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Chronicle of The Netherlands Dutch copyright law, 1995-2000

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1. Introduction

Since 1996, when the last chronicle on the Netherlands was published in this journal,¹ Dutch copyright law has seen important change. Not surprisingly, much of this was driven by the approaching ‘information society’, the transgression of the realm of copyright into the digital environment. The ongoing flow of European directives also had a major impact at the national level. The European Database Directive, adopted in 1996, was finally transposed in July 1999 in an atmosphere of controversy; early case law on the novel database right has given reason for concern. Dutch civil courts also handed out a host of interesting copyright decisions. The final five years of the millennium produced some outstanding scholarly writing as well. A large number of dissertations, monographs and compilations on copyright law and related matters saw the light.²

In this chronicle, an overview will be presented of Dutch copyright law as it has developed between 1995 and 2000. Legislation and case law prior to this period will be mentioned only incidentally. The structure of this chronicle is as follows. First, a brief introduction to the law of copyright in the Netherlands is presented, outlining the general legal framework (§ 2).³ This is followed by a summary of the most relevant amendments to the Dutch Copyright Act, and an introduction to the new Database Act, which implements the Database Directive, including a discussion of some early case law (§ 3). The final part of this chronicle comprises a selection of noteworthy court decisions in the field of copyright (§ 4).

2. General framework of Dutch law of copyright and neighbouring rights

The Dutch Copyright Act (DCA)⁴ was adopted in 1912, the year the Netherlands adhered to the Berne Convention.⁵ It has since been amended many times, but never been thoroughly revised. The Act

1 P. Bernt Hugenholtz, ‘Chronicle of The Netherlands, Dutch copyright law, 1990-1995’, RIDA 169, July 1996, p. 128-195.

2 Legal commentary: J.J. Brinkhof et al. (eds.), *Intellectuele eigendom, artikelsgewijs commentaar* [Intellectual Property, commentary by article], The Hague: VUGA 1996- ..., loose-leaf; Ch. Gielen and D.W.F. Verkade, *Intellectuele Eigendom* [Intellectual Property], Tekst & Commentaar series, Deventer: Kluwer 1998; D.J.G. Visser, *Naburige rechten* [Neighbouring Rights], Deventer: Tjeenk Willink 1999; D.W.F. Verkade and D.J.G. Visser, *Inleiding en parlementaire geschiedenis Databankenwet*, The Hague: Boom 1999. Dissertations: Julius C.S. Pinckaers, *From privacy toward a new intellectual property right in persona*, Information Law Series, Vol. 5, The Hague/Boston: Kluwer Law International 1996; Dirk J.G. Visser, *Auteursrecht op toegang* [Copyright protection of access], The Hague: VUGA 1997; Jaap F. Haeck, *Idee en programmaformule in het auteursrecht* [Idea and programme format in copyright law], Deventer: Kluwer 1998; Madeleine de Cock Buning, *Auteursrecht en informatietechnologie. Over de beperkte houdbaarheid van technologiespecifieke regelgeving* [Copyright and information technology. The perishability of technology specific legislation], Amsterdam: Otto Cramwinckel 1998, summarised in: *Informatierecht/AMI* 1998/8, p. 129-135; Mirjam Elferink, *Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen* [References in legislation. The status of normalisation in public law and copyright], Deventer: Kluwer 1998, summarised in: *Informatierecht/AMI* 1999/4, p. 49-57. Collections: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), *Intellectual Property and Information Law - Essays in Honour of Herman Cohen Jehoram*, Information Law Series, Vol. 6, The Hague/London/Boston: Kluwer Law International 1998; P. Bernt Hugenholtz (ed.), *Copyright and Electronic Commerce*, Information Law Series, Vol. 8, London/The Hague/Boston: Kluwer Law International 2000.

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.

4 Act of 23 September 1912, *Staatsblad* 308; an English translation is available from the Institute for Information Law web

protects ‘works of literature, science or art’, as exemplified in the non-exhaustive list of work categories of article 10 (1), which resembles article 2 (1) BC. Article 10 (2) clarifies that the Act protects ‘every production in the domain of literature, science or art, whatever may be the mode or form of its expression.’ The Act does not expressly require originality; according to the Dutch Supreme Court (*Hoge Raad*), a work must have an individual character and bear the personal imprint of its creator.⁶

Apart from the author’s moral rights, which are protected under article 25 DCA, right holders enjoy two rights of exploitation, both of which are defined and interpreted in a broad manner: a right of reproduction (*verveelvoudiging*) and a right of communication to the public (*openbaarmaking*). The former, which is defined in articles 13 and 14, comprises a right of reproduction, as well as a right of translation and adaptation. The latter, defined in article 12, 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.

Performers, phonogram producers and broadcasting organizations have enjoyed protection only since 1 July 1993, when the Neighboring Rights Act entered into force.⁷ The Act in many ways reflects the structure of the Dutch Copyright Act.

3. Amending the Dutch Copyright Act

Between 1995 and 2000 the Dutch Copyright Act was amended several times. The most important amendments⁸ have resulted from the implementation of the European Satellite and Cable Directive and the Database Directive.

3.1 Satellite and Cable

The European Satellite and Cable Directive (Council Directive 93/83/EEC) was implemented by the Act of 20 June 1996.⁹ The Dutch Copyright Act now expressly recognizes the act of broadcasting, by satellite, terrestrial transmitter or cable system, as a relevant act of communication to the public (article 12(1)(v) DCA). Satellite broadcasting is defined in article 12(7) DCA in terms similar to article 1(2)b-d of the Directive.¹⁰

Article 47b DCA restricts the application of the Dutch Act to acts of satellite broadcasting occurring in the Netherlands, or in countries outside the European Union, as prescribed by article 2(d) of the Directive.

