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## Government Works

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### 1. Introduction

That works produced by or for public sector bodies are in principle subject to copyright seems to have been assumed as early as the 1817 Copyright Act,<sup>1</sup> and as a matter of positive law is still true today. This is not to say government copyright is uncontroversial, or ever has been. The regulation of what we would today maybe more accurately term ‘public sector copyright’ is historically linked to ideas about representative democracy, the legitimacy and binding effect of laws, and transparency in judicial proceedings. These notions can produce a variety of regulatory outcomes, as the diversity in national laws shows.<sup>2</sup>

In the Netherlands the Copyright Act follows a two-pronged approach. Some categories of texts are excluded from copyright altogether on the grounds that they are core texts of the democratic state (laws, judicial decisions and the like). For other works produced by the public sector, or in which it has acquired copyright, the default position is that they may be freely reproduced, adapted, distributed or otherwise communicated once they have been first published by or on behalf of the public authorities. The public sector may however reserve its rights. As regards the requirements for protection, the duration and the scope of rights including limitations and exemptions, the investment of ownership and modalities of transfer, public sector information is in principle not treated differently from other works.

The historical development and key characteristics of the relevant provisions are discussed in section 2 below. As far as statute law is concerned, three things

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1 For a detailed analysis, see Chris Schriks, *Staatsauteursrecht*, Walburg Pers 2010.

2 Mireille van Eechoud, Bernt Hugenholtz et al, *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, Kluwer 2009, p. 62-63.

will become apparent. First, the provisions have gone largely unchanged for more than a century. Second, few conflicts seem to have arisen, assuming at least that the fact that only a handful of (published) cases exist is indicative of the incidence of disputes over copyright in government works. This suggests that the provisions are thus among the most stable and least controversial in Dutch copyright law. Or possibly, that they lack significance in practice. A third thing worth noticing is that the existence and exercise of copyright in government works so far seems to have gone largely untouched by European law, an issue explored in section 3.

This apparent stability may however not last much longer. Not only because harmonization at the EU level still progresses. A host of other developments have implications for copyright policy. These include the progression towards E-government, the rise of data-savvy civil society groups with an interest in transparent and accountable governments, the drive of authorities to manage information more efficiently, and the potential for commercial exploitation of public sector information by the private sector. Section 4 highlights how such trends affect the regulation of copyright in public sector information.

## 2. Government works in the Act of 1912

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

In his detailed analysis of early state copyright in the Netherlands, Schriks traces its origins to 17th-century printing privileges and the increasing grip city and provincial authorities secured over their ‘preferred’ printers. At the state level, the adoption of legal norms on the copying of official texts is linked to the introduction of government periodicals for official publication (‘Staatsblad’, ‘Staatscourant’) and the institution of the stationer’s office (‘Staatsdrukkerij’) in 1814.<sup>3</sup> Following the establishment of the United Kingdom of the Netherlands (1815-1830), there was a boom in the enactment of new statutes, notably codes such as the Civil Code and Penal Code. These laws were published by the Staatsdrukkerij.

The 1817 Copyright Act contained no explicit reference to copyright in government texts.<sup>4</sup> Two Royal Decrees, of 1822 and 1827, sought to establish (or confirm) copyright in all state documents. Once officially published, reproduction and further distribution was allowed unless the copyright was reserved. Many such reservations were made to protect the Staatsdrukkerij from competition. Some took the form of temporary monopolies, for example giving a six-month

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<sup>3</sup> Schriks, *Staatsauteursrecht*, p. 81-89, p. 109-117.

<sup>4</sup> Wet 25 January 1817, Stb. 1817, 5.

window for the printing of new codes. In *Staat v. Norman* however, the Supreme Court ruled that the state could not claim copyright in laws on the basis of the 1817 Copyright Act, since that act only vested rights in natural persons.<sup>5</sup> Subsequently the Decrees were repealed (1841).<sup>6</sup>

The period in which the copyright status of government texts was uncertain lasted until the 1881 Copyright Act. The 1860 proposals for a copyright act by the booksellers association excluded laws and other officially published texts from copyright.<sup>7</sup> This idea was taken up in the 1877 legislative proposal for a ‘Regeling van het auteursregt’ that would become the 1881 Copyright Act.<sup>8</sup> The Explanatory Memorandum to the proposal refers to the battle over state copyright in the previous decades. The new act explicitly recognized the possibility that legal entities under private law own (initial) copyright. In the Memorandum it is argued that there is no reason to treat the state differently from other ‘corporations’ by excluding it from owning copyright per se. However, the public interest will as a rule dictate that the state does not exercise its copyright but leaves everyone free to disseminate texts which the state assumes are (or should be) known to citizens. Article 4 therefore provided that ‘except in cases provided by law, no copyright exists in laws, decrees, ordinances and all that is otherwise, in speech or writing, publicly communicated by or on behalf of any public authority.’

A majority of the reporters to parliament agreed that in principle there should be no copyright in government works, but some members argued for an exclusion that was limited to laws and similar texts (as the contemporary draft for the Belgian Copyright Act provided). There was also some debate about the best way to regulate exceptions.<sup>9</sup> The government maintained these could be made ‘by law’, that is by royal decree or act of parliament.<sup>10</sup> In plenary session Article 4 was no longer a contentious issue and was adopted without further debate.<sup>11</sup> In the 1912 Copyright Act, it resurfaced in a slightly different version (see section 2.2 below).

5 Supreme Court 18.9.1840 (*Staat v. Norman*), cited in Jacqueline Seignette, *Challenges to the Creator Doctrine*, Deventer: Kluwer 1994, p. 46; see extensively on the case and the debate it caused among legal professionals, politicians and in the publishing industry, Schriks, *Staatsauteursrecht*, p. 131-182.

