholtz, ‘Het einde van het omroepbladenmonopolie nadert’, *Mediaforum* 1995-7/8, p. 82; Tobias Cohen Jehoram, ‘Copyright in non-original-writings. Past - present - future?’, in: J.J.C. Kabel & G.J.H.M. Mom (eds), *Intellectual property and Information Law – Essays in Honour of Herman Cohen Jehoram*, The Hague: Kluwer Law International 1998, p. 107-108.

Directive, ‘no other criteria [than ‘the author’s own intellectual creation’] shall be applied to determine [...] eligibility for [copyright] protection.’ Following the European Court of Justice’s decision in *Football Dataco*<sup>29</sup> that clearly rules out geschriftenbescherming for databases, it seems inevitable that the Dutch legislature will have to amend the law.

### *Neighbouring rights*

In 1990, after decades of discussion and foot-dragging, the Conventions of Rome and Geneva were finally ratified. For many years the Dutch Ministry of Culture (responsible for the national public broadcasting system) had adamantly opposed ratification of the Rome Convention, which it believed to be against the financial interests of the broadcasters. The Ministry’s resistance to ratification finally evaporated as the city of Amsterdam became a candidate for the 1992 Olympic Games, and the broadcasters came to realize that neighbouring rights were not merely a burden, but might be a bonus as well. On 18 March 1993 the Law on Neighbouring Rights, which is patterned after the Rome Convention and the Dutch Copyright Act, was finally adopted; it entered into force on 1 July 1993.<sup>30</sup> Interestingly, only a few years earlier the Dutch Supreme Court, in its *Elvis Presley* decision of 1989,<sup>31</sup> had ruled that performing artists and phonogram producers were protected under the Dutch misappropriation doctrine, which has as its legal basis the general tort provision of the Civil Code (Article 6:162). In its judgment the Court expressly anticipated the impending ratification and implementation of the Rome Convention.

### 3.3 *Doctrine*

Dutch scholarly doctrine on copyright subject matter is fairly rich. A major source of inspiration has always been, and still remains Henri Louis de Beaufort’s brilliant doctorate thesis on the place of copyright law in Dutch and international law, which was published just a few years before the Dutch adherence to the Berne Convention and the adoption of the 1912 Act.<sup>32</sup> In his thesis De Beaufort espouses an internationalist, authors’ rights view of copyright, taking issue with those jurists in the Netherlands – still numerous in his days – that questioned the concept of intellectual property. Much of De Beaufort’s work was, in turn,

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29 Court of Justice EU, 1 March 2012, Case C-604/10 (*Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*).

30 Act of 18 March 1993 (Law on Neighbouring Rights), *Stb.* 178.

31 Supreme Court 24 February 1989, *NJ* 1989, 701 (*Elvis Presley*).

32 De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*.



inspired by the great German jurist and legal philosopher Josef Kohler, whose work, in notable contrast to De Beaufort's, was amply quoted by the Dutch legislature.

Regarding copyright subject matter De Beaufort's ideas are remarkably modern and forward looking. In line with Josef Kohler he defines the concept of a work of authorship as the product of 'artistic creation' ('*kunstschepping*'). However, according to De Beaufort this does not imply that all works of authorship should belong to the higher arts. 'Even in writings that do not have as their sole purpose to elicit aesthetic emotions (such as scientific treatments) a certain "word art" is indisputable'.<sup>33</sup> But no copyright protection will arise for 'what is merely the fruit of the coolly reasoning and calculating brain, notwithstanding all the labour and inventiveness that might be expended'.<sup>34</sup>

With essentially functional subject matter, such as applied art, computer programs and databases, appealing for copyright protection in the latter part of the 20th century, a renewed interest in the notion the work of authorship gave rise to a number of influential doctorate theses that were published in the 1980s. Recognizing that copyright law is the product of several distinct, but competing rationales, and that the world of human intellectual creation and endeavor has become increasingly diverse, Willem Grosheide in his monumental 1986 dissertation<sup>35</sup> (*Auteursrecht op maat*, 'Tailored copyright') rejects the one-size-fits-all approach that copyright law traditionally reflects. Instead, Grosheide argues for a 'pluriform copyright law' that would encompass both artistic works and products of skill and labour by combining various tailor-made regimes under the umbrella of copyright.

In his doctorate thesis appearing only a year later, Antoon Quaadvlieg however forcefully rejects the idea of incorporating skill and labour into the law of copyright.<sup>36</sup> Instead Quaadvlieg postulates his 'theory of the subjective work'. Copyright in his opinion should not, as a matter of principle, grant protection to what is technically or functionally determined. The core argument of Quaadvlieg's thesis is that originality in copyright is essentially not geared towards achieving practical results. Inventiveness and originality are mutually exclusive. 'That is why the engineer follows the will of nature, but the author his own will [...]'.<sup>37</sup> According to Quaadvlieg, 'freedom of choice' – the author's freedom to select

33 De Beaufort, *Het auteursrecht in het Nederlandsche en internationale recht*, p. 127.

34 Id.

35 F.W. Grosheide, *Auteursrecht op maat*, Deventer: Kluwer 1986. See Willem Grosheide, 'Paradigms in Copyright Law', in: Brad Sherman and Alain Strowel (eds), *Of Authors and Origins*, Oxford: OUP 1994.

