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## **Chronicle of the Netherlands Dutch copyright law, 2001-2010**

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### 1. Introduction

Since 2001, when the last full chronicle on the Netherlands was published in this journal,<sup>1</sup> Dutch copyright law has witnessed important change, both in its legislation and in its case law. In the legislative area, the most important development was the implementation in 2004 of the European Information Society Directive, on which this author reported to RIDA in 2005.<sup>2</sup> The past decade also saw the implementation of the Enforcement Directive, and the introduction of new legislation on the supervision of collecting societies. In addition the Dutch Supreme Court (Hoge Raad) and the lower civil courts produced a host of important, and sometimes controversial decisions in the field of copyright.

This chronicle will provide an overview of Dutch copyright law as it has developed between 2001 and 2010. First, a brief introduction to the law of copyright in the Netherlands is presented, outlining the general legal framework (§ 2).<sup>3</sup> Then follows a summary of legislative developments most relevant to copyright (§ 3), and of forthcoming legislation (§ 4). Thereafter the pièce de resistance of this chronicle comprises a selection of noteworthy court decisions (§ 5). The scope of this chronicle is limited to copyright proper; neighbouring rights and database right will not be treated.

### 2. General framework of Dutch copyright law

The Dutch Copyright Act (DCA)<sup>4</sup> was adopted in 1912, the year the Netherlands adhered to the Berne Convention (BC).<sup>5</sup> It has since been amended many times, but never thoroughly revised. In 2008 the Act lost its official epithet '1912', and now lives on by the shorter name of *Auteurswet* (Author's law).<sup>6</sup> According to the legislature, its numerical surname "gave the wrong impression that the act was not frequently adjusted to technological development".

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1 P. Bernt Hugenholtz, 'Chronicle of The Netherlands, Dutch copyright law, 1995-2000', RIDA January 2001, 187, p. 111-175.

<sup>2</sup> P. Bernt Hugenholtz, 'The Implementation of Directive 2001/29/EC in The Netherlands', RIDA October 2005, 206, p. 117-147.

<sup>3</sup> 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.

<sup>4</sup> Act of 23 September 1912, Staatsblad 308; an unofficial English translation is available at [http://www.ivir.nl/legislation/nl/copyrightact1912\\_unofficial.pdf](http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf).

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

<sup>6</sup> Act of 13 March 2008, Staatsblad 85.

The Act protects ‘works of literature, science or art’, as exemplified in the non-exhaustive list of work categories of article 10 (1) that recalls 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.’ 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 described and interpreted in an extensive 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 rights of translation and adaptation. The latter, defined in article 12, covers all manners of making a work available to the public, including publishing and distribution, performing, exhibiting, reciting, broadcasting, cable (re)transmission, making available online, etc.

### 3. New legislation

Between 2001 and 2010 the Dutch Copyright Act was amended several times. Surely the most important revision of the Act resulted from the implementation of the Information Society Directive, which was reported previously in this journal and will not be repeated here.<sup>7</sup> In addition, several pieces of legislation that are directly relevant to copyright law were introduced in the course of the decade.

#### Photocopying

In 2002 the Dutch Copyright Act was amended in order to extend the existing photocopying regime, which formerly applied only to the public sector, to commercial enterprise.<sup>8</sup> As a result, private companies are now under an obligation to report to the *Stichting Reprerecht* (the reprography rights society) the number of photocopies annually made, and to pay a levy of 4,5 Eurocents per photocopy of copyright protected text.

#### Implementation of Resale Right Directive

In the course of 2006 the EC Resale Right Directive<sup>9</sup> was reluctantly, and minimally, transposed into Dutch law.<sup>10</sup> Resale royalty rates are established in accordance with the Directive.<sup>11</sup> The threshold sale price is set at €3000 (cf. article 3(2) of the Directive), while the resale right does not apply to acts of resale where the seller has acquired the work directly from the author less than three years before the resale and the resale price does not exceed € 10.000 (cf. article 1(3) of the Directive).

#### Home copying levies

A regime of home copying levies was introduced in the Netherlands in 1990.<sup>12</sup> Under article 16c (1) of the DCA a levy is due in respect of any ‘object which is intended to display the images or play the sounds recorded upon it’. The scope of this rather vague provision was in

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<sup>7</sup> RIDA 2005, Issue 206, October 2005, p. 117-147.

<sup>8</sup> Act of 28 March 2002, Staatsblad 2002, 186, effective 1 March 2003.

<sup>9</sup> Directive 2001/84/EC of the European parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ No. L 272/32, 13 October 2001.

<sup>10</sup> Act of 9 February 2006, Staatsblad 60, effective 1 April 2006.

<sup>11</sup> Decree of 21 February 2006, Staatsblad 100.

<sup>12</sup> Act of 30 May 1990, Staatsblad 305, English translation in: Copyright, October 1991, Laws and Treaties, Netherlands, Text 1-02.

practice determined by the *Stichting Onderhandelingen Thuiskopie* (SONT), an organization charged by law with setting levy tariffs. The gradual expansion of levies into the digital realm came to an immediate halt in 2007 when the Dutch government intervened and issued a government ordinance that limits levies to recording media, such as tape, recordable CD's and DVD's.<sup>13</sup> No levies will be imposed on MP3 players, DVD and hard disk recorders or iPhones, devices that according to some right holders should have become subject to levies as well. The decision to 'freeze' home copying levies was initially meant to expire in 2009, but was extended until 2013 by subsequent government ordinance.<sup>14</sup>

### Supervision of collecting societies

Responding to complaints from industry about the lack of transparency in the practices of collective rights management societies, a special law was enacted in 2003.<sup>15</sup> The law replaced the existing Byzantine patchwork of government-appointed supervisors by a single central supervisory board, the *College van Toezicht*. The board's main statutory task is to supervise the collection and distribution of royalties collected by the societies, and to ensure that tariff structures are transparent.

