RIDA

Chronicle of The Netherlands

Dutch copyright law, 1990-1995

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1. Introduction

Dutch copyright law has gone through a storm in the first half of the present decade. On the legislative front, after the relative calm of the 1980's, a flurry of amendments, many (but not all) of European origin, have descended upon the two Chambers of Parliament and the Dutch constituents. Not all of these bills have arrived safely on the Queen's desk for enactment. Some amendments have encountered strong headwinds, such as the 1992 Reprography Bill that was eventually rejected by the First Chamber of Parliament (see § 4 below).

The Dutch Civil Courts have been extremely productive as well, handing out a host of most important copyright decisions. Amidst this turbulence, the 1990-1995 period has produced some very interesting scholarly writing. Dutch legal doctrine has raised critical questions as to the scope, the limits and the future of the copyright system. Of prime importance was the publication in 1993 of the second (thoroughly revised) edition of the treatise on copyright and neighboring rights by professors Spoor and Verkade.[1] Moreover, a number of influential dissertations and monographs on copyright law and related matters saw the light.[2]

The increasing importance of copyright in The Netherlands is reflected by the sizeable

[1] J.H. Spoor and D.W.F. Verkade, Auteursrecht, 2nd ed., Deventer, 1993.

[2] Gerard J.H.M. Mom, Kabeltelevisie en auteursrecht [Cable television and copyright], Lelystad, 1990 (w. summary in English); Jaap H. Spoor, De gestage groei van merk, werk en uitvinding [The steady growth of trademark, work and invention], Zwolle, 1990; S. Gerbrandy, Auteursrecht in de steigers [Copyright under construction], Arnhem, 1992; Wirt J. Soetenhorst, De Bescherming van de uitgeefprestatie [the protection of the publisher], Zwolle, 1993 (w. summary in German); A.A. Quaedvlieg, Auteur en aantasting, werk en waardigheid [a discussion of the droit au respect], Zwolle, 1992; Th.C.J.A. van Engelen, Prestatiebescherming en ongeschreven intellectuele eigendomsrechten [Misappropriation and common law intellectual property rights], Zwolle, 1994 (w.summary in English); Willem Grosheide, Paradigms in Copyright Law, in: Brad Sherman and Alain Strowel (eds.), Of Authors and Origins, Oxford, 1994; Jacqueline Seignette, Challenges to the Creator Doctrine, Information Law Series, Deventer/Boston, 1994.

membership of the Dutch copyright society (*Vereniging voor Auteursrecht*), the Dutch branch of ALAI. Per 1 January 1996, the society's membership stands at 473. The subject of copyright has become extremely popular with law students as well; it is currently taught at law schools in Amsterdam, Leyden, Utrecht, Nijmegen and Groningen.

In this chronicle, an overview will be presented of Dutch copyright law as it has developed between 1990 and 1995. Legislation and case law prior to the 1990's will be mentioned only incidentally.[3] The structure of this chronicle is as follows. First, a concise introduction to the law of copyright in the Netherlands is presented, outlining the general legal framework (§ 2). This is followed by a discussion of the new Dutch Law on Neighboring Rights (§ 3), and a summary of the most relevant amendments to the Dutch Copyright Act (§ 4). The last part of this chronicle comprises a selection of noteworthy case law (§ 5).

2. General framework of Dutch copyright law

The Dutch Copyright Act (DCA)[4] is one of the oldest "living" copyright laws in the world. It was adopted in 1912, the year the Netherlands adhered to the Berne Convention; hence the Act's official title *Auteurswet 1912*.[5] The Act has since been amended many times, but never thoroughly revised. Thus, the Act has retained its original structure, which has proven to be surprisingly flexible and modern. Even in the "digital" 1990's, no need for thorough revision is currently felt.

The Act protects "works of literature, science or art", as exemplified in the non-exhaustive list of work categories of article 10 (1), which is reminiscent of article 2 (1) BC. Article 10 (2) clarifies that the Act, in fact, protects "every production in the domain of literature, science or art, whatever may be the mode or form of its expression." The Act does not expressly require *originality*, a prerequisite which has been developed in doctrine and case law[6]. According to the

[3] For a comprehensive overview of copyright law in The Netherlands see H. Cohen Jehoram, The Netherlands, in: Nimmer/Geller (ed.), International Copyright Law and Practice, Vol. 1, New York; see also S. Gerbrandy, Lettre des Pays-Bas, Le Droit d'Auteur 1965, 45; D.W.F. Verkade, Letter from the Netherlands, Copyright 1981, 176; D.W.F. Verkade, Letter from the Netherlands, Copyright 1985, 165.

[4] Act of 23 September 1912, Staatsblad 308; a full text of the Act (as amended to 1973) is published in Copyright, 1973, 181 et seq.

[5] The Netherlands has ratified the Paris Act of the Berne Convention; Act of 30 May 1985, Staatsblad 1985, 306.