6 Koninklijk Besluit van 24 April 1841 (Stb. 1841, 11); see extensively on the case and the debate it caused among legal professionals, politicians and in the publishing industry, Schriks, *Staatsauteursrecht*, p. 131-182.

7 Art. 6 Ontwerp eener wettelijke regeling van het kopijregt, ingediend door het Bestuur der Vereeniging ter Bevordering der Belangen des Boekhandels (1860), Kamerstukken II 1876-1877, 202, nr. 4.

8 Art. 4 1881 Act = Art. 6 Ontwerp van Wet tot regeling van het Auteursregt, Kamerstukken II 1876/77, 202 nr. 2.

9 Kamerstukken II 1876/77, 202, nr. 3 (Explanatory Memorandum), Kamerstukken II 1877/78, 25, nr. 1 (Preliminary Report).

10 Nadere MvA Regeling auteursrecht 1881 inz. art. 4, Kamerstukken II 1880-81, nr. 15 (1).

11 Handelingen II 1880/81, 1 June 1881, p. 1629 and 2 June 1881, p. 1637.

On the topic of government works, the original 1912 Act did not take anything from the Berne Convention,<sup>12</sup> for the simple reason that the 1886 Treaty did not specifically address the copyright status of government works. Later revisions explicitly left Union members the freedom to decide how to treat certain foreign government works. The 1928 Rome Act specified that '[t]he right of partially or wholly excluding political speeches and speeches delivered in legal proceedings from the protection provided by the preceding Article is reserved for the domestic legislation of each country of the Union.' (Article 2bis(1) Rome Act, Article 2bis Paris Act). Article 2(2) of the 1948 Brussels Act first expressed the right of countries to 'determine the protection to be granted to *translations of* [emphasis added] official texts of a legislative, administrative and legal nature.' The 1967 Stockholm Act broadened the provision to its current form, which is not limited to translations (Article 2(4) Paris Act 1971).

The Berne Convention thus leaves it to states to determine whether official documents are copyrighted and to what extent speeches delivered in political or legal proceedings are public domain. Note that the Berne Convention does not regulate domestic situations but only concerns the protection of works originating from *other* Union countries (Article 5(1) BC). So even if it were to directly regulate government works, the Dutch lawmaker would still be at liberty to decide on the copyright status of 'Dutch' government works, that is: works originating in the Netherlands either as country of first publication, or for unpublished works as country of the author's residence or nationality. The legislature however generally tends to align the protection for domestic works with the (substantive) norms of the Berne Convention and other copyright treaties. This is why Article 2(4) BC has informed the restructuring of the corresponding provision in the 1912 Dutch Copyright Act, as will be discussed below.

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

The original Article 11 of the 1912 Act closely resembled Article 4 of the 1881 Act. It no longer made specific mention of 'speech and writing' as the modes of communication covered by the exemption. It made a clearer distinction between those texts that are exempt from copyright, and works that are exempt unless the rights are reserved. The former category includes laws, decrees, ordinances and all manner of regulations (such as by-laws) proclaimed by public authorities, as well as judicial and administrative decisions. The second category covered 'everything else' published by or on behalf of public authorities, unless the rights

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<sup>12</sup> The Netherlands did not sign the Berne Convention until 1912, see Chapter 1 by Grosheide.

were reserved ‘either in a general manner by law, decree or ordinance, or in a specific case as evidenced by notice on the work itself or upon its communication’. The provision was placed in the section of the Copyright Act which details what works are protected.

When presenting the proposal the government thought it needed no clarification.<sup>13</sup> And it was probably right, judging by the fact that in both houses of parliament only one issue was raised, namely the impact of Article 11 on commercial law publishers. New compared to the 1881 Act was the explicit reference to judicial decisions as exempt from copyright. In the early 20th century, as was still the case until very recently, all commercial publishers of law journals relied on a network of law clerks, judges and lawyers to obtain the texts of judgments. They would generally pay to obtain copies. Some members of parliament argued that provision should be made to protect publishers from others copying the judgments from their journals.<sup>14</sup> The government disagreed: judgments ‘belonged to the people’ and were mostly given in public. That publishers paid to obtain a correct copy did not justify them claiming rights over its contents.<sup>15</sup>

As it happens, there is only one reported case in which a commercial publisher argued it had rights in a collection of statutes despite the exclusion of legal texts from copyright. Of the three reported cases which deal with the scope of the exemption for official texts, in the two other cases the plaintiffs seeking protection were the state on behalf of the Staatsdrukkerij, and the national standards body NNI. Not surprisingly, disputes over the scope of the second leg of Article 11 were brought by state-owned corporations: the Dutch National Bank (Nederlandse Bank NV) and the postal services (PTT), since privatized. These cases will be discussed in detail below.

In the century since its inclusion in the Copyright Act, the provision on government works has been revised on only two occasions, in 1972 and 2005. The overhaul of the Copyright Act in 1972<sup>16</sup> was rendered necessary by changes made to the Berne Convention (especially the Brussels Act of 1948) on topics other than government works. But the government took the opportunity to restructure the provisions on public sector information. Article 11 was split, its second leg made into a new Article 15b and placed in the Copyright Act’s section 3 on limitations. Article 11 now consisted of only one paragraph which dealt with the exclusion of

<sup>13</sup> Wet van 23 September 1912, Stb. 1912, 308.

<sup>14</sup> This was felt to be particularly important as publishers could not claim copyright in collections of judgments, as the proposed provision on copyright in collections only included collections of protected works, not public domain materials. Kamerstukken II 1911-1912, 227, nr. 4.

<sup>15</sup> Kamerstukken II 1911-1912, 227, nr. 5.