At present the mandate of the board is limited to supervising five collecting societies charged with statutory tasks: *Buma* (performing rights society), *Sena* (neighbouring rights society), *Stichting Thuiskopie* (home copying levies), *Stichting Leenrecht* (lending right) and *Stichting Reprerecht* (reprography right). A bill that would extend its application to all seventeen collecting societies active in the Netherlands is currently pending in the Parliament. The bill would also establish a special arbitration committee to mediate between collecting societies and users in matters concerning tariffs, as recommended by a government commissioned study that was jointly conducted by the universities of Amsterdam and Leyden.<sup>16</sup>

### Ownership of copyright in designs

Dutch copyright law has a long-standing tradition of protecting industrial designs, even if the Benelux Designs Act that was in effect in the Netherlands since 1975 provided for a special regime of design protection. Both regimes allowed copyright and design protection to apply concurrently. However, pursuant to former article 21(3) of the Benelux Act, copyright terminated automatically upon expiry of the shorter term of design protection, unless the rights owner deposited an instrument of copyright reservation with the Benelux Design Registry. In a case concerning imitations of Italian furniture designs, the Hoge Raad held that former article 21(3) of the Benelux Act conflicted with the prohibition on formalities of article 5(2) of the Berne Convention, and therefore did not apply to foreign works subject to the convention.<sup>17</sup> In a subsequent decision, the Dutch Supreme Court clarified that owners of Dutch works were still bound by former article 21(3) of the Benelux Act, since Berne's rule of national treatment does not govern domestic situations (article 5 (1) and (3), 1<sup>st</sup> sentence, Berne Convention).<sup>18</sup> Both decisions eventually led to revision of the Benelux designs law.

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<sup>13</sup> Decree of 5 November 2007, Staatsblad 435.

<sup>14</sup> Decree of 16 November 2009, Staatsblad 480.

<sup>15</sup> Act of 6 March 2003, Staatsblad 2003, 111.

<sup>16</sup> P.B. Hugenholtz, D.J.G. Visser & A.W. Hins, 'Geschillenbeslechting en collectief rechtenbeheer' (Conflicts resolution and collective rights management), study commissioned by the WODC (Ministry of Justice), 31 October 2007, summarized in AMI 2008, p. 94-98.

<sup>17</sup> Hoge Raad, 26 May 2000, NJ 2000, 671, GRUR Int. 2002, 1050 (Cassina a.o./Jacobs Meubelen BV a.o.).

<sup>18</sup> Hoge Raad 11 May 2001, AMI 2001, p. 97, GRUR Int. 2002, 10 (Vredestein/Ring 65).

The current law, which was later consolidated in the Benelux Convention concerning Intellectual Property,<sup>19</sup> no longer requires the deposit of an instrument of copyright reservation upon the expiry of a design right.

#### Implementation of Enforcement Directive

Implementation of the EC Enforcement Directive of 2004<sup>20</sup> that harmonized civil remedies was completed in the Netherlands in the course of 2007.<sup>21</sup> The main provisions of the Directive were transposed in a new Title 15 of the Dutch Code on Civil Procedure (new articles 1019 through 1019(1)). Highlights of the new regime include article 1019(h), which allows full cost recovery of reasonably made attorney's expenses, and article 1019(e), which allows the granting of preliminary ex parte injunctions in urgent cases. Early experience in the Netherlands indicates that ex parte injunctions have become popular instruments of copyright enforcement. The revised Code on Civil procedure also introduces and expands various evidentiary remedies.

#### Implementation of E-Commerce Directive

The EC E-Commerce Directive<sup>22</sup> was transposed into Dutch law, largely in the framework of the Dutch Civil Code, in 2004.<sup>23</sup> In the area of copyright its most important provisions concern the rules that immunize internet service providers from liability for damages that result from infringing third-party content (new article 6:196c of the Dutch Civil Code, transposing articles 12-14 of the Directive).

#### 4. Forthcoming legislation

##### Author's contracts

The paucity in the Netherlands of rules concerning author's contracts, such as those found in abundance in France, Germany and Belgium, remains a source of concern for authors and copyright scholars. The need for author-protective measures has become particularly urgent in the digital environment. Publishers, broadcasters and other intermediaries increasingly impose standard-form 'all rights' contracts on free-lance authors, giving them no alternative than to sign away their copyrights.<sup>24</sup> In 2004 the Institute for Information Law (IViR) published a report on the topic, which was commissioned by the Dutch Ministry of Justice.<sup>25</sup> The report

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<sup>19</sup> Benelux Convention concerning Intellectual Property (Trademarks and Designs) of February 25, 200, effective September 1, 2006.

<sup>20</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ No. L 195/16, 2 June 2004.

<sup>21</sup> Act of 8 March 2007, Stb. 2007, 108, effective 1 May 2007.

<sup>22</sup> 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 178/1 of 17 July 2000.

<sup>23</sup> Act of 13 May 2004, Staatsblad 210.

<sup>24</sup> See P.B. Hugenholtz, 'Sleeping with the enemy', inaugural lecture University of Amsterdam, Amsterdam: AUP 2000, abridged English version available at

<http://www.ivir.nl/publications/hugenholtz/thegreatcopyrightrobbery.pdf>.