36 A.A. Quaadvlieg, *Auteursrecht op techniek*, Zwolle: Tjeenk Willink 1987.

37 Quaadvlieg, *Auteursrecht op techniek*, p. 22.

expressive features from a range of apparently equivalent options – is not enough. In his view, an original work will arise only if the author has tested the results of his creative labour against his personal taste. This subjective test *ex post facto* is what typifies the original work. Technical or inventive products, by contrast, will be tested by their creators only as to their proper functioning – whether the product actually ‘works’. The author’s subjective taste does not play a role here; the test is purely objective. While Quaedvlieg does not expressly equate the notion of a work with artistic works, his theory comes close to the ideas of Kohler and De Beaufort. According to Quaedvlieg copyright ought to be reserved for purely creative acts not determined by functional considerations – in other words: *art*.

Three years after Quaedvlieg’s the third thesis in the ‘Auteursrecht op...’ trilogy was published: *Auteursrecht op informatie* (‘Copyright in information’)<sup>38</sup> – written by the author of this chapter (Hugenholtz). Focusing on informational works, such as databases, news reports and scientific works, this study critically examines one of the maxims of copyright law: that information as such is outside the scope of copyright law. Applying the concept of information as it has been developed in information science and semiotics, Hugenholtz demonstrates that the subject matter of copyright is in fact human-generated information. Copyright, in the author’s view, protects *original information*. However, according to the author, the concepts of originality and the (related) idea/expression dichotomy do not have intrinsic normative meaning, but are mere legal instruments for the courts to distinguish between what should be protected and what not. In order to safeguard freedom of information and expression it is, therefore, essential to create robust and flexible statutory limitations and exceptions to copyright, possibly including *fair use*.

### 3.4 Case law

Like in other countries of the author’s right tradition, the Dutch concept of a ‘work of literature, science and art’ is defined in an open and flexible way, leaving it to the courts to draw its contours more precisely. This section will discuss the main prerequisites and controversies relating to the ‘work’ concept as it has been developed in Dutch case law. In this context it is important to note that the Dutch civil court in highest instance (Hoge Raad, i.e. Supreme Court) has a mandate that is limited to interpretation of the law, and does not judge on issues of fact. Since assessments of originality are more often than not directly connected to the facts of a case, case law on this issue tends to be rather diverse and case-specific.

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38 P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989.

### 3.4.1 Originality

As noted before, the Dutch Copyright Act does not expressly require originality. However, it is settled case law that only original works are eligible for copyright protection – with the notable exception of *geschrevenbeschermt*. Over time, the Supreme Court has used different terms to describe the originality test. Since 1985 the Supreme Court uses a composite test: a work must have an ‘own, original character’ and ‘bear the personal stamp of the maker’.<sup>39</sup> In the landmark *Endstra* case, it clarified that the first means ‘the form may not be derived from another work’.<sup>40</sup> The work must be discernible from other works and not have been copied; novelty however is not required.<sup>41</sup> The requirement that the production must ‘bear the personal stamp of the maker’ means ‘that the form must be a result of creative human labour and thus of creative choices, so that it is a production of the human mind’.<sup>32</sup>

Following the dichotomy developed by Spoor and Verkade in their seminal treatise on Dutch copyright, Dutch courts tend to distinguish between ‘objective’ and ‘subjective’ features of a work.<sup>43</sup> Objective features include facts, data, common expressions, style, theories, discoveries and any expressive features that emanate from functional requirements. Choices that are completely or largely dictated by the need to achieve a certain technical or functional effect result in ‘objective’ characteristics, which do not count towards the required level of originality. ‘Subjective’ characteristics are those that reflect the personal tastes, views, habits or preferences of the author. Whether the originality requirement is met depends on whether the author has had enough ‘creative space’ – and used it so that the work shows sufficient subjective characteristics. In applying the originality test, courts generally assess what creative choices are available to the author within the restraints of the genre. The more a work has to meet functional or technical needs (e.g. industrial design, topographic map, scientific article), the less creative freedom its author is assumed to have.<sup>44</sup> Despite Grosheide’s powerful arguments in favour of ‘tailored’ copyright protection, it is generally assumed that the same originality criterion is to be universally applied to all work genres.

39 Supreme Court 29 November 1985, *NJ* 1987, 880 (Screenoprints). See also Supreme Court 4 January 1991, *NJ* 1991, 608 (Van Dale v. Romme).

40 Supreme Court 30 May 2008, *NJ* 2008, 556 (Zonen Endstra v. Nieuw Amsterdam).

41 Supreme Court 16 June 2006, *NJ* 2006, 585 (Kecofa v. Lancôme).

42 Supreme Court 30 May 2008, *NJ* 2008, 556 (Zonen Endstra v. Nieuw Amsterdam).

43 Spoor/Verkade/Visser, *Auteursrecht*, p. 67-70.

44 See e.g. Supreme Court 29 January 2010, LJN: BK1599 (Gavita v. Puutarhaliike Helle) [designs of lamp fittings for greenhouses not copyright protected because choices determining design of fittings were all aimed at achieving technical effect; freedom of choice too limited for copyright relevant creative contribution].