<sup>16</sup> Stb. 1972, 579.

official documents from copyright. The Commissie Auteursrecht had proposed to bring this text closer in line with the wording of the Berne Convention.<sup>17</sup> The government was of the opinion that no changes to the text of the abridged Article 11 were necessary, as it already complied with Article 2(4) Berne Convention.<sup>18</sup>

The new Article 15b was slightly rephrased. From a systematic viewpoint, it was judged better to formulate it as a proper limitation. Unlike the old Article 11, which suggested that absent a reservation of rights, copyright ceased to *exist* upon communication of the work, the new Article 15b allows free *use* of (published) government works.<sup>19</sup> In the latter case of course, the copyright formally still exists, but the public authority is no longer in a position to exercise it. The practical differences seem negligible but the approach is indeed more in keeping with the legal characteristics of the right.

As was noted above, under the Berne Convention, countries are free to limit or exclude protection of ‘political speeches and speeches delivered in the course of legal proceedings’ (Article 2bis(3) BC). The Dutch legislator never saw reason to exclude such speeches from protection *per se*. But speeches given in the houses of parliament and in local and provincial council meetings were considered to come within the scope of Article 15b. Without a reservation of copyright, the authors of such speeches would effectively lose their copyright prerogatives. So provision was made in Article 15b for the exclusive right of the author to make a collection of legal or political speeches. The change was presented as necessary because of Article 2bis(3) BC. It should be noted that the lawmaker did not consider that technically the Berne Convention does not require that Dutch authors, or authors of speeches first published in the Netherlands, retain the right to publish a collection.

Historically, the free use of Article 15b works existed irrespective of who owned the copyright in them. That is to say, it also applied where a public sector body made public works in which it did not own the copyright, either as corporate author, employer or following a transfer. The 2005 revision of the Copyright Act brought a significant change in this respect, as it limited the operation of Article 15b to cases where the public authorities own the copyright. Ironically, this change was proposed in the context of a policy drive to improve wider dissemination of information held by the public sector. An ambitious new

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17 Kamerstukken II 1980-1, 16740, nr. 4, p. 19, 26. The Commissie Auteursrecht proposed Art. 11 should read: ‘No copyright exists in official texts of a legislative, administrative or judicial nature, or in official translations thereof.’

18 Kamerstukken II 1980-1, 16740, nr. 3, p. 3.

19 In *Beatrix Postzegel* the Supreme Court made explicit that the ‘reproduction’ and making public are the same concepts as those of Art. 12 and 13 Copyright Act. Supreme Court 29 May 1987, *AMI* 1987, nr. 5/105, comment Verkade, *NJ* 1987, 1003.

national policy framework to open up government-held information was first articulated in the mid-1990s. Its subsequent implementation in law was however a less ambitious affair. By the turn of the century the EU had entered the field, proposing to regulate the (commercial) exploitation of public sector information. The result was Directive 2003/98 on the Re-use of Public Sector Information of 2003 (PSI Directive). The Dutch Government opted for a quick and minimalist implementation, instead of taking advantage of the discretion the Directive gives member states to adopt more generous re-use policies.

The PSI Directive is an instrument primarily meant to stimulate public sector bodies to foster exploitation of their rich data resources. Its objective is to make it easier for the private sector to develop new information products and services based on government information. The PSI Directive was implemented in the Dutch Freedom of Information Act in 2006. This *Wet Openbaarheid van Bestuur* (Wob) is the primary instrument that ensures a right of access to information held by public sector bodies. Its access regime applies to a broad range of public sector bodies across the executive and administrative branches of government, but not to parliament and courts. Since 2006, the *Wet Openbaarheid van Bestuur* has a separate part on re-use. It now requires public sector bodies<sup>20</sup> to allow the (commercial) re-use of information that is public, be it on the basis of the Freedom of Information Act itself or other laws. It does not prevent public sector bodies from reserving copyright under Article 15b. Far from it, in line with the PSI Directive, terms and conditions can be imposed on the commercial exploitation or other use. Such terms must however be non-discriminatory and transparent. And the legal basis for imposing terms of use arguably is ownership of intellectual property rights.<sup>21</sup>

Since the PSI Directive explicitly excludes information in which third parties own copyright from its scope, the Dutch Government felt it appropriate to also exclude third party copyrights from Article 15b Copyright Act. Also, the new set up would guard against the adverse effects of the public authority failing to make a reservation for the benefit of the actual copyright owner.<sup>22</sup> That is why as

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20 The access regime applies to a slightly different set of public sector bodies than the re-use regime, because the range of public sector bodies that the PSI Directive addresses is different from the 'bestuursorganen' that the *Wet Openbaarheid van Bestuur* applies to.

21 For database rights, the highest administrative court held as much. *Afd. Bestuursrechtspraak Raad van State* 29 April 2009, *AMI* 2009/6, p. 233-237, (B&W Amsterdam v. Landmark), Comment M. van Echoud; see also case note Grandia in *Computerrecht* 2010, 5.

22 The government followed the advice of a study it commissioned, M. Reinsma & H. van der Sluijs, *Naar ruimere openbaarheid en een vrij gebruik van bestuurlijke informatie, in opdracht van het ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Directie Informatiebeleid Openbare Sector*, December 2002.

of 2006, Article 15b only applies to works of which the public authorities are the ‘maker’ (author) or ‘rechtverkrijgende’ (successor in title). It is unclear where that leaves the provision on the exclusive right of the maker to publish his collective works even in the absence of a reservation.<sup>23</sup>

### *Scope of current Article 11*

Article 11 covers two types of documents, which traditionally correspond to the legislative and adjudicatory functions of government. As regards legislative documents, at the central level the information covered by Article 11 Copyright Act comprises acts of parliament, decrees issued by central government (so-called ‘algemene maatregelen van bestuur’, ‘kleine koninklijke besluiten’), and ministerial decrees. At the local level ordinances or bylaws (‘verordeningen’) can be issued by provincial or municipal authorities, water boards, and various (non-departmental) public sector bodies with rulemaking competence such as product boards (‘productschappen’) and industry boards (‘bedrijfschappen’).<sup>24</sup>

Judicial or administrative decisions include all decisions of bodies invested by law with the task of administering justice or taking decisions that are legally binding. It does not include binding advice and decisions by mediators or arbitration committees, since these are not bodies appointed by law, but by the parties to a dispute.<sup>25</sup> Article 11 does cover decisions by national courts and certain disciplinary tribunals. More important in terms of the volume of information concerned are administrative decisions in individual cases (‘beschikking’). These relate to a host of areas and can be issued by for example ministers, local authorities or other administrative bodies. Examples are planning permissions issued by municipal authorities, the approval of drugs by the Medicine Evaluation Board (CBGM), or decisions by market regulators such as the Competition Authority (Mededingingsautoriteit).