Article 26a DCA reflects the Directive’s system of compulsory collective management of cable retransmission rights. The provisions of the original implementation bill (no. 23813) were

site at <http://www.ivir.nl/documentation/legislation/copyrightact.html>.

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

⁶ Hoge Raad, 4 January 1991, NJ 1991, 608, English translation in: E.J. Dommering & P.B. Hugenholtz (eds.), *Protecting Works of Fact*, Information Law Series, Vol. 1, Deventer/Boston: Kluwer 1991, p. 93.

⁷ Act of 18 March 1993, Staatsblad 1993, 178; English translation available at

<http://www.ivir.nl/documentation/legislation/nbract.html>; WIPO translation in: *Industrial Property and Copyright*, December 1995, Copyright and Neighbouring Rights, Laws and Treaties, Text 2-01. For commentary see D.J.G. Visser, *Naburige rechten*, Deventer: Tjeenk Willink 1999; see also the 1990-1995 RIDA chronicle (note 1).

⁸ Minor amendments include a Decree of 30 September 1996, Staatscourant 1996, no. 191, expressly reserving copyrights in the ‘Euro’ logo and manual.

⁹ Act of 20 June 1996, Staatsblad 1996, 364, effective 1 September 1996, Staatsblad 1996, 410.

¹⁰ In the first and only case decided under the amended act, a provider of digital satellite retransmission services was held liable for copyright infringement; President District Court Utrecht, 21 February 1997, *Informatierecht/AMI* 1997, p. 84 (BUMA/Nethold). According to the Court, the simultaneous satellite retransmission in digital form of television programs that were originally transmitted by analogue satellite did not constitute ‘an uninterrupted chain of communication’, and therefore amounted to communication to the public within the meaning of article 12(7) DCA and article 1(2)a of the Directive.

substantially revised during the course of the parliamentary debates. Initially, the bill permitted only a single collecting society to act on behalf of all right holders. Under the Act the various categories of right holders may be represented by several collecting societies (article 26a DCA).. Negotiations between right holders and cable operators must be conducted in good faith (article 26b DCA). The mediation provisions of the Directive (article 11) have been implemented more or less *tel quel*.

3.2 Databases

The European Database Directive (Directive 96/9/EC) was finally transposed on 8 July 1999.¹¹ The Dutch Copyright Act traditionally protected 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.¹² This regime, a remnant of an eighteenth-century printer's right, somewhat resembles the *sui generis* introduced by the Directive. For many Dutch database producers, therefore, the new database right is of only limited consequence.

The Dutch legislature has elected to implement the Directive in two different legal instruments, the existing Copyright Act and a new Database Act, that introduces the database right. The amendments to the Copyright Act are relatively minor. The originality standard codified in article 3(1), 1st sentence of the Directive ('the author's own intellectual creation') has not been transposed. This is questionable in the light of the 1991 decision of the Hoge Raad in the case of *Van Dale v. Romme*.¹³ According to the Court, a collection of words will only qualify for copyright protection 'if it results from a selection process expressing the author's personal views'. Arguably, this originality requirement is more stringent than the European standard. Even so, the Dutch legislature's failure to implement this standard is understandable; the legislature clearly wished to avoid setting a double standard of originality.

The amendments to the Copyright Act mainly concern article 10, which now expressly mentions 'collections of works, data or other independent elements' (i.e. databases) as copyrightable subject matter (article 10(3) DCA). Pursuant to article 10(4), databases that qualify for *sui generis* 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, will enjoy the much longer copyright term of protection, which applies to non-original writings. It remains to be seen whether this result complies with the Directive; according to article 3(1), 2nd sentence, 'no other criteria [than 'the author's own intellectual creation'] shall be applied to determine [...] eligibility for [copyright] protection.'

The survival of the Dutch quasi-copyright in non-original writings as a 'safety net' for databases that do not meet the 'substantial investment' test, implies that databases may now be protected under a triple variety of legal regimes: copyright for original databases, database right for databases that reflect substantial investment, and quasi-copyright for non-original alphanumeric databases that lack substantial investment.

The database right is introduced in a separate Database Act, underscoring the novel right's *sui generis* status. In keeping with the Directive, the *sui generis* right is designed as a right of intellectual property. Interestingly, an early draft bill would have transposed the *sui generis* right as a set of special rules of unfair competition law.

The Directive does not leave room for exceptions to the *sui generis* right beyond those enumerated in article 9 of the Directive. Arguably, in the light of the existing copyright in non-original writings, the Netherlands could have invoked Recital 52, allowing Member States that have equivalent regimes to

¹¹ Act of 8 July 1999, Staatsblad 1999, 303, effective 21 July 1999.

¹² See P.B. Hugenholtz, 'Copyright and databases, Report on the Netherlands', in: M. Dellebeke (ed.), *Copyright in cyberspace*, ALAI Study Days 1996, Amsterdam: Otto Cramwinckel 1997, p. 491.

