



## **The Implementation of Directive 2001/29/EC in The Netherlands**

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### **1. Introduction**

In the Netherlands the transposition of 'Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society', in short: the Copyright Directive, was completed by the Act of July 6, 2004, which became effective on September 1, 2004.<sup>[1]</sup> Despite a flying start the Netherlands has failed to meet the implementation deadline of December 22, 2002, like so many other Member States. This was mainly caused by the slow proceedings in the Dutch Parliament, that never seemed to consider implementing the Directive an urgent matter.

In October 2000, well before the Directive was adopted, the Ministry of Justice already began consultations with interested parties in preparation of the implementation. Comments and proposals could be posted to a special web site operated by the Ministry. Anticipating the adoption the Dutch Copyright Committee, an expert committee advising the Minister of Justice,<sup>[2]</sup> already produced a draft implementation bill in July 2001. The bill that was eventually introduced in the Parliament closely resembles the Committee's draft, as does the final act. During the parliamentary discussions, that were mostly uneventful and without controversy, only minor changes to the proposal were made. The final act provides for amendment of the Dutch Copyright Act (DCA), the Neighbouring Rights Act and – to a very limited extent – the Database Act. In this article we shall concentrate on changes made to the Dutch Copyright Act. Many of the amendments to the DCA are reflected in the Neighbouring Rights Act.

Perhaps not surprisingly, most of the changes made to the law concern the limitations ('exceptions') of copyright. The Dutch legislature has seized the opportunity presented by the Directive to expand the existing catalogue of limitations by introducing several exceptions listed in Art. 5 of the Directive. This is the great irony of the Directive – an instrument originally intended to restrict limitations in the digital environment to a basic few. In the end, it has had the opposite effect, not only in the Netherlands, but in many other Member States as well. There are important lessons to be learned here, not only for the European legislature, but also for the copyright lobbyists that originally inspired this most ambitious of all directives in the copyright field. Asking too much has, in the end, lead to getting very little.

### **2. Economic rights largely unchanged**

The Dutch Copyright Act (DCA)<sup>[3]</sup> was adopted in 1912, the year the Netherlands adhered to the Berne Convention. It has since been amended many times, but never thoroughly revised. Even the recent transposition of the Copyright Directive has not necessitated sweeping revision. In its report to the Minister of Justice the Copyright Committee contemplated a full revision to bring the structure of the DCA in line with the structure and terminology of the 'acquis', but in

the end rejected such an undertaking, largely because it was not convinced of the consistency and quality of the European legislative product.<sup>[4]</sup>

So the changes made to the Act are mostly piecemeal, except for the introduction and amendment of a number of limitations, and the introduction of special rules on the protection of technological measures. Despite the Directive's obvious focus on the digital realm, the Dutch legislature has attempted to codify the new rules in a 'media-neutral' way as much as possible.

The transposition has left the definitions of the economic rights of reproduction (*verveelvoudiging*) and communication to the public (*openbaarmaking*) largely intact. Neither right has ever been given a proper definition in the law. According to the lawmaker of 1912, both rights are to be interpreted according to their 'natural meaning'. The modes of exploitation mentioned in Articles 12 and 13 are not definitions, but merely enumerations of acts *not* 'naturally' covered by these rights.

Both rights were considered by the Dutch legislature to already encompass the corresponding rights in the Directive (Articles 2 and 3).<sup>[5]</sup> This certainly is true for the latter right which has served as a source of inspiration for the right of making available that became a centrepiece of the WIPO Copyright Treaty and the Copyright Directive.<sup>[6]</sup> Whether the Dutch right of 'verveelvoudiging' already encapsulated the "right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part", as Article 2 of the Directive requires, is another matter. Anyway, the legislature's decision not to expressly implement Article 2 is consistent with earlier transpositions of the Computer Programs Directive and the Database Directive. Even though both directives (Articles 4(a) and 5 (a) respectively) espouse a broad interpretation of the right of reproduction, neither has inspired amendment of the corresponding rights in the Dutch law.