It is unclear to which extent so-called ‘beleidsregels’ come within the scope of Article 11. Beleidsregels are rules that are conceived and applied by a public authority to either interpret or apply legal norms in binding decisions. They do not have general binding effect, so are not ‘law’ in that sense. Arguably, as pseudo-law beleidsregels are so closely associated with legal norms<sup>26</sup> and their application

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23 The change was criticized by this author in ‘Vreemde bedgenoten: de Wob en de Richtlijn hergebruik overheidsinformatie’, *Mediaforum* 2005/9, p. 291. Other authors welcomed it as a just ‘repair’ of the danger that government inadvertently ‘give away’ copyrights of third parties by not making a reservation: M. Reinsma, ‘Wijziging artikel 15b Aw: de angel eruit?’, *AMI* 2006/4, p. 119-122; D.J.G. Visser, ‘Reactie’ in *Mediaforum* 2005-10, p. 332.

24 S. Gebrandy, *Kort Commentaar op de Auteurswet 1912*, Arnhem: Gouda Quint 1988, Art. 11, aant. 2-4.

25 Gebrandy, *Kort Commentaar op de Auteurswet 1912*, Art. 11, Aant. 7, p. 120.

26 The distinction between legal norms (‘recht’) and policy rules (beleidsregels) is viewed by many as

in individual cases by way of administrative decisions, they should be treated the same for copyright purposes. This is the more so since beleidsregels are – like acts, decrees and ordinances – generally published. They are in principle also subject to the norms of the Algemene Bestuurswet (General Act on Administration), which is the statute that contains general norms for administrative decision making and appeals. For other types of ‘pseudo-law’, i.e. guidelines, circulars, recommendations which are not based on formal (direct or mandated) powers of the issuing public authority, only a very liberal reading of Article 11 would exempt them from copyright.

A controversial issue is under what conditions standards set by standardization bodies are exempt from copyright. Most standards in the Netherlands are developed in collaborative processes between partners from the public sector and private sector. National standards may also be closely associated with international standards, developed by such bodies as ISO (general), W3C (web), ETSI (telecommunications). Most national standards are not set by a public authority, but coordinated by the national standardization body NNI/NEN. It is a foundation under private law and its activities have no basis in public law, so Article 11 (or 15b for that matter) does not apply directly. However, regulation in the area of e.g. construction, food safety, health and the environment, may refer to NEN standards, effectively requiring compliance with such norms. For example, the ‘Bouwbesluit’ which details technical requirements to be met in construction of housing, refers to about 50 different NNI standards. Does such a reference bring the standard within the scope of Article 11, that is: is there no longer copyright in the standard (assuming for the moment a standard is a literary work to begin with)? The Court of Appeal recently held that this is not the case.<sup>27</sup> By declaring a standard applicable such as happened here in the Bouwbesluit, it becomes generally binding. It does not however become a generally binding regulation within the meaning of the Grondwet (the Constitution) or Bekendmakingswet (Promulgation Act), i.e. not a legal instrument which must be proclaimed and published to have legal effect. Since the standard itself is set (and published) by a private body, Article 11 does not exempt it from copyright.<sup>28</sup> Note that if the above

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minimal if not absent, esp. after the Supreme Court decided that beleidsregels are ‘recht’ within the meaning of Art. 99 Wet Rechterlijke Organisatie (i.e. courts should in principle apply them as law). For a discussion see W. Voermans, ‘Beleidsregels’, in B. M. J. van der Meulen (ed.), *Info derde tranche Algemene wet bestuursrecht*, Den Haag: Vuga 1998, p. 45-80.

27 Court of Appeal Den Haag, 16 November 2010, cases 200.029.693/01 Staat v. Knooble B.V. c.s. & 200.031.136/01, Knooble v. NNI. LJN: BO4175. An appeal before the Supreme Court is pending.

28 The case has raised a storm not so much in copyright circles, but among administrative lawyers because of its implications for the (non)binding nature of standards. See Kees Stuurman, ‘Public access to standards: some fundamental issues and recent developments’, in: L. Mommers et al (ed.), *Het binnenste*

line of reasoning is applied to beleidsregels, these would probably also be outside the scope of Article 11.