¹³ *Supra* (note 6); see discussion in 1990-1995 chronicle (note 1).

preserve traditional exceptions. The Dutch legislature's choice not to invoke the recital, has been criticised.¹⁴

Case law

The *Vermande/Bojkovski* case, which was decided prior to the implementation of the Directive, inspired controversy. The case concerned the unauthorised publication on a web site of laws and regulations copied from a commercially published CD-ROM. According to the District Court of the Hague, the Database Directive did not permit a statutory limitation of the sui generis right in respect of such compilations. Under the Directive the CD-ROM publisher would, therefore, have been protected. However, since implementation had not yet been completed, and article 11 of the Dutch Copyright Act clearly places laws and regulations in the public domain, no injunction was granted.¹⁵

The case eventually led to the adoption in the Database Act of a provision (article 8(1)) that rules out government ownership of database rights in respect of laws, decrees, ordinances, as well as court and administrative decisions. Some commentators had advocated exclusion of these public domain materials from the scope of the database right altogether¹⁶, but in the light of the *Vermande* decision the legislature opted for a more prudent solution. Under article 8(1) of the Database Act, commercial publishers of compilations of legal materials may enjoy database protection, whereas government institutions may not. Interestingly, the article 8(1) exemption is not on the list of authorized exceptions of article 9 of the Directive. Instead, it is supposedly based on the catch-all provision of article 13, that leaves 'laws on [...] access to public documents' intact.

Another case decided prior to implementation concerned wholesale copying of telephone subscriber listings owned by KPN Telecom (the former Dutch PTT). The Court of Appeal of Arnhem did not accept the defendant's argument that KPN's collection of subscriber data was a mere spin-off of its core activity as a provider of telephone services, and therefore did not constitute 'substantial' investment.¹⁷ The Court, however, did find that KPN would abuse its dominant position by refusing to license its data under fair and reasonable terms.¹⁸ The dispute has continued before the Dutch Post and Telecommunications Authority (OPTA); KPN was eventually ordered to license its subscriber data for a very modest fee.¹⁹

The very first decision by the Dutch Competition Authority, which was established on 1 January 1998 following the enactment of the new Competition Law, concerned a similar case. Newspaper publisher De Telegraaf was refused a license in respect of the radio and television program listings owned by broadcasters NOS and HMG. Inspired by the *Magill* decision of the European Court of Justice, the Authority opined that the broadcasters had abused their dominant position.²⁰ By refusing to license, Dutch consumers were effectively prevented from buying newspapers containing program listings, a type of information product that did not (and still does not) exist on the Dutch market.

Since its adoption in July 1999, the Dutch Database Act has generated a handful of interesting decisions. The District Court of the Hague held that the operator of a dedicated search engine infringed KPN's database rights by providing data extracted from KPN's online telephone directory, without

¹⁴ D.J.G. Visser, 'Overweging 52 Databankrichtlijn', *Informatierecht/AMI* 1999, p. 73.

¹⁵ President District Court The Hague, 20 March 1998, *Informatierecht/AMI* 1998, p. 65 (*Vermande/Bojkovski*), English translation available at <http://www.ivir.nl/rechtspraak/vermande-uk.html>.

¹⁶ Dirk Visser, 'Het ministerie zwicht weer voor de uitgevers', *NJB* 1998, p. 1396; *contra*: A.A. Quaedvlieg, *NJB* 1998, p. 1564.

¹⁷ Court of Appeal Arnhem, 15 April 1997, *Informatierecht/AMI* 1997, p. 218 (KPN/Denda); cf. Dutch Competition Authority (Nederlandse Mededingingsautoriteit), 10 September 1998, *Mediaforum* 1998, p. 304, note P.B. Hugenholtz (*De Telegraaf/NOS and HMG*), § 7.24 (television program listings mere by-product of programming, substantial investment not demonstrated).

¹⁸ See final judgment by Court of Appeal Arnhem, 5 August 1997, *Informatierecht/AMI* 1997, p. 215.

¹⁹ Dutch Post and Telecommunications Authority (OPTA), 29 September 1999, *Computerrecht* 2000, p. 47 (Denda/KPN); the fee was set at less than f 0,005 per datum.

²⁰ Dutch Competition Authority, 10 September 1998, *supra* (note 17).

referring users of the service to its site, and thereby denying KPN advertising revenue.²¹ Again, the Court rejected the ‘spin-off’ argument.

Likewise, the District Court of the Hague found database right infringement in a case pitting the Dutch organisation of real estate brokers NVM against newspaper publisher De Telegraaf.²² The latter operated a web-based search agent (‘El Cheapo’) allowing users to look for real estate and other goods for sale. According to the Court, El Cheapo’s retrieval of data from the NVM web site amounted to unauthorised extraction and reutilisation within the meaning of the Database Act. Remarkably, the Court added that even the extraction of small amounts of data would qualify as (‘qualitatively’) substantial extraction, since just a few data might be of great value to end users.

By contrast, the District Court of Rotterdam did not find infringement in a case of a web site (‘Kranten.com’) providing automatic hyperlinks to newspaper articles posted online.²³ Newspaper publisher PCM argued inter alia that the unauthorised use of headlines constituted database infringement. The Court did not agree; the headlines were a mere by-product of newspaper publishing, and therefore did not reflect ‘substantial’ investment. Moreover, PCM had failed to show that by Kranten.com’s systematically linking to underlying web pages (‘deep’ linking) it had lost advertising revenue.

3.3 Other amendments

A much-publicized amendment to the Dutch Neighbouring Rights Act was enacted on 21 February 1997.²⁴ The amendment, which was initiated by members of parliament, curtails the right of secondary communication of broadcasting organizations. The right to communicate broadcast programs in public places now applies only if and where admission fees are charged. The amendment was inspired by rumours that the public broadcasting organisations were about to demand remuneration from café and bar owners for allowing customers to watch television programs (e.g. football matches).