<sup>25</sup> P.B. Hugenholtz & L. Guibault 'Auteurscontractenrecht: naar een wettelijke regeling?' (Copyright contract law: towards statutory regulation?), Study conducted for the Scientific Research and Documentation Centre (WODC) of the Dutch Ministry of Justice, August 2004, available at <http://www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf>, summary in English at

proposes the introduction of a package of legislative measures, including an obligation to specify the scope of a grant of rights, similar to existing rules in France and Belgium. The report also recommends the introduction of a ‘best seller clause’ (i.e. a right to contract revision in case of *ex post* disproportional remuneration), and a right to recover assigned rights in case of non-use. The IViR proposals have been partly incorporated in a draft bill that was circulated for public discussion by the Ministry of Justice in the course of 2010.<sup>26</sup> However, the draft bill goes considerably further than the IViR report by also proposing an outright prohibition to assign copyrights during the lifetime of the author, and a mandatory right of termination of exclusive licenses after five years. Not surprisingly, the draft bill has encountered fierce criticism.<sup>27</sup>

## Parliamentary working group

In the course of 2009 a parliamentary working group on copyright (the *Gerken* Committee) published its eagerly awaited report.<sup>28</sup> The Committee proposes to actively promote business models that offer online content to consumers under attractive terms; to prohibit private copying (downloading) from illegal sources, following the German example; to gradually abolish home copying levies; and to introduce legislation on author’s contracts. In response the Minister of Justice has stated that the Dutch Cabinet generally agrees with the Committee’s proposals.<sup>29</sup>

## 5. Case law

The first decade of the new millennium produced an abundance of interesting and sometimes controversial case law, a most important source of Dutch copyright law. The following section focuses on decisions by the highest civil court, the *Hoge Raad* (Dutch Supreme Court), and the courts of appeal. Whenever relevant or of special interest, decisions by the lower courts will also be mentioned. The cases treated below are ordered thematically as follows: subject matter, rights protected, exemptions, liability, moral rights, copyright contracts, collective rights management and international copyright.

### 5.1 Subject matter

#### Perfumes

During the past decade the Dutch Supreme Court has continuously struggled to demarcate the internal and external boundaries of the concept of the work of authorship. In a landmark decision of 2006 the Court held that the fragrance (scent) of a perfume qualifies, in principle, as a work of literature, science or art.<sup>30</sup> The Court opined as follows:

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<http://www.ivir.nl/publications/hugenholtz/Summary%2005.08.2004.pdf>. On copyright contract law see generally Bart Lenselink, *De verlening van exploitatiebevoegdheden in het auteursrecht* (dissertation Utrecht University), The Hague: SDY Uitgevers 2005.

<sup>26</sup> Ministry of Justice, Draft Bill, 1 June 2010, available at

<http://www.internetconsultatie.nl/auteurscontractenrecht>.

<sup>27</sup> See e.g. Dick van Engelen, *Nederlands Juristenblad* 27 August 2010, No. 28, p. 1827.

<sup>28</sup> Final Report of Parliamentary Working Group on Copyright (Gerken Committee), Tweede Kamer (Second Chamber), 2008-2009, 29 838 and 31 766, no. 19.

<sup>29</sup> Minister of Justice, Letter to the Second Chamber of the Parliament, 30 October 2009.

<sup>30</sup> Hoge Raad 16 June 2006, NJ 2006, 585 (Kecofa/Lancôme), [2006] ECDR 26; see Herman Cohen Jehoram, 28 EIPR 629 (2006).

“The description laid down in Art. 10 Auteurswet [...] of types of works, of what must be understood to be a ‘work’ in the sense of this Act, is put in general wording and does not rule out scents. This implies that as to the question of whether a scent qualifies for protection under copyright law, or not, it is decisive whether this concerns a product that is open to human perception and whether it has an original character of its own and bears the personal stamp of the maker. The notion of work in the Auteurswet does find its limits where a work’s own original character is no more than what is required to achieve a technical effect, but considering that in case of a perfume there is no purely technical effect, this last condition does not prevent granting protection under copyright law to the scent of a perfume. The circumstances that the properties of the human olfactory sense limit the ability to distinguish scents and that the level to which one can distinguish scents differs from one person to another, does not alter the above, nor does the circumstance that the specific nature of scents has the effect that not all provisions and restrictions in the Auteurswet can directly apply, considering for instance the use of perfume which cannot be denied to the ordinary user and which by its nature necessarily implies the spreading of the scent. [...]”<sup>31</sup>

The Court’s decision has drawn criticism from various commentators.<sup>32</sup> According to these critics the Hoge Raad has overstepped the boundaries of copyright and entered into the domain of patents, which encompasses for instance combinations of chemical ingredients. Indeed, the Dutch Court’s decision stands in remarkable contrast to a decision by the French Court of Cassation that was issued only three days earlier, and which expressly excludes fragrances from the domain of copyright as a matter of principle.<sup>33</sup> A few years earlier, the District Court of Amsterdam had already opened up the domain of copyright to the lesser senses by holding that the choice of ingredients and design of individual pralines in a box of chocolates qualified for copyright protection.<sup>34</sup>

### Kinetic scheme

In an earlier, no less controversial decision the Dutch Supreme Court accepted that a ‘kinetic scheme’ (chemical formula) representing various petrochemical components and reactions, may also qualify as an original work.<sup>35</sup> According to the Court, “whereas the kinetic scheme is a schematic representation of the production process of ethylene and propylene in the petrochemical industry [...], and the chemical reaction formulas incorporated in the scheme are by themselves no more than objective scientific data that as such cannot be protected by copyright, the Court of Appeal was right to examine whether the selection of these data, with a view to the question of incorporating them – or not – into the kinetic scheme, has its own individual, original character and bears the stamp of its maker.” The Court’s decision can be interpreted as holding that technically determined choices attract copyright protection. Not surprisingly, the decision has been severely criticized.<sup>36</sup>

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<sup>31</sup> English translation quoted from Boek9.nl, B9 7694.