[6] See F.W. Grosheide, Standards of qualification for the protection of literary and artistic property in Dutch copyright law, in: J.H.M. van Erp & E.H. Hondius (eds.), Netherlands Reports for the Fourteenth International

Dutch Supreme Court (*Hoge Raad*), a work must have an individual character and bear the personal imprint of its creator (see § 5.1 below).

Non-original writings

In deviation from continental European *droit d'auteur* tradition, the Dutch Act also protects so called *non-original writings*, i.e. texts, compilations of data and other information products expressed in alpha-numerical form, that do not meet the test of originality. This regime, the so-called *geschriftenbescherming* (protection of writings), is a remnant of an ancient 18th century printer's right, that still survives in the work catalogue of article 10 (1): "books, brochures, newspapers, magazines and *all other writings*."

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 program 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.[7] Thus, in the Netherlands producers of telephone directories, address books, almanacs and all sorts of other compilations of data (whether in paper or electronic form) are safely protected against unauthorized reproduction.

Rights protected

The Dutch Act is especially flexible in its definition of the rights granted under copyright. Apart from the author's moral rights (protected under article 25), rightholders may enjoy two rights of exploitation, both of which are defined and interpreted in a very broad manner: a right of reproduction (*verveelvoudiging*) and a right of communication to the public (*openbaarmaking*). The first right (defined in articles 13 and 14) comprises a right of reproduction *strictu sensu*, as well as a right of translation and adaptation. The right of communication to the public (article 12) effectively covers all acts of making a work available to the public, including acts of publishing and distribution, performing, exhibiting, reciting, broadcasting, cable (re)transmission, etc. The broad scope of the Dutch right of communication to the public makes

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Congress of Comparative Law, Athens 1994, The Hague, 1995, 175.

[7] Hoge Raad, 17 April 1953, NJ 1954, 211 (Het Radioprogramma); Hoge Raad, 27 January 1961, NJ 1962, 355 (Explicator); Hoge Raad, 25 June 1965, NJ 1966, 116 (Televizier).

it particularly suitable for the digital networked environment of the future.[8]

3. The Law on Neighboring Rights of 1993

In 1990, after decades of discussion and foot-dragging, the Conventions of Rome and Geneva were finally ratified by the Dutch legislature.[9] For many years the Ministry of Culture (responsible for the Dutch 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 neighboring rights were not merely a burden, but a bonus as well.

On 18 March 1993 the Law on Neighboring Rights was finally adopted; it entered into force on 1 July 1993[10]. Interestingly, only a few years earlier the Dutch Supreme Court, in its *Elvis Presley* decision of 1989, 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).[11] In its judgment the Hoge Raad anticipated the impending ratification and implementation of the Rome Convention.

The Dutch Law on Neighboring Rights of 1993 is patterned after the Rome Convention and the Dutch Copyright Act. In the following overview of the new law only the most significant differences are discussed.

The Law protects as "performing artists" not only persons performing literary or artistic works (article 1). As permitted by article 9 of the Rome Convention, the protection is extended to

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[8] See P.Bernt Hugenholtz, Adapting copyright to the information superhighway, in: P.B. Hugenholtz (ed.), The Future of Copyright in a Digital Environment, Information Law Series, Deventer/Boston, 1996.

[9] Staatsblad 1990, 303-304.

[10] Act of 18 March 1993, Staatsblad 1993, 178; WIPO translation in: Industrial Property and Copyright, December 1995, Copyright and Neighbouring Rights, Laws and Treaties, Text 2-01.

[11] Hoge Raad, 24 February 1989, NJ 1989, 701. See also Hoge Raad, 5 April 1991, NJ 1991, 819 (Elvis Presley II), ruling that the misappropriation rule applies as well to phonograms older than the 20 year Convention minimum; and Hoge Raad, 2 April 1993, NJ 1993, 573 (NVPI/Snelleman), ruling that bootlegging is an unlawful act in respect of both the performing artist and the phonogram producer that has "signed" the artist.

artists performing variety or circus acts and to puppeteers.

The exploitation rights granted under the Law to performing artists and producers of phonograms exceed the Rome Convention minimum. A performing artist enjoys not only the exclusive right of authorising the first fixation of his performance, but also the right to prohibit any reproduction, act of distribution (subject to exhaustion), transmission, retransmission or other communication to the public thereof. In addition, article 5 protects the moral rights of performing artists, much in the same way as article 25 of the Dutch Copyright Act.

The rights granted to phonogram producers (article 6) are similar to those enjoyed by performing artists. Broadcasting organisations (article 8) equally enjoy a bundle of exclusive rights: (re)transmission (over the air or via cable), fixation, reproduction, distribution or any other communication to the public. Interestingly, in departure from the Rome Convention, the subject matter of protection is not the "broadcasts" per se, but the "programs" broadcast.

Pursuant to Council Directive 92/100/EEC, film producers also are granted neighboring rights (article 7a); these rights are expected to largely overlap with existing copyrights. Implementation of the Directive has also caused the introduction into the Law of rights of rental and lending (see § 4.5 below).