For judicial documents, the general opinion is that only judgments, orders and other actual decisions are exempt. Documents or speeches such as pleadings, briefs, opinions and other parts of the case files are copyright protected, provided of course the normal criteria for protection are met. The distinction is confirmed in (only) one reported case, which dealt with the question whether a solicitor acting on behalf of the state could invoke copyright to prevent publication of his pleadings. The judge held that where parts of party documents are incorporated verbatim in a judgment, they share its fate as a public domain text.<sup>29</sup> It is unclear to what extent a reference in the judgment or order to documents lodged (a complaint, writ of summons, statement of appeal, etc.) also triggers Article 11. Obviously, where documents are lodged by for example public officials, Article 15b could come into play. With respect to opinions of the advocate general to the Supreme Court, it has been argued that permission to communicate these conclusions to the public is implicit in the nature of the advocate general's advisory function.<sup>30</sup>

### *Foreign official texts*

The earlier legislative history of Article 11 shows that no thought was given to its application in cases where the official texts did not emanate (directly) from domestic sources, but from supranational or foreign authorities. This comes as no surprise, after all, a hundred years ago there was no UN (its 'predecessor' the League of Nations dates from 1919), no EU, WTO, nor permanent international courts. Nor were judgments from foreign courts routinely recognized by Dutch courts. A narrow reading of Article 11 limits it to texts emanating from Dutch public authorities. It is however generally assumed that Article 11 also extends to foreign acts, judgments, administrative decisions, etc. issued by equivalent foreign public authorities and legal institutions.<sup>31</sup>

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*buiten*, eLaw: Leiden 2010, p. 405-415. For an in depth discussion of the copyright status of standards, see M. Elferink, *Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen* (diss. Leiden), Deventer: Kluwer 1998; for a discussion of similar problems in German copyright law, see Elferink, 'Auteursrecht op normalisatienormen revisited', in: *Een Eigen Oorspronkelijk Karakter* (Spoor bundel), 2007, p. 79-89.

29 Pres. Amsterdam 14 December 1965, NJ 1966, 86 (Veegens v. Vos).

30 Gerbrandy, *Kort Commentaar op de Auteurswet 1912*, Art. 11, Aant. 8, p. 121, speaking of communication in 'a suitable manner and place'.

31 D.W.F. Verkade, *Tekst & Commentaar Intellectuele Eigendom*, Auteurswet art. 11 (Kluwer online); Commissie Auteursrecht, *Advies Aanpassing Auteurswet 1912 aan Akte Van Parijs van de Berner Conventie*, Kamerstukken II 1980-1, 16740, nr. 4, p. 26 (to make clear that Art. 11 also governs foreign official texts, the Commissie advised to change the wording so that it no longer referred to public authorities).

In its 2000 White Paper on improving access to government information, the cabinet states that Article 11 covers foreign official texts, but with the limitation that it should concern texts with ‘legal effect’ in the Netherlands.<sup>32</sup> At a minimum then, there is no copyright in binding treaties, in secondary EC law such as directives and regulations and in European Commission decisions. Equally excluded from copyright are judgments and decisions of the European Courts of Justice, the European Court of Human Rights, other international courts, and decisions of foreign courts that are recognized here, for example judgments in civil and commercial matters, the recognition of which is in principle mandatory under EU law.<sup>33</sup> This is thought to be consistent with the purpose of Article 11 Copyright Act.<sup>34</sup> A more liberal reading of Article 11, including foreign and domestic texts alike, would make it easier to apply however. And as we have seen above, Article 2(4) Berne Convention allows the exclusion of foreign official texts generally, regardless of their legal effect in the Netherlands.

Statutes are public documents par excellence, and for this reason consolidated versions of legislation are also regarded as excluded subject matter, even if produced by private sector actors.<sup>35</sup> What is more, the creation of a consolidated text cannot be said to result in an original literary work. The legal texts that are the building blocks of the consolidated version are in themselves public domain. No creative selection or arrangement is involved, as the consolidation results basically from executing the ‘instructions’ of the later laws (‘Art. X shall be read...’ or ‘Art. Y is repealed’ etc.). Nor, one might argue, should consolidated versions be protected as non-original writings (‘geschriftenbescherming’) because this would defeat the purpose of excluding them from normal copyright.<sup>36</sup> Likewise the question could be raised whether an action in unfair competition should be available in Article 11 cases. The Supreme Court held that in principle it is not, in its landmark *Staat v. Den Ouden* judgment. The state had brought an

32 Nota ‘Naar optimale beschikbaarheid van overheidsinformatie’, Kamerstukken II 1999/2000, 26 387, nr. 7.

33 See notably the recognition rules of the Brussels I Regulation (44/2001) and Lugano Convention.

34 J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 138. Explanatory memoranda fall under Article 15b DCA.

35 Spoor/Verkade/Visser, *Auteursrecht*, p. 138: Article 11 DCA and Article 8 Databases Act address not only works by public authorities, but by the private sector as well. Different: J.J.C. Kabel, comment on Pres. District Court The Hague 20 March 1998, *AMI* 1998, p. 65 (Vermande v. Bojkovski), <http://www.ivir.nl/rechtspraak/wettenu.html>. English translation: <http://www.ivir.nl/rechtspraak/vermande-en.html>, P.B. Hugenholtz.

36 See for a discussion on the impact of database protection on collections of law and consolidated statutes: D. Visser, ‘Het ministerie zwicht weer voor de uitgevers’ *NJB* 1998, nr. 31 p. 1396-1397, A.A. Quaedvlieg, ‘Het verschil tussen wetten en wettendatabanken’, *NJB* 1998 nr. 34, p. 1564-1565, M. Reinsma, ‘Het ministerie zwicht niet’, *NJB* 1998, nr. 34, p. 1565, D. Visser, ‘Wetten zijn databanken’, *NJB* 1998, nr. 34, p. 1565-1566.

action against Den Ouden, a company that produced a book with regulations for shipping (the inland waterways ‘traffic code’) by copying the relevant legal texts from the official publications of the Staatsdrukkerij. The Staatsdrukkerij argued that taking the typeset text without adding any value was a wrongful act. Presumably this argument was run because obviously the text itself was excluded from copyright protection. The Supreme Court held that as a general rule (set out in earlier cases) profiting from another person’s efforts should not be qualified as a wrongful act, in the absence of intellectual property rights. This is the more so, the Court added, in disputes like the one at hand, which is about the copying of subject matter that is explicitly excluded from copyright protection.