<sup>32</sup> See e.g. E.J. Dommering, ‘Auteursrecht op parfum: De definitieve verdamping van het werkbegrip’, in: D.J.G. Visser & D.W.F. Verkade (eds.), *Een eigen, oorspronkelijk karakter: opstellen aangeboden aan prof. mr. Jaap H. Spoor*, Amsterdam: Uitgeverij DeLex 2007, p. 65-79; Herman Cohen Jehoram, ‘The Dutch Supreme Court Recognises Copyright in the Scent of a Perfume. The Flying Dutchman: All Sails, no Anchor’, EIPR 2006, 629.

<sup>33</sup> Cour de Cassation 13 June 2006, RIDA October 2006, 210, p. 348 (Bsiri-Barbir/Haarmann & Reimer).

<sup>34</sup> President District Court of Amsterdam, 9 August 2001 AMI 2001, p. 155-157 (Manfred Spaargaren Confiserie / Da Vinci Bonbons & Chocolate).

<sup>35</sup> Hoge Raad 24 February 2006, 28 IIC 615 (2007) (Technip Benelux BV/Goossens).

<sup>36</sup> See A.A. Quaedvlieg, AMI 2006, p. 155-161.

## Endstra Tapes

The Hoge Raad has continued to raise eyebrows for all too easily admitting as original works of authorship the designs of simple games, such as ‘four-in-a-row’<sup>37</sup>, as well as the design of highly standardized holiday homes.<sup>38</sup> By far its most controversial decision of the decade, however, concerned the *Endstra tapes* – a series of taped police interviews with Willem Endstra, a major resale estate investor turned police informer who was murdered after his role as an informer was revealed. After the interview tapes were leaked to the press, publisher Nieuw Amsterdam published the transcripts, ignoring protests from Endstra’s heirs who subsequently sued for copyright infringement. Were the Endstra tapes copyright works? Both the District Court and the Court of Appeal of Amsterdam judged that they were not. According to the latter, Endstra’s conversations with the police, although possibly reflecting Endstra’s ‘own original character’, were not ‘conceived as a coherent creation’ and not ‘created by design’, and therefore did not qualify as works of authorship. The Dutch Supreme Court, however, reversed.<sup>39</sup>

In its decision the Hoge Raad first recalls that, for a work to attract copyright protection, two criteria must be distinguished: a work must possess its own original character and bear the personal stamp of its author. The first requirement, according to the Court, essentially implies “that its form is not copied from another work”. The second requirement means “that there must be a form that is the result of human creativity and of creative choices, and thus is a product of the human mind. This excludes, in any case, all forms that are so banal or trivial as to not demonstrate any creative labor whatsoever”. According to the Court this feature (personal stamp) should be “cognizable from the product itself.” Copyright law does not require “that the author consciously create a work and make deliberate creative choices, because this would burden parties with insurmountable problems of evidence.”

The Endstra Tapes case has given rise to unprecedented discussion and debate among scholars and practitioners. While some commentators applaud the Hoge Raad’s ruling, arguing that a criterion of deliberate creation would be unworkable in practice, others fear that reducing the subject matter test to mere originality and personal stamp will lead to infinite expansion of the concept of the work of authorship.<sup>40</sup> Anything touched by human hand, including for instance sports performances, might be deemed a work. Moreover, if most words spoken by man would attract copyright protection, this might have disastrous consequences for freedom of expression and information.<sup>41</sup>

## Television program formats

Between 2001 and 2010, Dutch courts have dealt on a regular basis with cases concerning television program formats. The first case to reach the Dutch Supreme Court concerned the (in)famous reality television show *Big Brother*, which became a household word across the globe. Dutch television production company Endemol, developer of the Big Brother format, was sued by British production company Castaway for copyright infringement of its ‘Survive’

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<sup>37</sup> Hoge Raad 29 June 2001, NJ 2001, 602 (Impag/Hasbro).

<sup>38</sup> Hoge Raad 8 September 2006, NJ 2006, 493 (Timans/Haarsma & Agricola).

<sup>39</sup> Hoge Raad 30 May 2008, NJ 2008, 556 (Endstra/Nieuw Amsterdam).

<sup>40</sup> See e.g. M. Senftleben, AMI 2008, p. 140-142.