Article 3 provides for a rather ambiguous provision in respect of the rights of employers of performing artists. Under this provision the performing artist's exploitation rights may be exercised by the employer if parties have agreed thereto, or if such exercise derives from the nature of the employment contract, from usual practice or from the demands of fairness and equity. Under a similar proviso the employer must pay an equitable remuneration to the performing artist (or his successor in title) for every exploitation of his performance. Article 3 differs from the corresponding provision in the Dutch Copyright Act (article 7 DCA) in that it does not directly allocate the rights in the employer. Moreover, under article 3 of the Law the moral rights remain with the performing artist, whereas (according to prevailing doctrine) the moral rights of the author are directly attributed to the employer.

The Law contains a special rule for the exercise of rights by performers collaborating in an orchestra (article 13). In the case of a joint performance by six or more persons, these rights are to be exercised exclusively by a representative chosen by a majority of the orchestra members.

Article 7 implements article 12 of the Rome Convention, regarding secondary uses of phonograms. In view of the elaborate set of exclusive rights granted to performing artists and phonogram producers under articles 2 and 6 of the Law, this provision amounts to a statutory license rather than an additional right to equitable renumeration. Phonograms or reproductions thereof published for commercial purposes may be broadcast without authorization, on condition that equitable renumeration is paid both to the phonogram producer and the performer. In the event of disagreement as to the amount payable, the District Court of The Hague will have competence to determine this amount. The remuneration must be shared equally between the performer and the producer.

Payment is to be made exclusively to a representative legal person designated by the Dutch Minister of Justice (article 15). The legal person shall represent the rightholders both in and out of Court. It is subject to supervision by a Supervisory Board, the members of which are appointed by the Minister of Justice. Repartition schemes are to be approved by the Minister as well. The legal person so designated is the *Stichting SENA*, a foundation established in Hilversum.

The rights granted under the Act are subject to transfer or license; both require a written instrument (article 9). In this respect the Law is incongruent with article 2 of the Dutch Copyright Act, which contains a similar requirement only in respect of *transfers* of rights.

Articles 10 and 11 of the Law provide for several exemptions to the exclusive rights. Most of these (private use, quotation, educational use, etc.) are directly derived from the Copyright Act. For reasons known only to the legislature, other existing copyright exemptions are not repeated in the new Law.

The term of the rights granted under the Law are on a par with Council Directive 93/98/EEC. The rights shall expire on completion of 50 years after the end of the year in which the performance took place, the phonogram was manufactured or the program was broadcast.

The Act contains a separate chapter providing for criminal sanctions. Interestingly, a special provision considers as an offence the intentional submission of false or incomplete information to the designated collecting society.

The Dutch Law on Neighboring Rights is applicable to performers, phonogram producers and broadcasters, that are either nationals of the European Union or the European Economic Area (or established therein) or of a state party to the Rome or Geneva Conventions (article 32). Thus, the criteria of application are no longer strictly reciprocal, as in the version of article 32 originally enacted. The present article was enacted as part of the implementation of Council Directive 92/100/EEC.

The transitional provision of article 33 makes the law applicable to all performances, phonograms or programs predating the entry into force of the law. The Act does not contain a cut-off provision, as originally proposed, which would have excluded phonograms produced prior to 1964. To be sure, the Act does not have a retro-active effect; it is not applicable to any restricted acts that have occurred prior to its entry into force on 1 July 1993.

4. Amending the Dutch Copyright Act

Between 1990 and 1995 the Dutch Copyright Act has been amended nearly a dozen times. The most important amendments, many of which were the result of the various European Directives in the field of copyright and neighboring rights, will be discussed below. Some of these amendments have met with sharp criticism, both within and outside the Dutch Parliament. This criticism was inspired only in part by the sometimes mediocre quality of the proposed legislation. More importantly, it reflected growing reservations among many politicians and legal scholars about the steady expansion of the intellectual property rights system.[12]

Lingering doubts as to the quality of the proposal, as well as to the necessity of adding yet another slice to the "club sandwich" of copyright[13], eventually led to the withdrawal of the 1993 Reprography Bill (no. 22.600).[14] A majority of the Dutch Senate (First Chamber of Parliament) made it clear that it would vote against the amendment if it were not retracted. The recently

[12] Th. Koopmans, Intellectuele eigendom, economie en politiek, AMI 1994, no. 6, 107; J.H. Spoor, De gestage groei van merk, werk en uitvinding, Zwolle, 1990.

[13] E.J. Dommering, Verhuren en lenen: de laatste openbaringen in het auteursrecht, AMI 1994, no. 10, 187.

[14] The main purpose of the proposed amendment was to bring to life the existing compulsory license for in-house photocopying by companies and enterprises (article 17 DCA). The Reprography Bill would grant to the Dutch RRO (the *Stichting Reprorecht*) a *de lege* mandate to claim remuneration. See Dirk Visser, Reprography: recent experiences in the Netherlands, Copyright World, no. 47, February 1995, 42.

appointed Minister of Justice, Ms Sorgdrager, joined the chorus of criticism[15], and decided to set up an advisory Committee on Copyright, in order to prevent any further debacles. Prof. Verkade was named chairman of the Committee.[16] Since its installation the Committee has been influential in advising the Minister of Justice on pending and proposed legislation, as well as on European initiatives.