Amendments to the Copyright Act and Neighbouring Rights Act, implementing the EC ‘anti-piracy’ Regulation (no. 3295/94) and the enforcement provisions of TRIPs, were enacted on 25 February 1999.²⁵ Criminal provisions now encompass not only acts of importing pirated goods, but acts of transit and export as well.

3.4 Forthcoming legislation

Responding to complaints from industry about the proliferation of collecting societies and the lack of transparency in their practices, the Minister of Justice set up a working party to examine possible modes of cooperation between the collecting societies, and to promote rationalization and transparency. Most of the working group’s recommendations were approved by Government, including a proposal to replace the existing patchwork of government-appointed supervisors by a central board of supervision.²⁶ A bill to implement the proposal is expected shortly.

In October 2000 the Ministry of Justice started consultations with interested parties in anticipation of the implementation of the forthcoming European Copyright (‘Information Society’) Directive. Comments and proposals may be posted to a special web site operated by the Ministry.²⁷ The Dutch

²¹ President District Court of the Hague, 14 January 2000, Mediaforum 2000, p. 64, note P.B. Hugenholtz; Informatierecht/AMI 2000, p. 71, case comment A. Beunen at p. 58 (KPN/XSO).

²² President District Court of the Hague, 12 September 2000, Mediaforum 2000, p. 395, note M.M.M. van Eecloud (NVM/De Telegraaf).

²³ President District Court of Rotterdam, 22 August 2000, Mediaforum 2000, p. 344 (Kranten.com), English translation available at <http://www.ivir.nl/rechtspraak/kranten.com-EN.html>.

²⁴ Act of 21 February 1997, Staatsblad 1997, 120, effective 19 March 1997.

²⁵ Act of 25 February 1999, Staatsblad 1999, 110.

²⁶ Minister of Justice, Letter to the Second Chamber of Parliament, 16 April 1998, Informatierecht/AMI 1998, p. 107.

²⁷ <http://www.minjust.nl/auteursrecht>. For background see Arkenbout, ‘Nieuw auteursrecht op komst’, Informatierecht/AMI 2000, p. 125.

Copyright Committee, chaired by professor Verkade, is expected to produce a draft implementation bill in early 2001.

A report on 'Copyright and the New Media', which the Committee submitted to the Ministry on 18 August 1998,²⁸ is critical of the forthcoming Directive, and contains various noteworthy proposals for adapting copyright to the digital environment. Interestingly, the Committee recommends the introduction into Dutch law of an open-ended exemption that would allow unspecified uses that meet the 'three-step' test. Given the exhaustive list of copyright exceptions in the Directive, it is, however, unlikely, such a 'fair-use' type exemption will eventually be proposed.

The Minister of Justice and the Secretary of State for Education, Culture and Science joined the chorus of critics of the proposed Copyright Directive in a letter to the Second Chamber of Parliament of 10 May 1999.²⁹ The proposal is 'unbalanced and lacks sufficient foundation'. The letter also sets out a number of policy principles on the future regulation of copyright law in the digital environment, repeating many of the ideas of the Copyright Committee.

The absence in the Netherlands of specific rules on copyright contracts, such as those found in France, Germany and Belgium, is becoming a source of major concern among authors and scholars. The need for author-protective measures is particularly urgent in the digital environment; publishers increasingly impose standard-form 'all rights' contracts on free-lance authors, giving them no chance but to sign away their copyrights completely.³⁰ The Ministry of Justice is contemplating a bill.

4. Case law

The last half decade of the millennium has produced abundant case law, a most important source of Dutch copyright law. The following section focuses on decisions by the highest civil court, the Hoge Raad. Whenever relevant or of special interest, decisions by the lower courts are included as well. The cases discussed below are not presented in chronological order, but ordered thematically as follows: subject matter, rights protected, exemptions, moral rights, copyright contracts, collective administration of rights, international copyright and enforcement.

4.1 Subject matter

In a case involving two allegedly similar advertising (billboard) bearers, the Hoge Raad confirmed that copyright does not protect elements of style.³¹ The decision is in keeping with established principles of copyright law, even if some commentators in the past have argued otherwise.³² Remarkably, the Court's decision also seems to suggest that elements of style may not be taken into consideration when assessing infringement. Commentators have pointed out that a combination of unprotected elements may constitute originality,³³ as such, there remains a (modest) role for style to play in copyright.

Between 1995 and 2000, Dutch courts have produced a large volume of case law dealing with television program formats, games and similar subject matter on the borderline between idea and expression.³⁴ Most decisions confirmed the trend described in Jaap Haeck's dissertation of 1998³⁵: ideas will qualify for copyright protection if they are sufficiently elaborated.

²⁸ Copyright Committee, Report on Copyright and the New Media, 18 August 1998, summarized in *Informatierecht/AMI* 1998, p. 161; see P.B. Hugenholtz, 'De commissie auteursrecht en de nieuwe media', *Informatierecht/AMI* 1999, p. 1. For background see P.B. Hugenholtz, 'Het auteursrecht: het Internet voorbij?', *Preadvies NJV, Handelingen NJV* 1998-I, p. 197-260.

²⁹ English translation available at <http://www.ivir.nl/Publicaties/engvert1.doc>.

³⁰ P.B. Hugenholtz, *Sleeping with the enemy*, inaugural lecture University of Amsterdam, Amsterdam: AUP 2000.