The consensus is that Article 11 only concerns the ‘naked’ text of (consolidated) statutes, decisions, judgments etc. Edited elements (headnotes, keywords, summaries, indexes, etc.) as are routinely added by publishers and other third parties are not exempt.<sup>37</sup>

### *Scope of Article 15b*

Essentially, government works that do not fall within the narrower scope of Article 11 are subject to Article 15b. As to the type of works covered, it is not always clear where the boundaries lie between the two. Over time governments have taken contradicting positions. For example, in the early 1980s the government held that official translations of laws and other exempted texts are subject to Article 15b.<sup>38</sup> Later the government argued instead that official translations are Article 11 texts.<sup>39</sup> Contemporary policy documents on open government employ the term ‘basic information of the democratic state’ to denote information that should be free from copyright restraints and made freely available online as a matter of public interest. This includes all kinds of preparatory legislative materials, session reports of representative bodies and other material that traditionally is outside

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37 See Pres. District Court Den Haag 20 March 1998, *AMI* 1998/4, 65 (*Vermande v. Boikovski*): here a commercial publisher claimed non-original writings protection in ‘technical’ information (about repeal, entry into force etc.) it had included in the texts of some 200 statutes published on CD for law students. The court did not find infringement because the quantity of information copied was too low. It could thus avoid answering the principled question whether intellectual property law enabled monopolization of such information.

38 The Commissie Auteursrecht was of the opinion foreign official texts should be covered by Art. 11. Kamerstukken II 1980-1, 16740, nr. 4, p. 19, 26.

39 Kamerstukken II 1980-1, 16740, nr. 3, p. 3; Nota ‘Naar optimale beschikbaarheid van overheidsinformatie’, Kamerstukken II 1999/2000, 26 387, nr. 7, p. 5, 11. Note however (p.11) that this White Paper designates international legal instruments and decisions as basic information in which no intellectual property exists, but for some (obscure) reason then seems to exclude European ‘basisinformatie’ (primary and secondary EU law, court decisions and administrative decisions). See also ‘Naar toegankelijkheid van overheidsinformatie’, Kamerstukken II, 1996-1997, 20 644, nr. 30.

the scope of Article 11. As the law stands, such materials are covered by Article 15b, but this may change in the future (see section 5 below).

The free use of public sector information under Article 15b covers acts of ‘verveelvoudiging’ (reproduction and adaptation) and ‘openbaarmaking’ (communication to the public and distribution). Notably, the free use is not limited to making verbatim or complete copies, as one lower court would have it,<sup>40</sup> but extends to any type of reproduction, e.g. also to making partial copies or adaptations (translations, abridgements etc.).<sup>41</sup>

There are three cumulative criteria that must be met for works to be free to use under Article 15b. It must concern a work a) made public by or on behalf of the public authorities, b) in which the public authorities own copyright, and c) for which no reservation of rights has been made.

### *Made public by or on behalf of public authorities*

When is a work made public? There are no reported cases that confirm we must look to the concept of *openbaarmaking* of Articles 1 and 12 Copyright Act. Such would be the logical reading however.<sup>42</sup> The use of identical terms in Articles 1, 12 and 15b dates back to the original 1912 Act. Legislative history does not indicate that a more limited, or indeed broader, notion was intended.<sup>43</sup> If indeed Article 15b refers to the broad meaning captured by the term *openbaarmaking* of Article 12 Copyright Act,<sup>44</sup> it is triggered when copies of a work are published in print, when a work is made available for online consultation (on websites, via access controlled database, etc.), broadcast, publicly performed, etc.<sup>45</sup>

40 District Court Utrecht 6 April 1983 *NJ* 1983, 523 held that permitted reproduction under Art. 15b does not include making adaptations. The Court of Appeal (upheld by the Supreme Court) ruled that Art. 15b refers to the broad notion of reproduction as used in Articles 13 and 14. Supreme Court 29 May 1987, *NJ* 1987, 1003, m.nt. L. Wichers Hoeth.

41 See Spoor on the scope of the reproduction right, Chapter 8 below.

42 Same opinion: M. Reinsma, Comment on Art. 15b (AU II-Art. 15b-5), in: Brinkhof/Grosheide/Spoor (eds), *Intellectuele Eigendom Commentaar* (loose leaf ed.).

43 Spoor/Verkade/Visser, *Auteursrecht*, p. 144 argue for an autonomous interpretation of Art. 15b, instead of applying the definitions of communication to the public of Articles 1 and 12. This position seems inspired by a desire to curb application of the (old) Art. 15b in cases where the copyright does not rest with the public authority but a third party.

44 See Visser on Article 12, Chapter 9 below.

45 But see Subdistrict Court Sneek: the municipality that installs a sculpture commissioned by it in a public space does not communicate to the public under Art. 15b (note that the copyright in this case rested with the artist). Ktr. Sneek, 6 August 1998, *IER* 1998, 7. Making voting computers available for elections does not constitute making public the software that runs on these computers: Pres. District Court Amsterdam 14 June 2007, *Computerrecht* 2007, 116 (Wij vertrouwen stemcomputers niet). Art. 15b applies to patient information leaflet of registered pharmaceutical, where the Dutch Medicines Evaluation Board must approve the leaflet and makes the text available for public consultation, as part of its decision to allow the medication on the market: Pres. District Court Breda 10 July 1996, *Informatierecht/AMI* 1997/2, p. 40-42 (Roche v. Centrafarm).

A question that was more easily answered in 1912 than today is when there is making public by or on behalf of ‘de openbare macht’. Translated here as public authorities, a more literal translation from Dutch would be ‘the public powers’. References to ‘de openbare macht’ are sparse in contemporary statute law because the term is old-fashioned. Mostly they appear in relation to law enforcement. There is little copyright case law to guide interpretation. It is not consistent either, as is evident from the cases *Bankbiljet* (1968), *Beatrix Postzegel* (1987) and *Internetnotarissen* (1998).