4.1 Home taping

On 30 May 1990 a home taping levy was introduced into the Copyright Act.[17] The levy is intended to compensate right owners for the losses and damages incurred by massive private copying of musical works and films. The home taping provisions leave unchanged the existing exemption for personal use, study or practice of article 16b (4). Thus, the levy system does not directly affect the actual producers of the copies, the consumers. Instead, it is directed towards the manufacturers or importers of recording materials, making the levy system somewhat fiscal in nature.

The new regime is laid down in articles 16 c-g. Under article 16c (1) a levy is due in respect of any "object which is intended to show the images or play the sounds recorded upon it". This, in theory, is a very broad definition, including not only audio and video cassettes, but also celluloid film, erasable CD's, computer diskettes, etc. In practice, the levy is currently applied only to audio and video cassettes.

The levy shall be paid to a legal person designated (and supervised) by the Minister of Justice, which adequately represents the interests of the right owners. The legal person so designated is the *Stichting de Thuiskopie* (Home Copying Foundation). Yet another foundation is designated by the Minister of Justice to determine the amount of the levy. In this "negotiation" foundation representatives of rightholders and manufacturers or importers of recording tape are represented in equal numbers. The chairman is appointed by the Minister of Justice.

The levy provisions of the Dutch Copyright Act apply *mutatis mutandis* to the Law on

[15] Proceedings, First Chamber of Parliament, 7 February 1995, 17-587 - 17-596.

[16] Staatscourant, 24 March 1995, no. 60.

[17] Act of May 30, 1990, Staatsblad no. 305, English translation in: Copyright, October 1991, Laws and Treaties, Netherlands, Text 1-02.

Neighboring Rights, discussed in § 3 of this chronicle. The present amount of the levy is set at DFL 0,35 per hour playing time for audio tape (DFL 0,68 including neighboring rights), and at DFL 0,47 per hour playing time for video tape (DFL 0,77 including neighboring rights). The levy system exists only in respect of *recording materials*; recording *equipment* is not taxed.

4.2 New Civil Code

In the course of the present decade a brand new Dutch Civil Code is gradually being introduced into the law. The enactment of the new Code has had consequences for many branches of the law, including the law of copyright. This has resulted in a number of technical amendments to the Dutch Copyright Act, which will not be discussed in this chronicle.

More importantly, article 3:84 (3) of the new Code no longer allows for any *fiduciary transfer* of ownership. Consequently, the *fiducia cum amico* transfer of copyrights, a typical element of the legal relationship between authors of musical works and BUMA (the Dutch musical rights society), has lost its validity.

The legislature has provided for an alternative empowering mechanism in article 7:423 of the Code. Under this provision an exclusive power of attorney may have a "privative" effect vis-à-vis the author, depriving the author of the possibility to exercise his rights individually. Thus, a collecting society can act on behalf of its authors without fear of its legitimation *erga omnes* being undermined by licenses granted ad hoc by individual authors.[18].

4.3 Computer programs

The European Computer Programs Directive of 14 May 1991 (Council Directive 91/52/EEC) was implemented in the Netherlands on 7 July 1994.[19] The Dutch legislature has not opted for "en bloc" implementation, but for a more or less integrated legislative solution. The manner in which this has been effectuated has been criticised, both in Parliament and in doctrine.[20]

The software amendment adds a new (twelfth) work category to the list of article 10 DCA:

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[18] Under the old Civil Code the Hoge Raad had ruled that such a "privative" power of attorney was not feasible; Hoge Raad, 29 September 1989, NJ 1990, 307 (Van Speijk/ Beeldrecht).

[19] Act of 7 July 1994, Staatsblad 1994, 521; entry into force on 1 September 1994.

[20] See Dommering, AMI 1992, 83; Verkade, Computerrecht 1992, 86.

"computer programs and preparatory materials". Of course, no real need for such amendment existed; computer software was already considered safely protected under the old Dutch copyright law.

Surprisingly, the amendment may have a negative effect on the level of protection. The new law expressly excludes computer programs from the category of "writings". Thus, producers of computer programs may no longer enjoy the "quick and easy" protection of the quasi-copyright in non-original writings.

The amendment, furthermore, introduces a new Chapter VI (articles 45 h-n), defining rights and limitations very similar in scope (but not in wording) to the corresponding rules of the Directive. In addition, article 32 a provides for criminal remedies against the trade or possession of means intended to defeat technical protection mechanisms.

4.4 Term of Protection

On 21 December 1995 two further amendments to the Copyright Act were enacted, implementing Council Directives 93/98/EEC and 92/100/EEC respectively. As a result the term of protection under Dutch copyright law has now been extended to 70 years *post mortem auctoris* (or, in case of works created by a legal person, 70 years after publication).[21] The amendment further introduces the Directive's special rules for calculating the term of protection for audiovisual works. Also, the new publisher's right in editions of previously unpublished public domain works is implemented.