³¹ Hoge Raad, 29 December 1995, *NJ* 1996, 546, note D.W.F. Verkade, *Informatierecht/AMI* 1996, p. 199; see comment Quaedvlieg at p. 195 (Decaux-Mediamax).

³² F.W. Grosheide, 'De stijl van de meester en het auteursrecht', *BIE* 1985, p. 186.

³³ Quaedvlieg (note 31), p. 196.

³⁴ President District Court Amsterdam, 16 August 1996, *Informatierecht/AMI* 1997, p. 13 (Beydals/TROS); President District Court Amsterdam, 31 July 1997, *IER* 1997, p. 185 (Tuimeltoren); Court of Appeal Amsterdam, 26 March 1998,

The approaching millennium generated a fair share of bizarre cases as well, including a decision by the District Court of Amsterdam denying copyright protection of interviews that told the 'true' story of an alien abduction. The Court observed that the account was presented as facts, not fiction, and therefore lacked the personal imprint of an author.³⁶ The Court of Appeal of Amsterdam was similarly not impressed by a copyright claim in respect of erotic cakes, baked in the image of male or female bodily parts partly dressed in lingerie.³⁷ The Court considered that the mere idea of erotic patisserie cannot be copyright protected. Moreover, the defendant's tarts were deemed sufficiently dissimilar from plaintiff's pastry not to infringe. The Court also refused to award copyright protection to 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.³⁸ Plaintiff's argument that the Top Scan's movement as such represented an original work of authorship, was, not surprisingly, rejected.

4.2 Rights protected

Exhaustion

Prior to the implementation of Council Directive 92/100/EEC³⁹, the Dutch Neighbouring Rights Act provided for international exhaustion; the same rule still applies for copyright, as long as the European Copyright Directive is not transposed. In the case of *Pink Floyd v. Rigu Sound*⁴⁰ the Hoge Raad had to answer the question what exhaustion rule applied in the interim period between the implementation deadline set by the Directive (1 July 1994; article 15.1 of the Directive) and the actual implementation. The Court considered that interpreting the existing (now amended) Act in the light of the Directive would be *contra legem*, even if the Dutch legislature had failed to meet the implementation deadline.

Whether or not the various European Directives that provide for community-wide exhaustion indeed rule out a regime of international exhaustion at the national level, has been the subject of lively debate in the Netherlands.⁴¹ The European Court of Justice put an end to this controversy in its landmark *Silhouette* decision.⁴²

The *Dior/Evora* case⁴³, discussed in the previous chronicle, continued with decisions by the European Court of Justice and the Benelux Court of Appeal. Evora had advertised parallel-imported Dior perfumes in an illustrated brochure. Because trademark rights were exhausted, sale of the products could not be prevented. Not discouraged, Dior claimed Evora's illustrated advertising brochure infringed its copyrights in the packing of the perfume bottles. Referring to the European Court's long line of cases on community exhaustion, the European Court held that 'in circumstances such as those in point in the main proceedings, the protection conferred by copyright as regards the reproduction of protected works in a reseller's advertising may not, in any event, be broader than that which is conferred on a trade mark owner in the same circumstances.'⁴⁴ In other words, the copyright in the packing could not prevent the advertising of the lawfully parallel-imported products.⁴⁵ By contrast, the

Informatierecht/AMI 1998, p. 102 (Stratego/Battlefield); Court of Appeal, 21 January 1999, IER 1999, p. 129 (Impag/Marvin Glass); District Court Amsterdam, 7 June 2000, Mediaforum 2000, p. 260 (Castaway/John de Mol).

³⁵ Jaap F. Haeck, *Idee en programmaformule in het auteursrecht [Idea and Programme Format in Copyright] Law*, Deventer: Kluwer 1998.

³⁶ President District Court of Amsterdam, 29 April 1999, Informatierecht/AMI 1999, p. 132 (Wagenvoort/Prometheus).

³⁷ Court of Appeal Amsterdam, 11 November 1999, Informatierecht/AMI 2000, p. 62 (Cyráko/Erobaking).

³⁸ Court of Appeal Amsterdam, 9 December 1999, Informatierecht/AMI 2000, p. 139 (Top Scan/Sound Machine).

³⁹ Act of 21 December 1995, Staatsblad 1995, 653, effective 29 December 1995.

⁴⁰ Hoge Raad 25 October 1996, NJ 1997, 649, note D.W.F. Verkade; see S. Prechal, 'Richtlijnconforme uitputting', Informatierecht/AMI 1997, p. 23.

⁴¹ See e.g. D.W.F. Verkade, 'Extra-communautaire parallelimport en rechten van intellectuele eigendom', SEW 1997, p. 304; H. Cohen Jehoram, *Parallelimport, recht en beleid*, Deventer: Kluwer 1998.

⁴² European Court of Justice, 16 July 1998, Case C-3554/96 (*Silhouette*).

⁴³ Hoge Raad, 20 October 1995, NJ 1996, 682, note J.H. Spoor, Informatierecht/AMI 1996, p. 51 (*Dior/Evora*).

⁴⁴ European Court of Justice, 4 November 1997, Case C-337/95, Informatierecht/AMI 1998, p. 6 (*Dior/Evora*).

⁴⁵ Cf. Hoge Raad, 6 February 1998, NJ 1998, 569, note D.W.F. Verkade, IER 1998, p. 104 (*BMW/Blok*) (exercising

Benelux Court of Appeal did allow cumulative application of trade mark rights and copyrights in respect of the same subject matter⁴⁶, as did the Hoge Raad in an unrelated case involving cigarette packings.⁴⁷ The Hoge Raad also clarified that originality should be judged in the light of the circumstances at the time of creation; the Court did not accept the argument that originality may 'dilute' over time.