Since the right of 'openbaarmaking' traditionally includes a distribution right, no need was seen to introduce such a right *express verbis*. But the DCA has incorporated the rule of Community-wide exhaustion of Art. 4(2) of the Directive in a new Art. 12b of the DCA, much to the chagrin of the Dutch government that has always preferred a rule of international exhaustion. En passant, the new Art. 12b codifies the rule of exhaustion, a doctrine already well-established in Dutch copyright doctrine, but until recently never in the books.<sup>[7]</sup>

In the remainder of this article, the most important changes to the Dutch Copyright Act as a result of the implementation process, will be described. The following section will deal with the limitations of copyright, while section 4 will treat the new rules on circumvention. Finally, section 5 will offer a few conclusions and a look ahead.

### **3. Limitations amended and expanded**

Of the Copyright Directive's list of some twenty limitations, only ten existed in Dutch copyright law prior its implementation. The transposition process has produced six new limitations, while several existing exceptions have been broadened. One has been narrowed down; not a single existing limitation has been repealed. All in all, even though the Directive does not allow a broad, open and flexible fair-use style exemption of the kind the Dutch Copyright Committee and the Minister of Justice would have preferred,<sup>[8]</sup> the interests of users are generally well served by the new law.

Three-step test

The scholarly and parliamentary debate has largely focussed on the question whether the Dutch legislature should have codified Art. 5(5) of the Directive, the 'three-step test'.<sup>[9]</sup> According to the Government, supported by the Copyright Committee, Art. 5(5) instructs the Member States to apply the test when codifying any of the limitations listed in Art. 5(1) through 5(4), but does not require codification in and of itself.<sup>[10]</sup> Moreover, as pointed out by the Government, codification of the three-step test would inevitably lead to more open-ended limitations, which might undermine legal security. Indeed, earlier versions of the three-step test in Art. 9(2) of the Berne Convention or Art. 13 of the TRIPs Agreement, have never led to transposition in the law. In this sense Art. 5(5) will remain a 'meta-norm', addressed to the Member States, not to their citizens. Indirectly, however, the test may play a role before national courts invited to assess whether the lawmaker has actually complied with the test, an assessment that in the end will have to be made by the European Court of Justice.<sup>[11]</sup>

### Transient copying

The only mandatory limitation of the Directive, the 'transient copying' exception of Art. 5(1), has been transposed in a new Art. 13a DCA, which reads as follows:

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

Interestingly, the new provision is not placed under the 'Limitations' heading in the Act (par. 6 of the DCA), but incorporated in the preceding section on the right of 'verveelvoudiging'. Indeed, the article is not phrased as an exception, but as a 'carve-out' of the exclusive right of reproduction. This legislative technique reflects the doctrine that transient copies of the kind described in Art. 5(1) of the Directive remain outside the scope of the reproduction right, not by way of 'exception', but as a matter of normative principle.<sup>[12]</sup> Some commentators have criticized the structure of the new article, and argued that by implementing Art. 5(1) as a carve-out the three-step test is circumvented.<sup>[13]</sup> The argument, however, overlooks the fact that the test is already integrated in the language of Art. 5(1), as implemented in the Dutch law.<sup>[14]</sup> Notably the requirement that the exempted reproduction not have 'independent economic value' clearly mirrors the second step, i.e. the exempted use shall not 'conflict with the normal exploitation of the work'.<sup>[15]</sup>

### Private copying

The existing, rather complicated regime for private copying has been further complicated by the transposition of Art. 5(2)(b) of the Directive, which requires 'fair compensation' for “reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial”. Prior to implementation, the Dutch law's general provision on private copying, Art. 16b DCA, did not require remuneration (i.e. a levy), except for private copying on blank recording media ('home taping'), which is dealt with in Art. 16c of the Act. Pursuant to Art. 5(2)(b), the scope of Art. 16c has now been expanded to include reproductions of all categories of works on digital media. A levy is imposed on “any object intended to allow a work [...] to be heard, to show it or to be displayed”. This broad wording has raised the question whether a levy should be applied to digital recording equipment such as

MP3 players or cellular phones.