The level of creativity required by the courts is usually not high. In *Endstra*, the Supreme Court held that ‘excluded at any rate is anything that has a form so common or trivial, that it does not point to any type of creative labour of any kind.’ Such absence of creative labour is not readily assumed, for a variety of productions. Dutch courts have over time accepted copyright in a broad spectrum of works of low originality, such as passport photographs, striped wallpaper, the design of simple games like ‘four in a row’ and designs of basic holiday homes.<sup>45</sup>

### 3.4.2 *Idea v. expression*

Although the idea/expression dichotomy enshrined in various international and European instruments<sup>46</sup> is not mentioned in the Auteurswet, it has been clear from the start that Dutch copyright does not protect ideas, theories, methods of operation, styles and similar abstractions. The Dutch legislature is on record stating that ‘no copyright can exist on a system of stenography, on a system of singing education or of gymnastic exercises.’<sup>47</sup> In a 1946 landmark case concerning imitations of wooden figurines that were burnt and steel-brushed to achieve an aesthetic effect, the Dutch Supreme Court held that ‘only the form that is the expression of what inspired the author to his labour enjoys the protection of copyright protection; [...] that absent identity [between plaintiff’s and defendant’s works] the treating thereof according to the same method having an artistic effect, or the following of the same style, does not lead to [infringement].’<sup>48</sup> While later decisions by the Supreme Court confirm that a style per se is not copyright protected,<sup>49</sup> lower courts have on occasion granted non-copyright protection under a theory of slavish imitation.<sup>50</sup>

Characters in novels and cartoons straddle the borderline between unprotected idea and protected form. In *Suske & Wiske* the Dutch Supreme Court accepted that the visual features of cartoon characters are protected independently as

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45 Cantonal Court Haarlem 7 July 2010, LJN: BN0985 (passport photograph); Court of Appeal The Hague 6 March 2009, KG ZA 08-1667 (striped wall paper); Supreme Court 29 June 2001, NJ 2001, 602 (Impag v. Hasbro); Supreme Court 8 September 2006, NJ 2006, 493 (Timans v. Haarsma en Agricola).

46 Article 9(2) TRIPs Agreement; Article 2 WIPO Copyright Treaty; Article 1(2) Computer Programs Directive. See Court of Justice EU 2 May 2012, Case C-406/10 (SAS Institute Inc. v. World Programming Ltd).

47 L. de Vries, *Parlementaire Geschiedenis van de Auteurswet 1912, zoals sedertdien gewijzigd*, p. 10.6.

48 Supreme Court 28 June 1946, NJ 1946, 712 (Van Gelder v. Van Rijn).

49 See e.g. Supreme Court 29 December 1995 (Decaux v. Mediamax), Kluwer EU Copyright Cases, published on www.KluwerEUIPCases.com on 15 July 2007. A typically Dutch example of the idea/expression dichotomy is a case where the Court of Appeal of Amsterdam denied copyright protection for an assortment of erotic cakes that were baked in the image of male or female bodily parts. The court considered that the mere idea of erotic patisserie cannot be copyrighted. Court of Appeal Amsterdam, 11 November 1999, *Informatierecht/AMI* 2000, p. 62 (Cyráko v. Erobaking).

50 See Spoor, in Chapter 8 of this volume.

drawings; the Court however made clear that protection does not extend to the characters' verbal expression nor to the adventures that they experience.<sup>51</sup> While the majority of Dutch commentators endorse the idea that an original character may constitute a work per se regardless of its visualization,<sup>52</sup> and the occasional lower court seems to agree,<sup>53</sup> the Supreme Court has yet to confirm this.

Board games are another area where idea and expression converge. In *Impag v. Hasbro*, a case involving imitation of various commercially developed games based on traditional pastimes (s.a. tic-tac-toe), the Supreme Court accepted that an original 'game concept' may qualify for copyright protection abstract from the underlying unprotected idea and from its potentially copyrightable materialization in the form of a game design.<sup>54</sup>

*Television programme formats* have been among the most contentious subject matter brought before the Dutch courts in recent decades. This is not surprising given the huge commercial success that Dutch producers of formats have enjoyed in national and international television markets. The first television format case to reach the Dutch Supreme Court concerned the infamous reality television show 'Big Brother' that became a household name across the globe. Dutch television production company Endemol, developer of the Big Brother format, was sued by British production company Castaway for copyright infringement of its 'Survive' format, which had been developed by well-known rock star and philanthropist Bob Geldof. Plaintiff provided evidence that it had offered the Survive format for licensing to Endemol well before Big Brother was developed, but that the offer was eventually declined. The Court of Appeal accepted that plaintiff's Survive format was a copyright protected work, since it was elaborated in a detailed document and therefore constituted expression well beyond a mere unprotected idea. However, comparing Survive with Big Brother the court noted a number of differences, including the respective settings (uninhabited island v. enclosed studio), manners of presentation, and the procedures of removing contestants from the show. In the end, the court did not find copyright infringement, and the decision was upheld by the Hoge Raad.<sup>55</sup>

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51 Supreme Court 13 April 1984, *NJ* 1984 (Suske & Wiske).

52 Spoor/Verkade/Visser, *Auteursrecht*, p. 122.

53 District Court of Haarlem, 22 January 1991, *AMI* 1992, 188 (Sjef van Oekel).

54 Supreme Court 29 June 2001, *NJ* 2001, 602 (*Impag v. Hasbro*); see also District Court of The Hague 18 April 2012, IEPT20120418 (*Inspirion v. Pokonobe*).