The transitory law regarding the term of protection, which has been left mostly undecided by the Directive, has given rise to a lively scholarly debate. One of the principal questions was whether the rights that revive or are extended on 1 July 1995 (the date of entry into force of the amendment) would revert to the initial right owner (i.e. the author) or rather to the last protected rightholder. For practical reasons, the Dutch legislator has opted for the latter solution.

4.5 Rental and Lending Rights

The Act of 21 December 1995, implementing Council Directive 92/100/EEC, introduced into

[21] Act of 21 December 1995, Staatsblad 1995, 652; entry into force on 29 December 1995.

Dutch copyright law a right of public lending and an exclusive rental right.[22] The existing act providing for a not copyright-related public lending fee was subsequently withdrawn.

Pursuant to the amendment the definition of the right of communication to the public (article 12) is extended to include both the acts of rental and lending. "Lending" is defined as the making available without direct or indirect economic or commercial gain by institutions which are open to the public. The new articles 15 c-g provide for a statutory license in respect of the public lending of a work which has been put into circulation by or under authorization of the rightholder. Lending institutions must pay an equitable renumeration to rightholders; educational and research institutions, as well as affiliated libraries (and the Royal Library) are exempted. The amount of the renumeration for public lending is to be determined in the same way as under the home taping levy system, i.e. by way of a "negotiating" foundation in which both right owners and lenders are equally represented. Lending royalties will be exclusively collected by a representative legal person (i.e. the *Stichting Leenrecht*, foundation for lending rights), which is supervised by a board appointed by the Minister of Justice and the Minister of Culture. Repartition rules must be approved by both ministers as well.

4.5 Pending amendments

Yet another Act implementing a European Directive is currently pending before the First Chamber of Dutch Parliament. Copyright Amendment Bill no. 23813, implementing the Satellite and Cable Directive (Council Directive 93/83/EEC), is expected to be adopted shortly. The Bill was substantially revised during the course of the parliamentary debates in the Second Chamber. Initially, the Bill would permit only a single collecting society to act on behalf of all rightholders in respect of secondary cable retransmission. In its final form, the various groups of rightholders may each be represented by separate collecting societies, much in the same way as, at present, rightholders are represented in the collective agreements concluded with cable entrepreneurs.

The European Database Directive (Directive 96/9/EC), which was adopted on 11 March 1996, has not yet generated any legislative activity in The Netherlands. It remains to be seen, therefore, whether implementation thereof will further reduce the scope of the Dutch copyright in non-original writings, previously discussed.

[22] Act of 21 December 1995, Staatsblad 1995, 653; entry into force on 29 December 1995.

5. Case law

The first half of this decade has produced abundant case law, a most important source of Dutch copyright law. The following discussion of case law highlights focuses on decisions by the highest civil court, the *Hoge Raad* (Dutch Supreme Court). Whenever relevant or of special interest, decisions by the lower courts are included as well.

It is important to note that a majority of the cases quoted have been decided in interim injunction proceedings (*kort geding*). In first instance such proceedings are decided by a *unus iudex*, i.e. the President of the District Court (*Arrondissementsrechtbank*). In view of the practical need to respond rapidly to acts of intellectual property infringement, the *kort geding* has become the principal means of proceeding in intellectual property matters. An interim injunction, sometimes obtained within less than a week from the initial writ of summons, is a most effective means of restraining any further infringement.

The Dutch *kort geding* has become even more popular with intellectual property owners in view of the possibility of obtaining a so-called *cross-border* prohibitory injunction. The infringing party thereby is prohibited to commit any (further) acts of infringement, even if these acts take place outside Dutch territory.[23]

Dutch law of civil procedure does not require that interim injunction proceedings are followed up by any ordinary civil action. However, in the light of article 50 (6) of the TRIPs agreement this may no longer be true for the future. Whether or not the Dutch *kort geding* qualifies as a "provisional measure" within the meaning of article 50 (6) of TRIPs is still very much an open question.[24]

The cases discussed below are not presented in chronological order, but ordered thematically, following traditional subdivisions: subject matter, authorship, rights protected, exemptions, and moral rights.

5.1 Subject matter

[23] Hoge Raad, 24 november 1989, NJ 1992, 404 (Lincoln); cf. Heleen Bertrams, The cross-corder prohibitory injunction in Dutch patent law, IIC, Vol. 26 (1995), 618.

[24] J.J. Brinkhof, TRIPS-verdrag en het kort geding in zaken over intellectuele eigendom, BIE 1995, no. 11, 363; J.H.P.J. Willems, Hoe "provisional" is het Nederlandse kort geding?, BIE 1996, no. 1, 11.

Van Dale v. Romme

In the case of *Van Dale v. Romme*, decided by the Hoge Raad in 1991[25], the plaintiff sought protection for the approximately 230,000 alphabetically ordered headwords contained in the Van Dale dictionary of the Dutch language. A certain 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 District Court of Utrecht and the Amsterdam Court of Appeals). 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 The Hague Court of Appeal for further decision.