Online delivery

The broad scope of the Dutch right of communication to the public, which includes a right of 'making available to the public' *avant la lettre*, makes it particularly suitable for the digital networked environment. Lower courts have confirmed that posting works on bulletin boards or web sites is a restricted act.⁴⁸

A case decided by the District Court of Dordrecht raised intriguing questions of private international (copyright) law.⁴⁹ A Belgian company (Kapitol) had published telephone subscriber data on a web site which was physically located on a Belgian server. The data were supposedly copied from a database owned by KPN. Was the Dutch court the appropriate forum to hear the case? Applying article 5(3) of the Brussels Convention, the Court considered it was; even if the infringement had taken place in Belgium, the plaintiff had suffered damages in the Netherlands.⁵⁰ The Court also applied Dutch copyright law inasmuch protection was sought for the Netherlands (*lex protectionis*). Kapitol was ordered to disable access to its web site from the Netherlands. As to the rest of the world, no sanction was imposed. KPN's interest in having a court order of world-wide scope was deemed insufficient. Moreover, it was unclear whether KPN's subscriber data were actually protected outside the Netherlands.

On 9 June 1999 the landmark case of *Scientology v. XS4ALL* concerning the liability of Internet service providers was decided on the merits by the Court of the Hague.⁵¹ The Court largely confirmed the 1996 decision reached by the Court in summary proceedings, which was reported in the previous chronicle.⁵² The Court held that a hosting service provider does not directly infringe copyrights, and can only become liable if he knows, or has a reason to know, of the actual wrongful act taking place over its facilities. By including 'a reason to know', the standard developed by the Court is stricter than the liability provisions of articles 12 through 15 of the European Directive on Electronic Commerce which was adopted in June 2000 (Directive 2000/31/EC).⁵³

4.3 Exemptions

copyright in BMW car design to prevent advertising by unofficial car dealer considered abuse of copyright).

⁴⁶ Benelux Court of Appeal, 16 December 1998, IER 1999, p. 126 (Dior/Evora).

⁴⁷ Hoge Raad, 16 April 1999, NJ 1999, 697, note P.B. Hugenholtz (Bigott/Doucal).

⁴⁸ District Court Rotterdam, 24 August 1995, Computerrecht 1996, p. 194 (illegal software on bulletin board); President District Court Haarlem, 10 July 1996, Computerrecht 1996/5, p. 198 (pirated database on web site). See generally P. Bernt Hugenholtz, 'Adapting copyright to the information superhighway', in: P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, Information Law Series, Vol.4, The Hague/Boston: Kluwer 1996; Dirk J.G. Visser, *Auteursrecht op toegang* [Copyright protection of access], The Hague: VUGA 1997.

⁴⁹ President District Court of Dordrecht, 8 September 1998, Informatierecht/AMI 1999, p. 7, note M.M.M. van Eechoud (KPN/Kapitol).

⁵⁰ Cf. Court of Appeal Amsterdam, 11 November 1999, Informatierecht/AMI 2000, p. 62 (Cyráko/Erobaking) (Dutch court not competent to hear case of trademark infringement if Dutch market not affected by offer on foreign web site).

⁵¹ Court of the Hague, 9 June 1999, Informatierecht/AMI 1999, p. 110, note K.J. Koelman (*Scientology v. XS4ALL*),

Computerrecht 1999, p. 200, note P.B. Hugenholtz, available in English at <http://www.xs4all.nl/~kspaink/cos/verd2eng.html>

⁵² President District Court The Hague, 12 March 1996, Informatierecht/AMI 1996, p. 96, available in English in: M. Dellebeke (ed.), *Copyright in Cyberspace, ALAI Study Days Amsterdam, 4–8 June 1996*, Amsterdam, Cramwinckel 1997, p. 139.

⁵³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178 of 17 July 2000, p.1.

The Amsterdam Court of Appeal had great trouble deciding a case concerning the ‘missing pages’ of Anne Frank’s diary, reprinted without permission by Dutch newspaper *Het Parool*.⁵⁴ According to the Court, *Het Parool* could not invoke the quotation right of article 15a DCA, because the quoted pages had not been legitimately published prior to quotation. Interestingly, the Court also held that the freedom of expression and information guaranteed under Article 10 of the European Convention on Human Rights did not override the copyright claims of the right holder, the Anne Frank Foundation.⁵⁵ After carefully weighing the public interest in having the pages divulged against the interest of the Foundation in protecting, *inter alia*, the reputation of the Frank family members described in the diary fragments, the Court found for the Foundation, thereby reversing the decision of the District Court.⁵⁶

In a case involving tailor-made (custom) software, the Dutch Supreme Court recognized a user’s right of access to computer program source codes, overriding the software developer’s copyright in the program.⁵⁷

4.4 Moral rights

The Court of Appeal of Leeuwarden added another chapter to the long story of moral rights cases involving the destruction of works of art.⁵⁸ The Court opined that total destruction is a form of ‘distortion’, as protected under article 25 (1) d of the Copyright Act (the *droit au respect*). Other courts (and commentators) are not so sure.⁵⁹

The Court of Appeal of the Hague was faced with a rather unusual *droit au respect* claim from the designer of a petrol pump.⁶⁰ The designer had invoked his moral rights against Shell, having discovered (to his horror) that cheap-looking ‘Easypay’ pillars had been placed in close proximity to his prize-winning pumps. The Court was not convinced that, as a result of this, the designer’s reputation had been damaged. Moreover, granting moral rights protection would have disproportionately restricted Shell’s freedom to use the areas surrounding its petrol pumps.