<sup>41</sup> P.B. Hugenholtz, ‘Auteursrecht op alles’, Nederlands Juristenblad 2008, p 390-391.

format. Plaintiff provided evidence that it had offered the Survive format for licensing to Endemol founder John de Mol well before Big Brother was developed, but that De Mol had declined the offer. The Court of Appeal eventually accepted that the Survive format was a copyright protected work, since its format was elaborated in a detailed document and therefore went well beyond a mere unprotected idea. However, comparing Survive with Big Brother the Court noted a number of differences, including the respective settings (uninhabited island v. enclosed studio), manners of presentation, and the procedures of removing contestants from the show. In the end, the Court did not find copyright infringement. The court's decision was upheld by the Hoge Raad.<sup>42</sup>

## 5.2 Rights protected

The digitization, encryption and subsequent transmission by satellite of television program signals to cable operators gave rise to interesting case law on the scope of the rights of reproduction and communication to the public. In 2008 the District Court of Amsterdam was among the first courts to interpret new article 13a of the Dutch Copyright Act, which carves out transient copies from the right of reproduction in line with article 5(1) of the Information Society Directive.<sup>43</sup> According to the Court, the digitization of the programs that preceded the satellite transmission was indeed exempted under article 13a, because the digital files that were made in the process were only temporary, were an essential part of a technical process of communication, and had no independent economic value.

In 2009 the Hoge Raad was called to interpret the notion of *openbaar maken* (communication to the public) in connection with the provisions of the E.C. Satellite and Cable Directive,<sup>44</sup> which was transposed into Dutch law in 1996.<sup>45</sup> According to article 1(2)(c) of the Directive, communication to the public takes place even if programme-carrying signals are encrypted. However, in line with the definition of "satellite" as interpreted by the European Court of Justice in *Lagardère*,<sup>46</sup> communication to the public occurs only if the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent. In line with *Lagardère*, the Dutch Supreme Court held that a transmission via satellite of encrypted television programmes that can be received only by cable operators, does not qualify as communication to the public.<sup>47</sup> As a result, transmission to the public by cable of such directly introduced signals will be deemed an act of primary communication to the public, not subject to the Directive's compulsory collective rights management regime.

## 5.3 Exemptions

Prior to the express transposition into Dutch law of the Information Society Directive's parody exception (article 18(b) DCA), courts of appeal were twice confronted with a parody defence. While accepting that fictitious characters (clowns Bassie and Adriaan, renowned from television and film) are copyright works, the Court of Appeal of Amsterdam opined that

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<sup>42</sup> Court of Appeal of Amsterdam 27 June 2002; Hoge Raad 16 april 2004, AMI 2004, p. 172-179 (Castaway/Endemol).

<sup>43</sup> District Court of Amsterdam 4 June 2008, AMI 2008, p. 142-145 (Stemra/Chellomedia).

<sup>44</sup> Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official Journal No. L 248/15 of 6 October 1993.

<sup>45</sup> Act of 20 June 1996, Staatsblad 1996, 364, effective 1 September 1996, Staatsblad 1996, 410.

<sup>46</sup> *Lagardère Active Broadcast v Société pour la Perception de la rémunération équitable (SPRE) and Others*, ECJ 14 July 2005, Case C-192/04.

<sup>47</sup> Hoge Raad 19 June 2009, AMI 2010, p. 12-18 (Buma & Stemra/Chellomedia Programming).



the eponymous clowns featured in a television satire ('Bassy III') did not amount to copyright infringement, because of the parodist nature of the program and the lack of similarity between the clowns involved.<sup>48</sup> The same court however denied a parody defence to the Dutch publisher of 'Tanja Grotter and the Magic Contrabass', an originally Russian children's book that was clearly inspired by the successful Harry Potter series. According to the lower court, the contents of the Grotter work did not sufficiently contrast with the original for the former to qualify as parody. The appeal court confirmed, arguing that the story line, place in time, characters, plot, story development and (anti)climax of the Grotter book were so similar to Rowling's work that it could not be judged a parody.<sup>49</sup>

The scope of the statutory parody exemption that was introduced in Dutch copyright law in 2004 was tested by the District Court of Amsterdam in 2009.<sup>50</sup> The case involved a website depicting the Netherlands' most famous rabbit *Nijntje* (Miffy) in various unusual incarnations (e.g. as a disc jockey, a cocaine user and a terrorist). The Court partly accepted the website owner's parody defence, pointing to the adult themes that clearly contrasted with the small children's world that *Nijntje* normally occupies.

### Incidental use

The District Court of Arnhem was likely the first to interpret new article 18a of the DCA, which transposes article 5(3)(i) of the Copyright in the Information Society Directive's, on incidental uses.<sup>51</sup> The Court held that the inclusion in an electronic football game of the 'graffiti wall' in the Amsterdam Arena football stadium was such an incidental use, and therefore allowed.

### Freedom of expression

In a landmark decision concerning the publication of semi-secret documents of the infamous Church of Scientology, the Court of Appeal of The Hague ruled that journalist Karin Spaink, who had posted the documents on her website, had not committed copyright infringement.<sup>52</sup> Whereas Spaink could not rely on the quotation right (article 15a DCA) because the documents had never been lawfully published, Spaink successfully invoked direct application of article 10 of the European Convention on Human Rights, which guarantees freedom of expression. According to the Court, extensive quoting from these documents was a legitimate form of publicly criticizing Scientology's questionable ideas and behaviour.

### Three-step test

Whereas the Dutch legislature has refused to expressly transpose the 'three step test' of article 5(5) of the Information Society Directive,<sup>53</sup> the District Court of The Hague applied the test in a case concerning digital news clipping services. According to the Court, the State of the Netherlands could not rely on article 15 of the DCA, which allows certain uses by the media

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<sup>48</sup> Court of Appeal of Amsterdam 30 January 2003, AMI 2003, p. 94-98 (Van Toor c.s./Phanta Vision & NPS ).

<sup>49</sup> District Court of Amsterdam 3 April 2003 and Court of Appeal of Amsterdam 6 November 2003, AMI 2004, p. 36-42 (Rowling a.o./Byblos).