The Explanatory Memorandum speculates at some length on a future phasing out of levies, as required by Art. 5(2)(b) of the Directive (“fair compensation which takes account of the application or non-application of technological measures”). According to the Dutch Government account must be taken not only of the actual application of technical protection measures, but also of their being available. If technical protection measures are available in practice, i.e. if they can be used on an economical basis, levies should not become a bonus for rights holders who make no use of technical protection measures.[\[16\]](#)

Concomitantly, the scope of the 'old' Art. 16b has been decreased. It now primarily applies to handwritten reproductions or other 'analogue' reproductions, such as knitting a Mickey Mouse for private use. The revised provision does not impose a levy on such analogue reproductions, but leaves open the possibility that this will be done by separate government ordinance.

#### News reporting and quotation

The news reporting exception of Art. 15 DCA has been somewhat expanded to include media performing a function similar to the media expressly mentioned in the provision, e.g. newspapers, weeklies, magazines, radio and television programs. This amendment, which was inspired by the legislature's quest for media-neutrality, has opened up the possibility for news-oriented web sites to benefit from the exemption. Conversely, news published on the Internet may now be reused by other media, subject to the conditions of Art. 15 (notably, indication of source). Note that Art. 15 does not apply if copyright has been expressly reserved, no such reservation being allowed with regard to news of the day.

The quotation right of Art. 15a has also been updated. Quotation is now allowed not only in “an announcement, criticism or scientific treatise”, but also in a “publication for a comparable purpose”. In legal practice, quotation was already deemed permitted for a wide range of purposes, so the added words probably do not bring substantive changes.[\[17\]](#)

#### Incidental uses

Inspired by Art. 5(3)(i) of the Directive, the Dutch legislature has introduced a special exemption allowing the incidental inclusion of a work. According to the new Art. 18a, for the inclusion to be allowed the included work must be “a component of minor significance in another work”. The provision has raised questions as to the meaning of the word 'incidental'. Does it also allow *intentional* de minimis uses, such as filming a billboard as part of a documentary shot in a public square? Judging from the parliamentary proceedings, this is probably permitted.[\[18\]](#)

#### Parody

The revised Dutch Copyright Act now also expressly permits parody. This has been a disputed issue for many years – not because parody was considered a restricted act (the Dutch are proud of their sense of humour), but because it was difficult to conceptualize a parody defence absent an express exemption.[\[19\]](#) In line with Art. 5(3)(k) of the Directive, the new Art. 18b legalizes “caricature, parody or pastiche” on the condition that “the use is in accordance with the normal rules of social custom.”

## Works in public places

One of the few controversial changes to the Dutch Act concerns Art. 18. Prior to the revision, this provision allowed for reproduction or communication to the public of works of architecture and sculptures placed on, or visible from, public roads, on condition that the reproduced work not be the main object represented. The old article typically applied to situations where persons were depicted in front of a statue in a public square. The scope of the revised article is broader in several ways. First, the 'main representation' requirement has been dropped. Second, it applies to all works in 'public places', provided that the work "has been made to be permanently placed in public places" and is being reproduced 'as is'. According to the Government, such works are, to a certain extent, dedicated to the public domain.<sup>[20]</sup> Therefore, publishing postcards of a sculpture in a public park is now permitted without the right holder's authorization.