55 Court of Appeal Amsterdam 27 June 2002; Supreme Court 16 April 2004, *AMI* 2004, p. 172-179 (*Castaway v. Endemol*).

### 3.4.3 *Compilations*

Copyright protection of compilations and other works of fact has been a source of perennial contention before the Dutch courts well before the Database Directive was transposed in 1999.<sup>56</sup> In the landmark case of *Van Dale v. Romme* decided by the Dutch Supreme Court in 1991,<sup>57</sup> the plaintiff sought protection for the approximately 230 000 alphabetically ordered headwords contained in the authoritative Van Dale dictionary of the Dutch language. A certain Rudolph Jan Romme, whose hobbies included the solving of crossword puzzles and the making of anagrams, had copied all the Van Dale headwords on computer diskettes, and had rearranged the words into a database. In combination with a simple searching algorithm Romme was now able to speed up, or practically automate, the process of solving these puzzles. Van Dale was granted copyright protection in two instances; the Hoge Raad reversed. According to the Court a collection of words will only be protected by copyright 'if it results from a selection process expressing the author's personal views'. Since this rather severe test had not been applied by the Amsterdam Court of Appeal, the Court granted the appeal and remanded the case to the Court of Appeal of The Hague for further decision.

While the latter court eventually did find sufficient personal expression in the selection process employed by the Van Dale lexicographers,<sup>58</sup> the *Van Dale* case demonstrated that collections of data are not safely protected under traditional copyright doctrine – a conclusion that encouraged the European Commission to propose sui generis protection for databases only one year later.<sup>59</sup>

Curiously, in the *Van Dale* case the protection of non-original writings, which might have granted plaintiff easy relief, was never at issue. Most cases preceding the implementation of the Database Directive in 1999, however, were simply based on geschriftenbescherming. Indeed, a host of decisions underscore the practicality of this regime for the producers of all sorts of compilations, such as election tables, telephone directories, hit parade lists, address books, arithmetic tables, and – last, but not least – radio and television programme listings.<sup>60</sup>

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56 See P.B. Hugenholtz, 'Protection of Compilations of Facts in Germany and The Netherlands', in: E.J. Dommering and P.B. Hugenholtz (eds), *Protecting Works of Fact: Copyright, Freedom of Expression and Information Law*, Deventer/Boston: Kluwer Law and Taxation Publishers 1991, p. 59-66.

57 Supreme Court 4 January 1991, *NJ* 1991, 608, English translation in: Dommering/Hugenholtz, *Protecting Works of Fact*, p. 93.

58 Court of Appeal The Hague 1 April 1993, *NJ* 1994, 58.

59 'Implementing the Database Directive', in: J.J.C. Kabel & G.J.H.M. Mom (eds), *Intellectual property and Information Law – Essays in Honour of Herman Cohen Jehoram*. Den Haag: Kluwer Law International 1998, p. 183-200.

60 District Court The Hague 22 May 1913, *NJ* 1913, 1212 (verkiezingstabel); Supreme Court 1 November 1937, *NJ* 1937, 1092 (Telefoongids Brummen); District Court Amsterdam 10 February 1977, *Auteursrecht* 1977, 66 (Nederlandse Top 40); District Court Arnhem 15 January 1947, *NJ* 1947, 474 (adresboek Arnhem);

#### 3.4.4 *Technical and functional works*

While Article 10(1) Auteurswet mentions several types of work having a functional character, such as geographical maps, works of architecture, industrial designs and computer programs, finding originality in such productions is often a quagmire. Indeed protecting ‘useful’ works in an author’s right system that favours aesthetically inspired choices over skill and labour, presents courts with a seemingly insoluble paradox. In practice, courts regularly escape from this dilemma by reducing the originality requirement in respect of such works to a simple ‘freedom of choice’ test. If an author despite the functional or technical constraints of the subject matter has been left with a sufficiently broad range of (roughly) equivalent options, then courts tend to assume that the resulting choices have led to an ‘original’ production. A rule of thumb often applied by lower courts is a test of statistical improbability; if it is unlikely that another designer, constructor or programmer facing the same constraints would have produced a similar work, then the work is declared original by default.

Even the Dutch Supreme Court seems to endorse this reductionist approach to originality. In a highly controversial decision the Court accepted that a ‘kinetic scheme’ (i.e. a chemical formula) representing various petrochemical components and reactions, may qualify as an original work.<sup>61</sup> According to the Court, ‘whereas the kinetic scheme is a schematic representation of the production process of ethylene and propylene in the petrochemical industry [...], and the chemical reaction formulas incorporated in the scheme are by themselves no more than objective scientific data that as such cannot be protected by copyright, the Court of Appeal was right to examine whether the selection of these data, with a view to the question of incorporating them – or not – into the kinetic scheme, has its own individual, original character and bears the stamp of its maker.’ The Court’s decision can be interpreted as holding that technically determined choices may result in copyright protection. Not surprisingly, the decision has been severely criticized by commentators.<sup>62</sup> Other commentators,<sup>63</sup> however, point out the Supreme Court’s holding should be narrowly construed in the light of the facts

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District Court Zwolle 15 March 1948, *NJ* 1949, 55 (tabellenboek); Supreme Court 17 April 1953, *NJ* 1954, 211 (Radioprogramma I); Supreme Court 27 January 1961, *NJ* 1962, 355 (Explicator); Supreme Court 25 June 1965 no. 9843, *NJ* 1966, 116 (Televizier II). See Beunen in Chapter 3 of this volume for further discussion of geschriftenbescherming.