Van Dale did eventually prevail; the Court of Appeal found sufficient personal expression in the selection process employed by the Van Dale lexicographers.[26] Even so, the Van Dale decision clearly demonstrated that collections of data are not safely protected under traditional copyright doctrine. Curiously, in the *Van Dale* case the protection of non-original writings, which might have granted plaintiff easy relief, was not an issue. Indeed, a host of decisions in the 1990-1995 underscore the practicality of this regime for the producers of databases.[27]

An interesting aspect of the *Van Dale* decision is the rather severe standard of originality set by the Hoge Raad. In order for an object to qualify as a work of literature, science or art, "it is necessary for it to have an original and individual character bearing the personal imprint of its maker", the Court declared. According to some commentators, this formula implies a higher

[25] Hoge Raad, 4 January 1991, NJ 1991, 608, English translation in: E.J. Dommering & P.B. Hugenholtz (eds.), Protecting Works of Fact, Deventer/Boston, 1991, 93.

[26] Court of Appeals The Hague, 1 April 1993, NJ 1994, 58.

[27] President District Court of The Hague, 5 November 1991, Computerrecht 1992, 77; President District Court of Amsterdam, 16 April 1992, KG 1992, 176; President District Court of Breda, 23 December 1992, AMI 1993, 90.

standard of originality than previously applied by the Court. If this is true, Dutch law may be somewhat out of step with the emerging European norm of "the author's own intellectual creation", as found in the Software and Database Directives.

Formats

The borderlines between unprotected idea and protected expression were thoroughly investigated in a number of cases involving the protection of television "formats" and storylines.[28] In the case of *Jacques Antoine & Cie v. Veronica Omroep Organisatie* protection was sought for the format of the French adventure show "La Chasse aux Trésors". According to the plaintiff, Veronica's show "Hunting the Fox" (*Op jacht naar de vos*) was an unauthorised imitation or adaptation of Antoine's format.

The Court of Appeal accepted, in principle, that a television format or plot could qualify as a copyright protected work, provided it is sufficiently expressed (preferably in an existing television program). The Court, however, did not find infringement. Defendant's program was considered different from Antoine's format in many respects. Even so, the Court's decision is important in that it recognises copyright protection of television formats, which have become a valuable commodity in the audiovisual market place. In practice, formats are being traded as exclusive properties.

Other works

Other works granted copyright protection in the 1990-1995 time frame include: the character of a well-known comedian[29], a computer memory module[30], sculptured gardens[31], a pond[32],

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[29] President District Court of Amsterdam, 15 November 1990, AMI, 1991, 70 (Talkabout); President District Court of Amsterdam, 17 January 1991, AMI 1991, 71 (La Chasse I); President District Court of The Hague, 3 January 1994, AMI 1996, 8 (The Bold and the Beautiful); President District Court of Amsterdam, 24 November 1994, AMI 1996, 9 (Sikilu Musicals); President District Court of Amsterdam, 3 March 1994, AMI 1994, 119 (Bokkerijders); see generally Jaap F. Haeck, Netherlands Report, in: The Protection of Ideas, Proceedings of ALAI Workshop, Sitges, 4-7 October 1992, 129-132; Joris van Manen, Televisieformats en -ideeën naar Nederlands recht, Amsterdam, 1994. District Court of Haarlem, 22 January 1991, AMI 1992, 188 (Sjef van Oekel).

[30] President District Court of Breda, 13 February 1991, AMI 1992, 174.

[31] President District Court of Amsterdam, 20 April 1990, BIE 1992, 95.

[32] President District Court of Almelo, 12 July 1994, AMI 1995, 11.

recreational bungalows[33] and a Japanese tea house[34]. Not surprisingly, Dutch courts also recognised the creativity in the design of bicycle carriers[35], fishing boats[36], cycle-bags and wallets[37].

5.2 Authorship

The case of *Kluwer v. Lamoth* concerned the protection of photographic works.[38] Lamoth had produced a series of photographs of needle works (published in women's magazines), assisted by a "stylist" employed by publisher Kluwer, who had creatively arranged the needleworks. Kluwer argued that the stylist (or rather Kluwer) was a co-author of the photographs. The Hoge Raad agreed; it dispelled the rather technocratic notion that a photographic work can be created only by the actual photographer.

5.3 Rights protected

In its landmark decisions of 1981 and 1984[39] the Dutch Supreme Court had expressly left undecided the question whether the collective reception of television programs by means of small communal antenna systems constitutes a *communication to the public*. On 24 December 1993 the Hoge Raad decided this remaining issue in the affirmative.[40]

The Court held that it is not up to the courts to fix a quantative criterium (such as a certain number of subscribers) on the grounds of which the service provided by communal antenna systems might fall outside the scope of the right of communication to the public. The Court suggested that, if there were a need for an exemption for small-scale systems, the compulsory license provision of article 17a of the Dutch Copyright Act (in conjunction with article 11 bis (1)

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[33] President District Court of Haarlem, 19 July 1994, KG 1994, 303.

[34] District Court of Arnhem, 29 September 1994, AMI 1995, 72.

[35] President District Court of The Hague, 16 August 1994, BIE 1995, 93.