<sup>50</sup> District Court of Amsterdam 22 December 2009, AMI 2010, p. 127-132 (Mercis & Bruna/Punt.nl).

<sup>51</sup> District Court of Arnhem 21 September 2005, AMI 2005, p. 204 (Tellegen/Codemasters).

<sup>52</sup> Court of Appeal of The Hague, 4 September 2003, AMI 2003, 217-223 (Scientology/Spaink).

<sup>53</sup> See P. Bernt Hugenholtz, 'The Implementation of Directive 2001/29/EC in The Netherlands', RIDA October 2005, 206, at p. 127.

of news articles and items, to justify its internal electronic clipping service, since such use exceeded the scope of ‘normal exploitation’.<sup>54</sup>

In 2008 the District Court once again found inspiration in the three-step test and opined that private copying from obviously illegal sources, as occurs routinely in peer-to-peer networks, is not exempted under the home copying exemption (article 16c of the DCA).<sup>55</sup> The decision is controversial, given repeated assurances in the past by the Dutch Minister of Justice that the source of a private copy is irrelevant. However, as noted above, this official position is now subject to change.

#### 5.4 Liability

Some of the most striking court decisions during the first decade of the millennium concerned secondary liability of online intermediaries. Possibly the most publicized court case coming from the Netherlands in recent times was the copyright infringement suit initiated by Buma (the Dutch performing rights society) against KaZaA, in its heyday the most popular peer-to-peer provider in the world, attracting between four and five million daily users in 2001. According to Buma the illegal file sharing facilitated by KaZaA amounted to “the largest case of copyright infringement in history”. Before the District Court of Amsterdam, Buma demanded that the KaZaA software that allowed file sharing be customized in such a way that future copyright infringement by KaZaA’s users would be prevented. The court order that was subsequently granted by the President of the District Court was however overruled by the Court of Appeal of Amsterdam. According to the appeal court Buma’s demand – effectively an obligation to filter internet traffic – was technically unfeasible. Moreover, in obiter dictum, the Court of Appeal opined that KaZaA had not acted unlawfully by facilitating copyright infringement, since KaZaA had shown that its software was not used exclusively for sharing copyright protected content. For example, KaZaA users also on occasion shared their own holiday photographs and jokes (sic!).

Before the Supreme Court Buma attempted in vain to convince the court that its request for an injunction should be interpreted broadly to include an all-out prohibition of distributing the KaZaA software in case filtering would prove impossible, but according to the Hoge Raad this was not what Buma had demanded. Therefore Buma’s appeal in cassation was rejected.<sup>56</sup>

The Supreme Court’s decision has been interpreted by some, and even hailed, as judicial recognition of the legality of peer-to-peer networks.<sup>57</sup> But this is a misunderstanding, as can be illustrated by various more recent lower court decisions that did find contributory liability, under a theory of ‘facilitating infringement’, in cases of websites offering hyperlinks to illegal MP3 files<sup>58</sup> or of ‘torrent sites’, i.e. websites containing metadata that point users to (infringing) files available for peer-to-peer transfer.<sup>59</sup>

While the E-Commerce Directive immunizes internet service providers from liability for damages that result from infringing third-party content (new article 6:196c of the Dutch Civil

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<sup>54</sup> District Court of The Hague 2 March 2005, AMI 2005, p. 103 (Nederlandse Dagbladders/Staat).

<sup>55</sup> District Court of The Hague 25 June 2008, AMI 2008, p. 146-152 (ACI Adam/Stichting De ThuisKopie).

<sup>56</sup> Hoge Raad 19 December 2003 NJ 2009, 548 (Buma/KaZaA).

<sup>57</sup> See for example ‘Dutch Supreme Court Rules Kazaa Legal’, PC World, 20 December 2003, [www.pcworld.com/article/113968/dutch\\_supreme\\_court\\_rules\\_kazaa\\_legal.html](http://www.pcworld.com/article/113968/dutch_supreme_court_rules_kazaa_legal.html).

<sup>58</sup> Court of Appeal of Amsterdam 15 June 2006, AMI 2006, p. 173-179 (Brein/Techno Design).

<sup>59</sup> District Court of Utrecht 26 August 2009 (Brein/Mininova), IER 2009, p. 255-264; and District Court of Amsterdam 22 October 2009, AMI 2010, p. 18-24 (Pirate Bay).

Code), injunctive relief is not ruled out. As court decisions in the Netherlands reveal, injunctive relief may sometimes come in the form of court orders to terminate Internet accounts or to identify infringing internet subscribers.<sup>60</sup>

## 5.5 Moral rights

Like other countries of the author's rights tradition, Dutch law recognizes a moral right of integrity in rather generous terms (article 25(1)(d) DCA). But does this protect authors against the complete destruction of original works of visual art or buildings? In 2003 the Dutch Supreme Court decided this controversial issue by holding that the "complete destruction of an object incorporating a copyright protected work can not be qualified as a distortion of the work"<sup>61</sup> However, "in case of originals, as with buildings, circumstances may demand that the owner only proceeds to destruction if he has reasonable grounds to do so, taking into account the interests of the author by either adequately documenting the work of architecture, or giving the author an opportunity to do so".