The provision has been criticized as being overbroad.<sup>[21]</sup> Moreover, the notion of 'public place' appears to be ambiguous. Does it, for instance, include museums? According to the lawmaker, probably not.<sup>[22]</sup>

## Other new exemptions

The Directive has inspired the introduction of yet three more exemptions. In line with Art. 5(3)(b) of the Directive, Art. 15i of the DCA permits the use of works for the benefit of disabled persons, on condition of payment of fair compensation. Art. 15h allows the use of works in a public library, museum or archive network, provided the work has been previously collected; the text remains close to the wording of Art. 5(3)(n) of the Directive. Finally, Art. 16n introduces a limitation that allows public libraries, museums and archives to make archival copies of previously collected works, subject to strict conditions. The purpose must be merely archival, (1) with the aim of restoring the work, (2) to replace it in case of imminent destruction or (3) to maintain 'readability' of the work in case of near-extinct retrieval technology. The making of these so-called 'preservation copies' falls well within the ambit of Art. 5(2)(c) of the Directive.

## 4. Protection of technological measures and rights management information

The Dutch lawmaker has remained relatively faithful to the words of Articles 6 and 7 of the Directive that require legal protection of digital rights management systems. Art. 29b almost literally reproduces Art. 7(1) and (2) of the Directive. The anti-circumvention provision of Art. 29a is noteworthy only for its reluctance to directly transpose Art. 6(4) of the Directive, the notoriously opaque 'facilitation' requirement.<sup>[23]</sup> Instead, Art. 29a(4) delegates the power to the Government to provide for such an obligation by way of government ordinance, if right holders fail to voluntarily facilitate the exercise of copyright exemptions. The instrument of an ordinance will allow a flexible and timely response, according to the Government.<sup>[24]</sup> Interestingly, Art. 29b(4) refers not only to the obligatory exceptions of Art. 6(4)(1) of the Directive, but also to the optional private copying exemption mentioned in Art. 6(4)(2).

The prohibitions on circumvention and removal of rights management information are not defined as part of the exclusive right of the copyright holders, but as unlawful acts sanctionable under civil law. No criminal sanctions have been imposed; according to the legislature, criminal enforcement of these new norms would be wholly premature.<sup>[25]</sup>

## 5. Conclusion

To say that the Dutch legislature has enthusiastically embraced Directive 2001/29/EC, would be

overstating it. In respect of the economic rights harmonized by the Directive, the Dutch lawmaker has acted conservatively, and transposed the norms of the Directive only insofar as amendment of existing national provisions was deemed inevitable. The legislature has been more forthcoming in the area of exceptions. Six new limitations, all rubberstamped by the Directive, have been introduced, while the scope of several others has been expanded.

All in all, the transposition process has left Dutch government officials, legal scholars and students of the law of copyright begging for a moratorium on further harmonisation. Since 1991 no fewer than eight directives in the field of copyright have been issued. For the last fifteen years the legislative machinery in the Member States has been engaged in a process of constant transposition, at great expense to the taxpayers and to the detriment of the integrity of well-calibrated national legal systems. It is high time to put this process to an end. Judging from its recent Recommendation on online rights management,<sup>[26]</sup> the European Commission has already drawn the same conclusion. The Commission now seems to prefer more flexible, but less ambitious regulatory instruments. The era of copyright directives may finally be over.

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## Notes

[1] Act of July 6, Staatsblad 336. The original proposal, subsequent amendments and proceedings of the parliamentary debate are officially published under number 28482. The proposal has inspired only limited commentary, notably J. Seignette, 'Implementatie en dan nog meer', AMI 2002/1, p. 6; D.J.G. Visser, 'Enkele opmerkingen bij Wetsvoorstel 28482', AMI 2002/5, p. 169; VvA Studiecommissie Informatiemaatschappij, 'Reactie op het Wetsvoorstel 28482 tot uitvoering van de Richtlijn Auteursrecht en naburige rechten in de informatiemaatschappij', 10 October 2002 (not published); H. Cohen Jehoram, 'Implementatie van de Auteursrechtrichtlijn. De stille strijd tegen een spookrijder', NJB 2002/34, p. 1690.