[36] President District Court of Amsterdam, 26 February 1993, IER 1993, 23 (Fish Hawk boat).

[37] President District Court of Haarlem, 13 Juni 1995, IER 1995, 33.

[38] Hoge Raad, 1 June 1990, NJ 1991, 377.

[39] Hoge Raad, 30 October 1981, NJ 1982, 435; RIDA 112 (1982), 168; Hoge Raad, 25 May 1984, NJ 1984, 697.

[40] Hoge Raad, 24 December 1993, NJ 1994, 641; RIDA 162 (1994), 405; see Juliette Jonkers, the Dutch Community Cable Case: A Christmas judgment by the Dutch Supreme Court, Copyright World, no. 38, March 1994, 43.

under 2 BC) would be an appropriate instrument therefor.

On a lighter note, the Court of Appeal of Den Bosch ruled that the showing of (pornographic) movies in private "cabines" (in a sex-shop) constituted an act of communication to the public. The Court correctly observed that the essence of the right of communication to the public is making the work available to the public, and that it does not matter whether or not the work is actually communicated to an audience simultaneously.[41]

In a case involving the transit of cigarettes through the island of Aruba (part of the Kingdom of the Netherlands), the question to be decided was whether such transit amounted to a communication to the public (of the copyright protected cigarette packs). The Hoge Raad considered it was not; communication to the public presupposes the existence of a "public". Since the cigarettes were not put on the market in Aruba, no relevant act of communication to the public had taken place.[42]

Important questions of exhaustion were addressed in the case of *Novell v. America Direct.*[43] The latter offered for sale in the Netherlands Novell computer software which was parallel-imported from the United States. Was the right of distribution exhausted? The President of the Court held that the European Software Directive's exhaustion rule was limited to the territory of the European Union (article 4 c of the Directive). Even if the Dutch legislator had failed to fully implement this provision, the Dutch Act had to be interpreted in conformity with the Directive. Thus, Community exhaustion was applied, and the imported software was held to be infringing.

5.3 Exemptions

Between 1990 and 1995 the Hoge Raad twice examined the scope of the quotation right.[44] The criteria eventually developed by the court boil down to a test of the functionality and

[41] Court of Appeal of Den Bosch, 1 February 1994, AMI 1995, 51 (GUFA/Havermans). The GUFA decision demonstrates that the Dutch right of communication to the public is sufficiently flexible to be applied in the digital networked environment of the future, where delivery-on-demand of copyrighted works will be the rule, not the exception.

[42] Hoge Raad, 27 January 1995, NJ 1995, 669 (Cigarrera/Doucal).

[43] President District Court of The Hague, 7 July 1995, IER 1995, 30.

[44] Hoge Raad, 22 June 1990, NJ 1991, 268 (Beeldrecht/Malmberg); Hoge Raad, 26 June 1992, NJ 1993, 205 (Damave/Trouw).

proportionality of the quotation. The *Damave/Trouw* decision further clarifies that a quotation may be "exploitative" of the work, but still permitted, provided the test is met.

The scope of the news reporting exemption (article 15) was at issue in the case of *Stichting Reprorecht v. NBLC*.[45] Defendant, the Dutch national organisation of public libraries, provided a clipping service for library users. Could the service qualify as an exempted "newspaper" or "magazine" within the meaning of article 15?

Failing to find a guiding principle in article 10 *bis* (1) of the Berne Convention, the Court turned to the legislative history of article 15. During the parliamentary debate the responsible ministers had stated repeatedly that clipping services would fall under the scope of this provision. This "authentic" interpretation of the provision led the Court to hold that clipping services are exempted under article 15. In a later decision by the District Court of The Hague[46] the Court, however, refused to treat a CD-ROM containing literary reviews "clipped" from a large number of Dutch newspapers, as an exempted clipping service.

Of prime importance to the Dutch system of copyright exemptions is the Hoge Raad's recent decision in *Dior v. Evora*[47]. Evora, a large retailer of perfumes and cosmetics, offered for sale parallel-imported Dior products. Because of the exhaustion rule the sale of these products could not be prevented by Dior. When Evora advertised its Dior products in an illustrated brochure, containing photographs of the products involved, Dior scented its chance.

Dior claimed Evora's advertisements infringed the copyrights in the packing of the perfume bottles pictured in the brochure. Evora countered that the exhaustion rule must imply that the products may be displayed without authorization in advertisements. Moreover, Evora drew an analogy with the art catalogue exemption of article 23 DCA. Under this provision the owner of a work of art is free to reproduce it in a sales catalogue.

The Dutch Supreme Court observed that no existing copyright exemption could be applied to the

[45] Hoge Raad, 10 November 1995, IER 1995, 41.

[46] District Court of The Hague, 3 May 1995, AMI 1995, 116 (LiteROM).

[47] Hoge Raad, 20 October 1995, AMI 1996, 51.

facts of the case. The Court then held that there must be room to draw the borderlines of copyright *outside* the existing system of exemptions, on the basis of a balancing of interests similar to the rational underlying the existing exemption(s). In other words, the Court "unlocked" the system of statutory exemptions, which was considered closed by many. It remains to be seen, however, whether the Court has simply accepted the analogous application of existing exemptions or, indeed, opened the door for a more general "fair use" type exemption.