## 5.6 Copyright Contracts

In 2005 the Court of Appeal of Amsterdam narrowly interpreted a broadly worded grant of rights by cartoonist Toon van Driel to his publisher, which had occurred well before the advent of the Internet. Applying the 'purpose of grant' rule enshrined in article 2(2) of the DCA, the Court held that the grant did not include future (i.e. digital) uses.<sup>62</sup>

Absent statutory rules on copyright contracts, authors found refuge against unfair contracts in general rules of contract law. In 2006 the Court of Appeal of The Hague judged that some provisions in the standard publishing contract applied by magazine publisher Sanoma, including an eighteen month period of exclusivity, were unreasonably onerous upon the freelance journalists and photographers that had brought the suit.<sup>63</sup> In 2008 the Court of Appeal of Amsterdam allowed song writer Hans van Hemert to terminate a music publishing contract and recover his copyright, on the evidence that the music publisher had failed to actively promote his repertoire.<sup>64</sup>

In a case brought by a freelance film critic against Dutch newspaper De Volkskrant for the unauthorized re-use of published film reviews on the newspaper's website and cd-rom archive, the Amsterdam Court of Appeal visibly struggled with the question of assessing damages.<sup>65</sup> After consulting an economic expert, and taking into account that Internet use was at the time still in an 'experimental phase', the Court concluded that compensation in the order of 6-7% of the original honorarium for one-time print publication was justified. In addition, the Court awarded a sizeable sum (NLG 10.000) for loss of copyright exclusivity, since the author was robbed of his right to negotiate a license (with the newspaper or other third parties) that would have allowed electronic uses.

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<sup>60</sup> See e.g. District Court of Amsterdam 5 January 2007, AMI 2007, p. 55-58 (Brein/KPN).

<sup>61</sup> Hoge Raad 6 February 2004, AMI 2004, p. 140-152 (Jelles/Zwolle).

<sup>62</sup> Court of Appeal of Amsterdam 29 September 2005, AMI 2006, p. 128-133 (Vrijbouter/Van Driel).

<sup>63</sup> Court of Appeal of The Hague 28 September 2006, AMI 2008, p. 99-103 (VSenV a.o./Sanoma).

<sup>64</sup> Court of Appeal of Amsterdam 23 December 2008 AMI 2009, p. 61-64. (Intersong Basart/ Hans van Hemert).

<sup>65</sup> Court of Appeal of Amsterdam 2 May 2002, AMI 2202, p. 144-147; Court of Appeal of Amsterdam 27 July 2006, AMI 2007, p. 145-148 (Stam/De Volkskrant).

In 2009 a decision by the Amsterdam Court of Appeal concerning copyright ownership of commissioned works of industrial design stirred up controversy. According to articles 3.8.2 and 3.29 of the Benelux Convention concerning Intellectual Property, copyright in commissioned designs is vested in the commissioning party, absent special agreement to the contrary. Applying an earlier decision by the Benelux Court of Justice holding that a commissioning party qualifies as ‘designer’ even in cases of non-registered designs, the Amsterdam Court of Appeal held that copyright in a non-registered design made for hire vests directly in the commissioning party. Not surprisingly, the decision has given rise to criticism in legal doctrine and among designers.<sup>66</sup>

## Creative Commons

The first known court decision involving a Creative Commons license was handed down in 2006 by the District Court of Amsterdam.<sup>67</sup> The case concerned family photos posted on a website by Dutch media celebrity Adam Curry under a Creative Commons license that allowed for non-commercial uses only. Nevertheless Dutch tabloid ‘Weekend’ reproduced some of the photos in a story about Curry’s children. Curry then sued Weekend for copyright infringement. In its defence Weekend argued that it had failed to note the ‘CC’ notice that accompanied the photos, and had assumed that no authorization was needed. The Court rejected Weekend’s defence, and upheld the conditions of the Creative Commons license, which Audax should have noticed had it acted in a less negligent manner.

## 5.7 Collective rights management

Dutch performing rights society Buma was sued on several occasions by institutional users complaining of excessive tariffing. None of these cases were however successful. In one case the Dutch Competition Authority, referring to the standard set by the European Court of Justice in the Tournier case,<sup>68</sup> compared Buma’s rates for use of musical works in theatres with customary tariffs in other Member states, and did not find abuse of a dominant position.<sup>69</sup> In a similar complaint brought before a civil court, the District Court of Haarlem dismissed the complaint for lack of insight into the workings of the music market and tariff structures.<sup>70</sup> More generally, both the courts and the Competition Authority find it hard to assess the alleged unreasonableness of tariffs set by collecting societies in non-competitive markets. In a report published by the Dutch Competition Authority in 2007, the Authority concludes that competition law does not offer a suitable framework for judging tariffs by collecting societies.<sup>71</sup>

Much of the litigation in the past decade concerning collective rights management related to issues of territoriality. The British Performing Right Society (PRS) sued its Dutch counterpart Buma in 2008 before the District Court of Haarlem, alleging that Buma had granted multi-

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<sup>66</sup> See D. Visser, AMI 2009, p. 97-98; H. Vanhees, AMI 2009, p. 179-181; V. van den Eijnde, AMI 2009, p. 182-185; D. Visser, AMI 2009, p. 186-187.

<sup>67</sup> District Court of Amsterdam 9 March 2006, AMI 2006, p. 87-93 (Curry/Weekend).

<sup>68</sup> European Court of Justice 13 July 1989, Case C-395/87 (Tournier).

<sup>69</sup> Nederlandse Mededingingsautoriteit (Dutch Competition Authority) 15 March 2002, AMI 2004, p. 83-85 (VSCD/Buma). See also Court of Appeal of Den Bosch 12 October 200, AMI 2001, p. 51-53 (De Poort van Roosendaal/Buma).