In *Bankbiljet*,<sup>46</sup> a clothing shop used images of banknotes in its advertisements. The Dutch Central Bank brought an action for copyright infringement of the note design. The case turned on the question whether Article 11 second paragraph (now Article 15b) applied. The Bank is not a legal entity formed under public law, but a corporation: a public limited company, in which all shares are owned by the state. Its institution and operation were at the time governed by the 1948 Bank Act. It had a legal monopoly on the issuing of banknotes. In first instance and on appeal the courts held that issuing banknotes is a public task, as the legal monopoly is exercised to aid a proper monetary system. The Bank argued it was not a public authority, nor did it issue money on behalf of a public authority. Rather, it was independent of the government and had issued money throughout its history, something the state had never done. The Supreme Court overturned the lower courts’ judgments. It held that being a legal entity under private law, the Bank is not a public authority. Nor does the fact that it assists in the exercise of a public task (contributing to a well-functioning financial system) make it act on behalf of public authorities. Furthermore, the issuing of banknotes is not a typical public task.<sup>47</sup> Interestingly, despite the Supreme Court’s judgment in the banknote case, the Minister of Finance has on behalf of the State made several reservations on the design of coins.<sup>48</sup> The issuing of coins is entrusted to the Koninklijke Nederlandse Munt, a state-owned company.

In *Beatrix Postzegel*<sup>49</sup> the Advocate General discusses at length the Supreme Court judgment in *Banknote*. He admits he finds the Court’s reasoning difficult to apply and predicts that using a standard of ‘typical public task’ will create much

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46 Supreme Court 14 June 1968, *NJ* 1968, 276 (DNB v. C&A, Telegraaf – ‘Bankbiljet’).

47 That the 1948 Bank Act confirmed the legal monopoly to issue banknotes for an indeterminate time (earlier monopolies were temporary but invariably renewed) was of no importance. The 1998 Bank Act specifically lists the provision of bank notes (in cooperation with the European Central Banking system) as a (public) task. For a history see J. R. van Zwet, *De ontwikkeling van de Bankwet 1814-1998. Van ’s Konings oudste dochter tot integrerend onderdeel van het ESCB*, Amsterdam: DNB 2011.

48 See e.g. Stcrt. 1998, 23 (design euro), Stcrt. 2000, nr. 84 (design special European Championship football euro).

49 Supreme Court 29 May 1987, *NJ* 1987, 1003 (Struycken & Unger v. Riet – Beatrix Zegel).

debate and legal uncertainty. The Advocate General prefers a minimum formal standard: Article 15b applies to any organ or entity that has no independent legal status and is a hierarchical part of central government and that communicates a work in the exercise of its legally defined task.<sup>50</sup> If these formal criteria are met, Article 15b applies, notwithstanding the possibility that Article 15b also governs cases where these formal criteria are not both met. Hence their function as ‘minimum’ standard. In the *Beatrix Postzegel* case the minimum formal standard sufficed. The question was whether stamps issued by the national Postal Services (‘PTT’) were made public by or on behalf of the public authorities. The stamp design was by two artists who had retained their copyright.

The Supreme Court seemed to follow the Advocate General’s double minimum standard. It considered that the PTT at the time was part of the ‘Rijksdienst’ (state). It was not a separate legal entity, although by public law it was designated to operate under separate management, albeit under a responsible minister. On the basis of the Postal Act 1954 and implementing laws, the PTT has the exclusive task of issuing stamps. The Supreme Court upheld the Court of Appeals finding that the making public of the stamps by the PTT constituted making public by the public authorities. That the activities of the PTT are not limited to assisting with public tasks was deemed irrelevant.

The Court of Appeal Arnhem in the later *Internetnotarissen* case held that a ‘public authority’ is a body that has regulatory authority, i.e. a body that derives from the law the authority to make binding rules. In the case before it, it had to decide whether Article 15b applied to (the information on) a website where public notaries announced the details of executorial sales of properties.<sup>51</sup> The court set out that a public notary has statutory tasks (tasks instructed by law), and is an administrative organ within the meaning of the ‘Algemene Wet Bestuursrecht’ (General Act on Administrative Law). However, that does not mean that in the exercise of their statutory tasks, public notaries must be considered as belonging to the public authorities within the meaning of Article 15b. This depends on the nature of the public tasks performed. The court considered that the legal role of the public notary in public executorial sales is primarily supervisory. Article 15b therefore does not apply to the public announcements notaries make of such sales.

The court seems to apply three different criteria cumulatively. The first two are formal criteria: whether the agent involved is a public sector body, and whether it has statutory public tasks. Such formal criteria were also applied in *Beatrix*

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50 Acting on instruction from and for third parties (i.e. publishing services provided to private sector customers) would thus be excluded.

51 Court of Appeal Arnhem 24 June 2008, *Computerrecht* 2008, 138 (Openbareverkoop.nl v. Internet notarissen) with comment O. Volgenant.

*Postzegel*, and as we have seen, promoted by the Advocate General in that case. But the Arnhem Court adds a third substantive criterion. Because essentially it asks for an assessment of the actual activity for which the Article 15b limitation is asserted, in relation to the statutory task with which it is associated. It is unclear how this standard operates precisely. Does Article 15b only apply if the publication of works is a core element of a statutory task? How is this to be determined, considering that statutory tasks tend not to be described in great detail in law itself, and ideas about the scope of a public task fluctuate considerably over time, depending on the political climate and the state of the nation's coffers?

The formal approach of *Beatrix Postzegel* has the advantage of predictability, always a good characteristic for copyright limitations to be effective. What is more, the past decades witnessed a concerted effort to clarify and reorganize the mushrooming 'fourth' sector with its plethora of semi-public bodies that was increasingly seen as problematic at the time of the *Beatrix Postzegel* case. Public tasks are more likely to be laid down by statute. Coherent criteria for defining public sector bodies are available from administrative law. It is therefore easier today to capture 'public authorities' through application of formal criteria. These formal criteria may cast the net of Article 15b a little wider compared to also applying a substantive criterion of the 'typical' or 'core' public task. If an organization finds itself within reach of Article 15b, it can of course still retain its copyright prerogatives, just by making a reservation.