By contrast, the District of Rotterdam did find infringement of the moral rights of well-known visual artist Peter Struycken.⁶¹ The National Institute of Architecture had staged an exhibition of ‘street art’ in the Institute’s outside arcade, for which Struycken had previously created a ‘light sculpture’, projecting a variety of colours on the pillars of the arcade. According to the artist, the street art effectively destroyed the visual effects, thereby mutilating Struycken’s work. The District Court agreed.

4.5 Copyright Contracts

On 24 September 1997 the District Court of Amsterdam ruled that newspaper publisher *De Volkskrant* needed permission from three free-lance journalists for the use of their articles in quarterly CD-ROM compilations and on the newspaper’s web site.⁶² According to the Court, both the CD-ROM compilations and the web site differ substantially, *qua* content and lay-out, from the original printed

⁵⁴ Court of Appeal Amsterdam, 8 July 1999, *Informatierecht/AMI* 1999, p. 116 (Anne Frank Fonds/*Het Parool*).

⁵⁵ See P. Bernt Hugenholtz, ‘Copyright and Freedom of Expression in Europe’, to appear in: Rochelle Cooper Dreyfuss, Harry First and Diane Leenheer Zimmerman (eds.), *Innovation Policy in an Information Age*, Oxford: Oxford University Press, forthcoming, available at <http://www.ivir.nl/medewerkers/hughholtz-uk.html>.

⁵⁶ President District Court Amsterdam, 12 November 1998, *Mediaforum* 1999, p. 39.

⁵⁷ Hoge Raad, 21 June 1996, *NJ* 1997, 327, note D.W.F. Verkade, *Computerrecht* 1996, p.186 (Van Genk/De Wild). See also Court of Appeal Den Bosch, 7 February 1994, *NJ* 1994, 616.

⁵⁸ Court of Appeal Leeuwarden, 17 March 1999, *Informatierecht/AMI* 1999, p. 158 (Bonnema/SBB); see comment A.A. Quaadvlieg, *IER* 2000, p. 13.

⁵⁹ District Court Utrecht, 3 June 1998, *Informatierecht/AMI* 1999, p. 39 (Van Schijndel/Utrecht), note H. Cohen Jehoram; Court of Appeal Leeuwarden, 29 December 1993, *Informatierecht/AMI* 1996, p. 13.

⁶⁰ Court of Appeal The Hague, 11 November 1999, *Informatierecht/AMI* 2000, p. 15 (De la Haye/Shell).

⁶¹ President District Court Rotterdam, 10 September 1998, *IER* 1999, p. 22, note J.J.C. Kabel (Struycken/NAI).

⁶² District Court of Amsterdam, 24 September 1997, *Informatierecht/AMI* 1997, p. 194 (Heg c.s./*De Volkskrant*), English translation in: 22 *Columbia-VLA Journal of Law and the Arts* 181; see case comment by P. Bernt Hugenholtz, 22 *Columbia-VLA Journal of Law and the Arts* 151.

version of the newspaper. CD-ROM and web site constitute independent means of reproduction and communication to the public in different media, for which additional permissions must be secured. De Volkskrant had failed to do so; the print licenses granted by the journalists did not imply a right of electronic reuse.⁶³ In the 1980's, when the licenses were initially granted, plaintiffs could not have foreseen that their contributions would be included in a CD-ROM or web site.

Interestingly, the Court found infringement not only of the authors' pecuniary rights, but of their moral rights as well. The Court ruled that the authors' moral right of first publication (*droit de divulgation*) encompasses first publication in every separate (new) medium. In other words, the journalists had a moral right to decide over electronic republication.

In a follow-up decision on the amount of compensation, the Amsterdam Court ordered De Volkskrant to pay 3 % of the journalists' annual honorarium for each initial year of web site republication, and 1,5 % for each subsequent year. For CD-ROM uses the percentages were set at 4 % and 2 % respectively.⁶⁴

4.6 Collective administration of rights

In a case involving alleged plagiarism of the 1920's hit 'I wanna be loved by you', the Court of Appeal of Amsterdam ruled that Stemra, the Dutch mechanical rights society, does not enjoy a presumption of legitimation, as e.g. in Germany.⁶⁵ In the case at hand, which involved a musical work that had changed copyright ownership many times, the society was unable to prove its 'chain of title'.

The Dutch performing rights society BUMA had a world premiere in 1996 when it introduced a 'temporary' blanket license scheme for Internet use of musical works.⁶⁶ The scheme drew praise for its audacity, but criticism for its meagre legal foundations. Commentators were not sure the standard-form contracts between musical authors and the society actually encompass electronic uses.⁶⁷

The macabre case of *Hille v. Buma and Stemra* pitted the author of the Dutch lyrics to the song 'Amazing Grace' against his own collecting societies. Hille complained that Buma and Stemra had failed to collect revenues for playing the song at funerals, where it is regularly performed. The Hoge Raad dismissed the complaint; the internal rules of exploitation of Buma and Stemra did allow the societies to forgo exploitation under special circumstances, such as these.⁶⁸

On 9 June 2000 the Hoge Raad refused to settle a long-standing dispute between the Dutch public broadcasters (represented by NOS) and SENA, the collecting society of performing artists and phonogram producers. Ever since the Neighbouring Rights Act became effective (in 1993), parties have disagreed over the amount of the 'equitable remuneration' the broadcasters must pay to SENA. The Hoge Raad left the issue largely undecided by putting a series of prejudicial questions to the European Court of Justice.⁶⁹ The crucial question is whether the words 'equitable remuneration' in article 8(2) of Directive 92/100/EEC represent a term of community law. If so, the Court would like to know, how should the remuneration be calculated?