<sup>70</sup> District Court of Haarlem 17 December 2003, AMI 2004, p. 81-83 (VSCD/Buma).

<sup>71</sup> Nederlandse Mededingingsautoriteit (Dutch Competition Authority), ‘De NMA en het toezicht op collectieve beheersorganisaties’, February 2007.

territorial licenses for online use of the PRS repertoire outside the Netherlands, thereby causing licensees to infringe the copyrights of PRS' members. In its defense Buma pointed to the CISAC decision of the European Commission,<sup>72</sup> which in its opinion invalidated territorial restrictions in reciprocal licenses. The District Court however opined that the CISAC decision did not directly nullify territorial restrictions, and ordered Buma to refrain from offering licenses that involve the use of PRS repertoire outside the Netherlands. The decision was upheld on appeal.<sup>73</sup>

in response, Buma sued Dutch web radio station Fresh FM, which had secured a license agreement with PRS, for unauthorized webcasting of copyrighted music aimed at Dutch audiences. On this occasion, the District Court of Amsterdam sided with Buma and granted an injunction against the station.<sup>74</sup>

## 5.8 International Copyright

The protection of American creations in the Netherlands led to a host of interesting decisions concerning the Berne Convention. With reference to article 2(7) BC the Court of Appeal of Amsterdam denied copyright protection to the famous *Maglite* flashlights. According to the Court, since torches are 'useful articles', their designs are not protected under United States copyright law. Therefore, the Dutch court was under no international obligation to grant national treatment.<sup>75</sup> The Court of Appeal came to a similar decision in a later decision involving the Eames Lounge Chair, another icon of American design.<sup>76</sup>

Since the accession of the United States to the Berne Convention, effective March 1, 1989, there had been some 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 Dutch Supreme Court finally settled this issue by unequivocally recognizing that article 18(1) BC is self-executing, and therefore applies directly even lacking implementation by the Dutch legislature.<sup>77</sup> In other words, old U.S. works are protected in the Netherlands, unless the term of copyright protection in the United States has lapsed. Expiry in the U.S. for other reasons, e.g. non-compliance with formalities, will however not result in loss of copyright protection in the Netherlands.

In another noteworthy case involving the protection in the Netherlands of old American works, the Court of Appeal of Amsterdam was called to interpret article 3(3) of the Berne Convention, the so-called 'back door to Berne' provision.<sup>78</sup> Was *Tarzan of the Apes*, the original Tarzan story written by Edgar Rice Burroughs and published in 1912 in the American magazine 'The All-Story', simultaneously published in the United Kingdom? Based on the evidence presented to the Court, the Court found that copies of the magazine had been made available to the public in sufficient quantity 'so as to satisfy the reasonable requirements of

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<sup>72</sup> European Commission, decision of 16 July 2008, Case COMP/C2/38.698 (CISAC).

<sup>73</sup> District Court of Haarlem 19 August 2008, AMI 2008, p. 184-189; Court of Appeal of Amsterdam 19 January 2010, AMI 2010, p. 76 (PRS/Buma).

<sup>74</sup> District Court of Amsterdam 9 July 2009, Case 429705/KGZA09-1213SR/PvV.

<sup>75</sup> Court of Appeal of Amsterdam 13 September 2001, BIE 2001, p. 437 (Mag Instruments/Buzaglo).

<sup>76</sup> Court of Appeal of Amsterdam 11 April 2002, AMI 2003, p. 54-59 (Vitra/Architects).

<sup>77</sup> Hoge Raad 29 June 2001, NJ 2001, 602 (Impag/Hasbro).

<sup>78</sup> Court of Appeal of Amsterdam, 26 July 2001, AMI 2002, 12-17 (ERB/Beukenoord a.o.).

the [British] public' (article 3(3), first sentence, Berne Convention). Therefore, Tarzan of the Apes was deemed protected in the Netherlands.

A complicated case concerning mural paintings by Dutch-French artist Vincent Raedecker (deceased in 1987) that were destroyed during renovation of the *Congresgebouw* in the Hague, led to a set of interesting decisions by the Court of Appeal in the Hague.<sup>79</sup> One issue concerned the law applicable to the contract of commission. Since Raedecker resided in France while receiving the commission, the court applied French contract law to the case. However, it applied Dutch law to any claims based directly on moral rights infringement. Since Raedecker had failed to expressly designate his French widow, or anyone else, as the person charged with exercising his moral rights *post mortem*, no moral rights protection was granted, as Dutch law requires the execution of an express instrument of designation for moral rights to survive the author.<sup>80</sup>

In 2008 the Court of Appeal in Den Bosch decided yet another case involving French-Dutch copyright relations.<sup>81</sup> The French Michaud family invoked copyright protection for the design of its pear-shaped honey pots. Before the court the question arose which law determined the issue of copyright ownership, *lex protectionis* or *lex originis*? The Court of Appeal opted for the latter, i.e. the law of France.

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<sup>79</sup> Court of Appeal of The Hague, 11 September 2003, AMI 2004, p. 78-80; Court of Appeal of The Hague, 16 September 2004, AMI 2005, p. 37-39 (Raedecker/Nederlands Congrescentrum).

<sup>80</sup> Art. 25(2) DCA reads: "Upon the death of the author, the [moral] rights [...] shall belong, until the expiry of the copyright, to the person designated by the author in his last will and testament or in a codicil thereto."

<sup>81</sup> Court of Appeal Den Bosch 14 October 2008, AMI 2009, p. 34-36.