[2] Commissie Auteursrecht (Dutch Copyright Committee), 'Advies over de uitvoering van de EG-richtlijn auteursrecht en naburige rechten in de informatiemaatschappij', The Hague, July 2001. The Committee was composed of the following members: Prof. Feer Verkade (chairman), Prof. Egbert Dommering, Prof. Willem Grosheide, Prof. Bernt Hugenholtz, Prof. Jaap Spoor, Mr. Ernst Numann (Supreme Court) and Ms. Jacqueline Schaap (attorney).

[3] Act of 23 September 1912, Staatsblad 308, as amended most recently by the Act of July 6, Staatsblad 336. A consolidated version of the Act was published in Staatsblad 2004, 410. An unofficial English translation by the Ministry of Justice is available at [http://www.justitie.nl/Images/copyright%20act\\_tcm74-38518.doc](http://www.justitie.nl/Images/copyright%20act_tcm74-38518.doc). For general commentary see J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer, 2005.

[4] Commissie Auteursrecht (note 2), p. 4-5.

[5] Explanatory Memorandum, 28482, no. 3, p. 13.

[6] See P. Bernt Hugenholtz, 'Intellectual Property Rights on the Information Superhighway', Report to the Commission of the European Communities (DG XV), August 1994, available at <http://www.ivir.nl/publications/hughholtz/superhighway.html>.

[7] See P. Bernt Hugenholtz, 'Chronicle of The Netherlands. Dutch copyright law, 1995-2000', RIDA 2001 (187), p. 111-175 (January 2001).

[8] Commissie Auteursrecht, 'Advies over auteursrecht en de nieuwe media', augustus 1998, summarized in *Informatierecht/AMI* 1998, p. 161; see Explanatory Memorandum, 28482, no. 3, p. 22.

[9] See commentary cited in note 1; see also K.J. Koelman, 'De nationale driestappentoets', AMI 2003/1, p. 6; M. Senfleben, 'Bepkeringen à la carte: waarom de Auteursrechtrichtlijn ruimte laat

voor fair use', AMI 2003/1, p. 10.

[10] Explanatory Memorandum, 28482, no. 3, p. 20; Nota naar.Aanleiding van het Verslag (Memorandum of Reply) , 28482, no. 5, p. 17-19.

[11] See for an early, but unconvincing application of the test District Court The Hague, 2 March 2005, AMI 2005/3, p. 103-107, note J. Seignette, Computerrecht 2005/3, p. 143 (Newspapers / State of the Netherlands).

[12] Explanatory Memorandum, 28482, no. 3, p. 37-38.

[13] Seignette (note 1), p.8

[14] C.B. van der Net, 'Artikel 13a Aw (technische en functionele kopieën)', AMI 2005/5, p. 169.

[15] Nota naar.Aanleiding van het Verslag (Memorandum of Reply) , 28482, no. 5, p. 17-19.

[16] Explanatory Memorandum, 28482, no. 3, p. 46.

[17] D.J.G. Visser, 'Artikel 15a Aw (citaatrecht)', AMI 2005/4, p. 134.

[18] P.B. Hugenholtz, 'Artikel 18a Aw (incidentele verwerking)', AMI 2005/2, p. 57.

[19] See Hoge Raad, 13 April 1984, NJ 1984 , 524 (Suske & Wiske)

[20] Explanatory Memorandum, 28482, no. 3, p. 52; M.R. de Zwaan, 'Artikel 18 Aw (kunst op openbare plaatsen)', AMI 2005/3, p. 88.

[21] Seignette (note 1), p. 9.

[22] Explanatory Memorandum, 28482, no. 3, p. 25; Visser (note 15), p. 171.

[23] P. Bernt Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid', EIPR 2000-11, p. 501-502.

[24] Explanatory Memorandum, 28482, no. 3, p. 59.

[25] Explanatory Memorandum, 28482, no. 3, p. 56.

[26] Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276 of 21 October 2005.