61 Supreme Court 24 February 2006, 28 *IIC* 615 (2007) (Technip Benelux BV v. Goossens), note A.A. Quaadvlieg.

62 See A.A. Quaadvlieg, *AMI* 2006, p. 155-161.

63 M. de Cock Buning & E.J. Numann, ‘De gestage wildgroei van het auteursrecht. Een hogesnelheidstrein dreigt te ontsporen’, in: D.J.G. Visser & D.W.F. Verkade (eds), *Spoorbundel*, Amsterdam: DeLex, 2007, p. 25-46.

and procedure of the case, and does not imply a general recognition of ‘technical works’ as subject matter protected under copyright. Indeed, several more recent decisions of the Court seem to confirm this view.<sup>64</sup> For example, in a case involving the designs of – allegedly copied – light fittings (*Gavita v. Puutarhaliike Helle*) the Court endorsed the Court of Appeal’s holding that all choices underlying the designs were essentially determined by technical considerations, leaving the designer too little freedom to create original works.<sup>65</sup>

### *Industrial design*

Questions of originality are particularly vexing in the area of works of applied art and industrial design, a category expressly mentioned in Article 10(1)(11). Under the (old) Benelux Design Act, courts used to set a higher standard of originality for (concurrent) copyright protection because the wording of the Design Act seemed to imply that only designs of a ‘clearly artistic’ character could attract copyright protection. In *Screenoprints* the Supreme Court, however, ruled that designs should be treated on a par with other categories of copyright works,<sup>66</sup> notwithstanding the fact that (novel and individual) designs may also find shelter under the special Benelux design protection regime. As a consequence, case law on copyright protection of industrial design tends to be highly unpredictable. While some lower courts seem to apply the adage that ‘anything worth copying is worth protecting’,<sup>67</sup> other courts set higher standards – as is, for example, apparent in the string of *Stokke* cases decided by the Dutch courts in recent times. Like in many other European countries Norwegian furniture producer Stokke has been stubbornly defending its famous *Tripp Trapp* children’s chair against imitation before the Dutch courts.<sup>68</sup> The results have been mixed. Whereas the Amsterdam Court of Appeal typifies the Tripp Trapp as a largely technically defined chair designed in a ‘minimalistic Scandinavian style’,<sup>69</sup> with only the L-shape as a copyright protected element, other courts tend to see a predominantly aesthetic design.<sup>70</sup>

64 See e.g. Supreme Court 16 June 2006, *Kecofa v. Lancôme*, LjN: AU8940, NJ 2006, 585 [holding that technical features of the scent of a perfume are categorically excluded from copyright protection].

65 Supreme Court 29 January 2010, LjN: BK1599 (*Gavita v. Puutarhaliike Helle*).

66 Supreme Court 29 November 1985, NJ 1987, 880 (*Screenoprints v. Citroën*). See Anselm Kamperman Sanders in Chapter 4 of this volume.

67 For example, Dutch courts have over time recognized originality in such staple Dutch productions as bicycle carriers, fishing boats, cycle-bags and wallets; District Court of The Hague 16 August 1994, *BIE* 1995, 93; District Court of Amsterdam 26 February 1993, *IER* 1993, 23; District Court of Haarlem 13 June 1995, *IER* 1995, 33.

68 See e.g. Court of Appeal Amsterdam 15 March 2011, LjN BQ3808, IEF 9475, B9 10669 (*H3 v. Stokke*), Court of Appeal Den Haag 31 May 2011, LjN BQ6773, IEF 9740, *IER* 2012/3/ (*Hauck v. Stokke*), Court of Appeal Amsterdam 17 January 2012, IEF 10797, B9 10669 (*Stokke v. Jamak*).

69 Court of Appeal Amsterdam, 17 January 2012, IEPT20120117 (*Stokke v. Jamak*).

70 D.J.G. Visser, ‘Kroniek van de Intellectuele Eigendom’, *Nederlands Juristenblad* 2012, p. 1044.



The concurrence of multiple legal doctrines and regimes, such as industrial design protection, slavish imitation and occasionally even trademark protection, further complicates the application of copyright to industrial design. The different standards that each regime sets (novelty, individual character, distinctiveness, originality) tend to converge before the courts and thus further erode the prerequisites of copyright in practice.<sup>71</sup>

### *Computer programs*

The idea of copyright protection for computer software was not immediately and universally supported in Dutch legal doctrine, when the issue first arose in the 1970s and 1980s. While according to a majority of commentators the concept of a work was open-ended and flexible enough to encompass this novel subject matter,<sup>72</sup> other commentators were more hesitant. A notable opponent of software copyright was Prof. Guy Vandenberghe, who in his (Flemish) dissertation published in 1984 convincingly argued against equating computer programs with normal works of authorship.<sup>73</sup> According to Vandenberghe software is essentially technical subject matter, and neither copyright's exclusive rights nor its term of protection really fit the characteristics of software and the needs of the software industry. Doctrinally Vandenberghe's main argument against software copyright was that computer programs are artifacts not intended for human communication, but machine instructions, and therefore outside the domain of literature and art. Instead of copyright Vandenberghe proposed a *sui generis* regime for computer programs, not unlike the WIPO model provisions that were published in 1978.<sup>74</sup> Recent Dutch literature from the field of law and economics seems to confirm that copyright is ill suited for the protection of computer programs.<sup>75</sup>

Despite these doctrinal reservations, Dutch courts generally, and generously, have granted copyright protection well before the Computer Programs Directive was adopted in 1991,<sup>76</sup> and have continued to do so afterwards. Cases where

71 See F.W. Grosheide, 'Zwakke werken', in D.W.F. Verkade & D.J.G. Visser, 'Intellectuele eigenaardigheden', Deventer: Kluwer 198, p. 121 [arguing for the application of trademark law-based infringement analysis in copyright cases].

72 See e.g. D.W.F. Verkade, *Juridische bescherming van programmatuur*, 2nd ed., Alphen aan den Rijn: Samsom 1986; J.H. Spoor, 'Aspects of Copyright Protection of Computer Software', *Software/Law Journal*, Vol. 4 (1986), p. 259; P.B. Hugenholtz & J.H. Spoor, *Auteursrecht op software*, Amsterdam: Otto Cramwinckel 1987.