4.7 International Copyright

⁶³ See also District Court of Amsterdam, 9 August 2000, Mediaforum 2000, p. 349 (PCM/Koenen a.o.) (use of electronically archived newspaper articles for external purposes deemed infringement).

⁶⁴ District Court Amsterdam, 22 December 1999, Informatierecht/AMI 2000, p. 93 (Heg c.s./De Volkskrant).

⁶⁵ Court of Appeal Amsterdam, 1 February 1996, IER 1996, p. 81, Informatierecht/AMI 1996, p. 112 (STEMRA/Result).

⁶⁶ Tijdelijke regeling muziekgebruik op Internet, Informatierecht/AMI 1997, p. 63, Informatierecht/AMI 1998, p. 89; see J. Jonkers, 'Buma/Stemra en het Internet', Informatierecht/AMI 1997, p. 54.

⁶⁷ H.W. Wefers Bettink, 'Muziek op Internet: de BUMA-regeling', Computerrecht 1997, p. 55; J. Jonkers, Computerrecht 1997, p. 159.

⁶⁸ Hoge Raad, 6 March 1998, NJ 1999, 113, note D.W.F. Verkade, Informatierecht/AMI 1998, p. 83 (Hille/BUMA).

⁶⁹ Hoge Raad, 9 June 2000, Informatierecht/AMI 2000, p. 164 (SENA/NOS).

Since the accession of the United States to the Berne Convention, effective March 1, 1989, there had been uncertainty whether the retroactivity rule of Article 18 BC applied to works of U.S. origin in the Netherlands. Those opposing retroactivity could point to the fact that a) the U.S. had denied retroactivity to foreign works, and b) the Netherlands had failed to implement article 18(1) BC. The Court of Appeal of Amsterdam was not convinced.⁷⁰ According to the Court, article 18(1) BC is self-executing, even absent implementation by the Dutch legislature. The lack of reciprocal retroactivity in U.S. law was considered irrelevant.⁷¹

Dutch copyright law has a long-standing tradition of protecting industrial designs, even if the Benelux Designs Act (effective in the Netherlands since 1975) provides for a special regime of design protection. Both regimes allow copyright and design protection to apply cumulatively. However, pursuant to article 21(3) of the Benelux Act, copyright terminates automatically upon expiry of the shorter (maximum 15 year) term of design protection, unless the rights owner deposits an instrument of copyright reservation with the Benelux Design Registry. On 26 May 2000, in a case concerning imitations of Italian furniture designs, the Hoge Raad held that article 21(3) of the Benelux Act is in direct conflict with the prohibition on formalities of article 5(2) of the Berne Convention. [note 71a] Therefore, article 21(3) of the Act no longer applies to foreign copyright holders protected by the Berne Convention.^{71a}

4.8 Enforcement

On 16 June 1998 the European Court of Justice resolved an issue which had been plaguing Dutch intellectual property lawyers for several years.⁷² Dutch law of civil procedure does not require that an interim injunction proceeding is followed up by a full procedure on the merits. However, article 50 (6) of the TRIPs agreement clearly states that ‘provisional measures’ will become ineffective unless a proceeding on the merits is initiated within a certain period. Wishful thinking practitioners insisted that the Dutch *kort geding*, by far the most popular procedure in intellectual property cases, is not a ‘provisional measure’ within the meaning of TRIPs. The European Court was not impressed, but left unsettled the remaining question whether TRIPs is a self-executing treaty.⁷³ Even so, the so-called ‘TRIPs formula’, which sets a term for initiating a full civil procedure, has now become standard language in cases decided in ‘kort geding’.

On 14 April 2000 the Hoge Raad settled another long-standing dispute among practitioners.⁷⁴ Pursuant to article 27a DCA, right holders may request a court order against copyright infringers to hand over the profits originating from the infringement. The wording of article 27a DCA (‘in addition to claiming damages’) suggest that copyright holders may claim profits and full damages. The Court, however, did not allow both claims to cumulate; courts may not award more compensation than the highest of either sum.

⁷⁰ Court of Appeal Amsterdam, 1 February 1996, *Informatierecht/AMI* 1996, p. 112 (STEMRA/Result).

⁷¹ See E.D.G. Kiersch, ‘Met terugwerkende kracht tot 1886: artikel 18 van de Berner Conventie’, *Informatierecht/AMI* 1997, p. 6.

^{71a} Hoge Raad, 26 May 2000, *Ars Aequi* 2000, p. 677, note H. Cohen Jehoram (Cassina/Jacobs).

⁷² European Court of Justice, 16 June 1998, Case C-53/96, *NJ* 1998, 240, note D.W.F. Verkade, *Informatierecht/AMI* 1999, p. 58 (Hermès/FHT).

⁷³ See also Hoge Raad 26 February 1999, *NJ* 1999, 717 (Ajax).

⁷⁴ Hoge Raad, 14 April 2000, *NJ* 2000, 489, note D.W.F. Verkade, *Informatierecht/AMI* 2000, p. 134 (HBS/Danestyle).