In an earlier decision by the District Court of Amsterdam[48] the Court ruled that, under certain circumstances, the copyright owner's exclusive rights might be set aside by the freedom of expression and information guaranteed under article 10 of the European Convention on Human Rights, even if no statutory exemption were applicable.

5.4 Moral rights

Judging from recent case law, the destruction of works of architecture and monumental art is a popular activity in The Netherlands. But is it an infringement of the author's moral right? A majority of the Dutch courts that have addressed this issue, is of the opinion that the complete destruction of a work is something quite different from alteration, distortion or even mutilation - the acts protected under article 25 DCA.[49]

In the perfume industry's ongoing battle against parallel imports, the perfumer's moral right in the perfume bottle's label and package was invoked by Chanel. The Court of Appeals of Amsterdam held that the removal of minute stickers containing batch codes was not an infringement of any moral right, since the labels were not part of the protected work.[50]

Another rather unexpected setting for a moral rights action was the case of *Oxenaar v. Ohra*. Prof. Oxenaar is a well-known graphical designer; he has designed some of the beautiful banknotes currently in use by the Netherlands Bank. In the *Ohra* case Oxenaar complained about Ohra's use of "his" banknotes in its advertisements for financial services. Oxenaar was offended by the advertisement's careless reproduction of the banknotes. Moreover, Oxenaar was hurt by

[48] District Court of Amsterdam, 19 January 1994, AMI 1994, 51 (Boogschutter).

[49] Court of Appeals Den Bosch, 17 December 1990, NJ 1991, 443; Court of Appeals Amsterdam, 11 June 1992, AMI 1993, 186; Court of Appeals Leeuwarden, 29 December 1993, AMI 1996, 13.

[50] Court of Appeal of Amsterdam, 28 February 1991, BIE 1992, 128 (Chanel/Maxis).

another Ohra advertisement displaying a birthday cake in the form of a thousand guilder bank-note.

The Court of Appeals of Arnhem dismissed Oxenaar's claim. The Court held that Oxenaar could not monopolize the symbolism inherent in the banknotes he designed. The public's interest in "talking money" prevailed over Oxenaar's interest in protecting his moral rights.

In the *OMA*[51] case the Hoge Raad was faced with the problem of balancing the author's moral rights with the moral interests of third parties. The case involved a monumental neon sculpture to be installed on the roof top of an old people's home. The text of the sculpture would read *De negende van OMA* ("The ninth of OMA"), a tongue-in-cheek reference to the architect involved, the Office of Metropolitan Architecture (OMA). The elderly inhabitants were not amused; they found offence in the (obviously intended) pun - "Oma" meaning "grandma" in the Dutch language. The Court decided that the moral rights of the architect to have his work installed must give way to the interests of third parties not to be offended by it.

5.5 Other issues

The Dutch Supreme Court's decision in re *Barbie* put to an end a longstanding controversy in Dutch copyright doctrine.[52] According to a minority of scholars the copyright in a work is, in fact, a monopoly in its expression. If a second work is found to be very similar or even identical, it is by definition an infringing reproduction. The majority holds the opposite view: copyright does not preclude, at least in theory, the existence of non-infringing identical works. Under this doctrine copyright protects only against *copying*.

In *Barbie* the Dutch Supreme Court flatly rejected the monopoly theory. Instead, the Court developed a common sense rule of evidence: if two works are (nearly) identical *prima facie,* the onus is on the author of the later work to prove it was independently created (and thus *not* copied).

The decision by the District Court of Den Bosch in the case of *Georgetti* echoes the resounding

[51] Hoge Raad, 20 May 1994, NJ 1995, 691 (De Negende van Oma).

[52] Hoge Raad 21 February 1992, NJ 1993, 164 (Barbie).

Phil Collins judgment of the European Court of Justice[53]. The Court set aside the reciprocity rule of article 2(7) of the Berne Convention, which for many years has been an obstacle to Italian industrial designers in obtaining copyright protection in The Netherlands. Plaintiff Georgetti was, at last, awarded national treatment.[54]

Finally, with a view to the second half of this decade, mention must be made of the recent decision by the President of the District Court of The Hague in the case of *Scientology v. XS4ALL et. al*. The President ruled that an Internet provider, in granting access to copyright protected materials placed on Internet Web sites, can not be held liable for copyright infringement.[55] According to the President, Internet providers are unable to influence, or even have knowledge of, the information flowing through the net. Liability might be assumed, however, in cases of clear-cut copyright infringement, if the Internet provider is duly informed thereof. The Church of Scientology has appealed the verdict.

[53] European Court of Justice, 20 October 1993, joint cases C-92/92 and C-326/92 (Phil Collins).

[54] District Court of Den Bosch, 11 March 1994, AMI 1994, 138.

[55] President District Court of The Hague, 12 March 1996, Mediaforum 1996, B59.