73 G. Vandenberghe, *Bescherming van computersoftware*, Antwerpen: Kluwer 1984.

74 *WIPO Model provisions on the protection of computer software - 1978* - WIPO Publication, No. 814(E) - Geneva: WIPO - 27 p.

75 A. van Rooijen, *The Software Interface between Copyright and Competition Law*, Alphen aan den Rijn: Kluwer Law International, 2009.

76 Spoor/Verkade/Visser, *Auteursrecht*, p. 590.

copyright protection was denied are exceptionally rare. In one noteworthy case a Dutch Court of Appeal denied copyright protection to software that was evidently based on standard software that was customized on only minor points, none of which reflected the results of creative labour.<sup>77</sup> In another case a lower court denied copyright protection because the plaintiff was essentially claiming protection for a novel idea enshrined in the plaintiff's software.<sup>78</sup>

### 3.4.5 *Beyond the domain of literature, science and art*

Dutch copyright law protects 'any creation in the literary, scientific or artistic domain, regardless of the manner or form in which it has been expressed'.<sup>79</sup> While open-ended, this language patently suggests that copyright should not extend beyond the domain of 'literature, science and art'. Doctrine and case law, however, tend to take these words largely for granted, or even ignore them, and concentrate their analysis solely on the prerequisite of originality. In his dissertation, Grosheide criticizes this one-dimensional approach.<sup>80</sup> In line with German scholars such as Prof. Ulmer and Dr. Dietz,<sup>81</sup> Grosheide argues instead for the application of a two-step test. As a first step, courts should determine whether the subject matter at issue falls within the domain of literature, science and art (which he redefines as 'cultural information'). Only if this has been established, courts may apply the originality test. As a consequence, intellectual creations that are perhaps original but outside the realm of 'culture' would not attract copyright protection.

However, as any quick survey of Dutch case law over the last century reveals, courts in the Netherlands rarely<sup>82</sup> query whether intellectual productions fall within the domain of copyright. For example, lower courts have in the past not shied away from granting copyright protection to such purely technical subject matter as a computer memory module<sup>83</sup> and a chemical reaction formula.<sup>84</sup>

Courts have also on occasion applied copyright to creations appealing to the lesser senses. For example, the Court of Amsterdam once opined that the

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77 Court of Appeal The Hague 31 January 2012, IEPT20120131 (Sun Company Benelux v. Sol de Mallorca).

78 District Court Alkmaar 29 March 2012, IEPT20120329 (De Raaf v. Total Systems).

79 Article 10(1) in fine Dutch Copyright Act.

80 Grosheide, *Auteursrecht op maat*, p. 195 ff.

81 E. Ulmer, *Urheber- und Verlagsrecht*, 3rd ed., Berlin/Heidelberg/New York: Springer 1980, p. 126 ff.; A. Dietz, *Das Urheberrecht in der Europäischen Gemeinschaft*, Baden-Baden: Nomos 1977, p. 60.

82 For a rare and exemplary case where a lower court rejected mere 'technical' originality as a matter of principle see District Court of The Hague 27 February 2007, IEPT20070227 (Bekisting) [while the design of an industrial casing may have individual character the expressive features are technically determined; Dutch law does not recognize a copyright in 'nuts and bolts'].

83 District Court of Breda, 13 February 1991, AMI 1992, 174.

84 Supreme Court 24 February 2006, 28 IIC 615 (2007) (Technip Benelux BV v. Goossens),

exceptional taste of a box of pralines qualified for copyright protection.<sup>85</sup> And the Court of Breda famously saw an original work in the ingredients of ‘Autodrop’, a popular licorice. By contrast, the Court of Appeal of Amsterdam, more sensibly, refused to award copyright protection to the design of a fairground attraction (the ‘Top Scan’) consisting of several rapidly rotating arms, producing supposedly thrilling (and certainly nauseating) effects on those volunteering to take a ride.<sup>86</sup>

### *Perfumes*

The Dutch Supreme Court has been reluctant to recognize that the domain of literature, science and art has an external boundary. In a controversial decision of 2006 the Court held that the fragrance (scent) of a perfume qualifies, in principle, as a work of literature, science or art.<sup>87</sup> In *Kecofa v. Lancôme* the Court opined:

The description laid down in Art. 10 Auteurswet [...] of types of works, of what must be understood to be a ‘work’ in the sense of this Act, is put in general words and does not rule out scents. This implies that as to the question of whether a scent qualifies for protection under copyright law, or not, it is decisive whether this concerns a product that is open to human perception and whether it has an original character of its own and bears the personal stamp of the maker. The notion of a work in the Auteurswet does find its limits where a work’s own original character is no more than what is required to achieve a technical effect, but considering that in case of a perfume there is no purely technical effect, this last condition does not prevent granting protection under copyright law to the scent of a perfume. The circumstances that the properties of the human olfactory sense limit the ability to distinguish scents and that the level to which one can distinguish scents differs from one person to another, does not alter the above, nor does the circumstance that the specific nature of scents has the effect that not all provisions and restrictions in the Auteurswet can directly apply, considering for instance the use of perfume which cannot be denied to the ordinary user and which by its nature necessarily implies the spreading of the scent. [...].<sup>88</sup>

85 District Court of Amsterdam 9 August 2001, *AMI* 2001, p. 155-157 (Manfred Spaargaren Confiserie v. Da Vinci Bonbons & Chocolate); District Court of Breda 18 December 1990, *Informatierecht/AMI* 1992, p. 16 (Autodrop), note E.J. Dommering.

86 Court of Appeal Amsterdam, 9 December 1999, *Informatierecht/AMI* 2000, p. 139 (Top Scan v. Sound Machine).

87 Supreme Court 16 June 2006, *NJ* 2006, 585 (Kecofa v. Lancôme), [2006] ECDR 26.

88 English translation quoted from Boek9.nl, B9 7694.

The Court's decision has drawn criticism from various commentators.<sup>89</sup> According to these critics the Hoge Raad has ignored the boundaries of the domain of copyright by according copyright protection to subject matter – basically, a combination of chemical ingredients – that belongs to the realm of patents. Indeed, the Dutch Court's decision stands in remarkable contrast to a decision by the French Court of Cassation that was issued only three days earlier, and which expressly excludes fragrances from the domain of copyright as a matter of principle.<sup>90</sup> Other commentators are more understanding. According to Quaedvlieg, 'it seems hard to deny that making perfumes can be a creative and artistic activity'. Even so, applying the basic norms of copyright (originality, scope of rights and limitations) remains highly problematic.<sup>91</sup>

### *Endstra Tapes*

By far the most controversial Supreme Court decision of the last decade, however, concerned the *Endstra tapes* – a series of taped police interviews with Willem Endstra, a major resale estate investor turned police informer who was murdered after his role as an informer was revealed. After the interview tapes were leaked to the press, publisher Nieuw Amsterdam published the transcripts, ignoring protests from Endstra's heirs who subsequently sued for copyright infringement. Were the Endstra tapes copyright works? Both the District Court and the Court of Appeal of Amsterdam judged that they were not. According to the latter, Endstra's conversations with the police, although possibly reflecting Endstra's 'own original character', were not 'conceived as a coherent creation' and not 'created by design', and therefore did not qualify as works of authorship.<sup>92</sup> The Dutch Supreme Court, however, reversed.<sup>93</sup>

In its decision the Hoge Raad first recalls that, for a work to attract copyright protection, two criteria must be distinguished: a work must possess its own original character and bear the personal stamp of its author. The first

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89 See e.g. E.J. Dommering, 'Auteursrecht op parfum: De definitieve verdamping van het werkbegrip', in: D.J.G. Visser & D.W.F. Verkade (eds), *Een eigen, oorspronkelijk karakter: opstellen aangeboden aan prof. mr. Jaap H. Spoor*, Amsterdam: Uitgeverij DeLex 2007, p. 65-79; Herman Cohen Jehoram, 'The Dutch Supreme Court Recognises Copyright in the Scent of a Perfume. The Flying Dutchman: All Sails, no Anchor', *EIPR* 2006, 629.

90 Court of Cassation (France) 13 June 2006, *RIDA* October 2006, 210, p. 348 (Bsiri-Barbir v. Haarmann & Reimer).

91 A.A. Quaedvlieg, 'Droit d'auteur et parfums: le nez, l'esprit et l'industrie', *Revue Internationale du Droit d'Auteur* 230, October 2011, p. 6-77, at p. 64.

92 Compare District Court of Amsterdam 29 April 1999, *Informatierecht/AMI* 1999, p. 132 (Wagenvoort v. Prometheus) [denying copyright protection for interviews that told the 'true' story of an alien abduction, because account was presented as facts, not fiction, and therefore lacked personal imprint of an author].

93 Supreme Court 30 May 2008, *NJ* 2008, 556 (Zonen Endstra v. Nieuw Amsterdam), note E.J. Dommering.

requirement, according to the Court, essentially implies ‘that its form is not copied from another work’. The second requirement means ‘that there must be a form that is the result of human creativity and of creative choices, and thus is a product of the human mind. This excludes, in any case, all forms that are so banal or trivial as to not demonstrate any creative labour whatsoever’. According to the Court this feature (personal stamp) should be ‘cognizable from the product itself.’ Copyright law does not require ‘that the author consciously create a work and make deliberate creative choices, because this would burden parties with insurmountable problems of evidence.’

The *Endstra Tapes* case has given rise to unprecedented discussion and debate among scholars and practitioners. While some commentators applaud the Hoge Raad’s ruling, arguing that a criterion of deliberate creation would be unworkable in practice, others fear that reducing the subject matter test to mere originality and personal stamp might lead to infinite expansion of the concept of the work of authorship.<sup>94</sup> Anything touched by human hand, including for instance sports performances, would be deemed a work. Moreover, if most words spoken by man were to attract copyright protection, this would have disastrous consequences for freedom of expression and information.<sup>95</sup>

#### 4. European context

The influence of European harmonization on the concept of the work of literature, science and art has so far been fairly limited. While the Computer Programs Directive has made Dutch courts even more confident than they already were to award software copyright protection, the Directive’s core prerequisite – that the computer program be ‘original in the sense that it is the author’s own intellectual creation’<sup>96</sup> – was never expressly transposed into Dutch law. The Dutch legislature has likewise refrained from transposing similar language from other European directives concerning databases and photographs.<sup>97</sup> Apparently, the Dutch legislature assumed that the Dutch standard of originality as it has been developed by the courts is on a par with the harmonized European norm.<sup>98</sup>

Although none of the European directives provides for a general standard of

94 See e.g. M. Senftleben, *AMI* 2008, p. 140-142.

95 P.B. Hugenholtz, ‘Auteursrecht op alles’, *Nederlands Juristenblad* 2008, p. 390-391; H. Cohen Jehoram, ‘Auteursrechtelijke zin en onzin – Kroniek van het auteursrecht in Nederland 2006-2010’, *Auteurs & Media* 2010/3, p. 246-251.

96 Article 1(3) Computer Programs Directive.

97 Article 3(1) Database Directive; Article 6 Term Directive.

98 See (for computer programs) A.A. Quaadvlieg, ‘The Netherlands’, in: Walter/von Lewinski, *European Copyright Law*, p. 230.

protection, the European Court of Justice has in its *Infopaq* and *BSA* decisions extended this standard to apply to other categories of works.<sup>99</sup> In *Painer*<sup>100</sup> the European Court of Justice elaborated the notion of the ‘author’s own intellectual creation’ in respect of (portrait) photographs, a work category expressly harmonized, by pointing out that a ‘photographer can make free and creative choices in several ways and at various points in [a portrait’s] production.’<sup>101</sup> Apparently, the existence of sufficient ‘freedom of creative choice’ is a strong indicator for intellectual creation. While Dutch courts seem to have taken due note of these decisions and now diligently refer to the ‘author’s own intellectual creation’ and quote *Infopaq*, *BSA* and *Painer*, often in combination with the *Endstra* criteria, the originality standard applied in practice appears to have remained roughly the same.<sup>102</sup> In one case the Amsterdam Court of Appeal expressly rejected the argument that *Infopaq* might imply a lowering of the Dutch originality standard.<sup>103</sup>

Most likely the more recent *Football Dataco* decision<sup>104</sup> will be of greater consequence, not only because it spells the end for geschriftenbescherming of databases,<sup>105</sup> but even more so because of the European Court of Justice’s outright rejection of skill and labour as a factor in determining intellectual creation. According to the Court, ‘the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author [...] cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the

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99 See European Court of Justice 16 July 2009, C-5/08 (*Infopaq International A/S v. Danske Dagblades Forening*); and in particular Court of Justice EU, 22 December 2010, Case C-393/09 (*BSA v. Ministerstvo kulture*) [graphic user interface of a computer program, while failing to qualify as a ‘computer program’, deemed protected by copyright if it is its author’s own intellectual creation].

100 Court of Justice EU 1 December 2011, C-145/10 (*Eva-Maria Painer v. Standard VerlagsGmbH, a.o.*), § 90.

101 Article 6 Term Directive.

102 See e.g. Court of Appeal The Hague 22 December 2009, LJN: BL2812; District Court of Arnhem 25 March 2009, LJN: BI0225 (*De Rode Roos*); District Court of Amsterdam 30 March 2011, B9 9946 (*Xperience v. NIPED*); Court of Appeal Arnhem 3 May 2011, B9 9616 (*De Culinair Makelaar v. Bi-Wear*); District Court of Utrecht 25 May 2011, IER 2011/55, p. 390 (*Marlies Dekker v. Saphh*); District Court of The Hague 6 December 2011, B9 10515 (*New Steps v. Schuurman schoenen*); District Court of The Hague 16 December 2011, B9 10570 (*Vopo Pompen- en Machinefabriek B.V. v. Hertog Polderbemalingen B.V.*); District Court of The Hague, 8 February 2012, IEPT20120208 (*Burgers v. Basil*); Court of Appeal Den Bosch 13 March 2012, IEPT20120313 (*AllRound v. Dutch Designz*); District Court of The Hague 14 March 2012, IEPT20120314 (*Fatboy v. Garden Impressions*); District Court of The Hague 18 April 2012, IEPT20120418 (*Inspirion v. Pokonobe*). See also the Advocate General’s opinion in Supreme Court 29 January 2010, LJN: BK1599, *RvdW* 2010, 223 (*Gavita v. Puutarhaliike Helle*).

103 Court of Appeal Amsterdam 17 January 2012, IEPT20120117 (*Stokke v. Jamak*).

104 Court of Justice EU, 1 March 2012, Case C-604/10 (*Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*).

105 See discussion above in s. 3.2.

selection or arrangement of that data.<sup>106</sup> This has led at least one commentator to conclude that merely ‘technical’ originality, as recognized by the Supreme Court in *Technip*, no longer suffices for copyright protection.<sup>107</sup>

## 5. Conclusion

If the preceding overview proves anything, it is the sobering conclusion that the influence of Dutch legal doctrine, while on occasion rich and inspiring, has been very limited in shaping the law of copyright relating to works of authorship. As Visser has noted, courts high and low in the Netherlands seem to be guided more by intuitive feelings of justice and fairness (‘onderbuikgevoel’, i.e. ‘underbelly feeling’) than by legal doctrine. While this may lead to equitable results in non-controversial cases, the judiciary’s pragmatic approach towards the concept of a ‘work of literature, science and art’ has most certainly contributed to an unwarranted expansion of the realm of copyright,<sup>108</sup> and to occasional excesses that jeopardize freedom of expression and competition, compromise the consistency of the law of intellectual property and undermine the legitimacy of copyright. It is hoped for that the Dutch Supreme Court will in future cases find inspiration in recent decisions by the European Court of Justice to apply a more coherent and constricted conception of ‘works of literature, science and art’.

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<sup>106</sup> *Id.*, § 42.

<sup>107</sup> D.J.G. Visser, ‘Kroniek van de Intellectuele Eigendom’, *Nederlands Juristenblad* 2012, p. 1049.

<sup>108</sup> J.H. Spoor, *De gestage groei van merk, werk en uitvinding*, Zwolle: Tjeenk Willink 1990.