A contemporary and functional way to delineate the public sector is by considering both the status of a legal entity and the presence of a public task (authority). This is the system followed in the *Algemene Wet Bestuursrecht*.<sup>52</sup> All legal entities under public law and their bodies would be public authorities in the sense of Article 15b. Public bodies with separate status as a public legal entity under Article 2:1 of the *Burgerlijk Wetboek* (Civil Code) are the state, provinces, municipalities, water boards and any other body with regulatory powers under the 'Grondwet' (Constitution). In addition, Article 15b would capture natural persons or juridical persons under private law to the extent that they are invested with any public authority. Any works communicated either directly by them or on their behalf by third parties within the exercise of their public task would come within the scope of Article 15b.

It is unclear to what extent, if at all, Article 15b applies to works communicated by foreign public authorities.<sup>53</sup> One could argue that at least where these foreign

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52 Art 1:1 (1) Awb: '(a) een orgaan van een rechtspersoon krachtens publiekrecht ingesteld, of (b) een ander persoon of college, met enig openbaar gezag bekleed.'

53 D. Visser in *Tekst & Commentaar Intellectuele Eigendom*, Auteurswet Art. 15b supports application of Art. 15b to foreign authorities.

authorities – the EU, WTO, UN come to mind – also address Dutch audiences, a teleological reading supports application to foreign public sector bodies. To the extent that foreign government works do not come within the scope of Article 2(4) BC, the exemption of Article 15b will have to meet the requirements of the three-step test as laid down in international conventions (Article 9 BC, Article 13 TRIPS, Article 10 WCT) and in Article 5(5) Information Society Directive.

*Public authority must have copyright*

In *Beatrix Postzegel* the Supreme Court had held that neither the text nor the purpose of (old) Article 15b left room for an interpretation that limited the provision to cases in which the public authority owned copyright. So for works communicated to the public without a reservation of rights prior to 2006, it is still irrelevant who owns copyright in the work. As we have seen, the current Article 15b explicitly requires that the public authorities must own the copyright. It is not clear whether the actual public sector body that communicates the work must be the one to own the copyright, or whether it suffices if *some* public authority owns it, or co-owns it. Considering that a string of policy initiatives seek to stimulate information and data sharing between different parts of government, a liberal interpretation may be preferred. As it is, information (especially datasets) published by one public sector body may originate from a variety of public sector sources, so determining who owns what is often difficult.

There are three principal ways in which legal entities such as the state, or a province, or one of the many non-departmental public sector bodies ('zelfstandig bestuursorgaan') can own copyright. A public sector body may be right owner on the basis of the presumption of Article 8 on corporate authorship. It provides that if a work has been made public by and as coming from a public or private legal entity,<sup>54</sup> without reference to any natural person as the author of the work, the entity shall be regarded as the author and therefore copyright owner. The presumption is rebuttable. More likely, it will be initial owner on the basis of Article 7 Copyright Act.<sup>55</sup> A public sector body will typically own all the rights in works created 'in house' by its staff. The opposite is true for works produced on commission by a third party: unless parties agree otherwise, the third party holds the copyrights in the work. A public sector body can of course acquire copyright through assignment.<sup>56</sup> It is unclear whether Article 15b requires a full transfer. A

54 This includes public sector bodies which are legal entities (state, municipality, water board) and the various private legal entities (companies, associations, foundations).

55 See Seignette on works made under employment, Chapter 5 above.

56 The requirements for transfer are discussed elsewhere, see Lenselink on copyright contracts, Chapter 7 below.

literal reading suggests the provision does not apply to situations where the public authority has ‘merely’ acquired an exclusive licence.

Public sector bodies routinely enlist private companies to supply information services. These may take the shape of commissioned reports, enquiries, data collection, software development, etc. Whether or not the public sector body has acquired the copyright is of course difficult to ascertain for third parties. Standard terms of agreement can give some guidance. For example, all parts of the central government are supposed to adhere to the standard conditions for agreements for the commissioning of services (‘ARVODI’<sup>57</sup>) and for software and ICT services and products (‘ARBIT’).<sup>58</sup> Broadly speaking, under the standard terms the government as commissioning party acquires all intellectual property rights in tailor-made services/products. For standard ‘off-the-shelf’ products or services the supplier must grant a non-exclusive licence to be specified in the agreement.

### *Making a reservation*

A public authority can only exercise its copyrights if it explicitly reserves the rights. There is little case law on the reservation requirement.<sup>59</sup> A reservation can be made in a variety of ways. The text of Article 15b implies that the preferred method is ‘in a general manner’ by enacting it in an act of parliament (‘wet’) or in delegated instruments, such as a royal or ministerial decree (‘besluit’). It is reasonable to assume that such general decisions require publication.<sup>60</sup> A reservation can also be made ‘in bepaalde gevallen’ i.e. in particular cases, by including a notification on the work itself or on copies thereof, or announcing a reservation when the work is made available to the public. The latter mode was meant to enable reservations for speeches, since their delivery in public, i.e. in a council meeting, is also regarded as openbaarmaken.

In practice, particular reservations are much more common than general reservations. One rarely finds reservations in laws or delegated instruments. Most

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57 Art. 23 Algemene Rijksvoorwaarden voor het verstrekken van opdrachten tot het verrichten van Diensten 2008, Besluit van de Minister-President, Minister van Algemene Zaken, van 26 February 2008, Nr. 3313667, Stcrt. 2008, 52, p. 7.

58 Art. 8 Algemene rijksvoorwaarden bij IT-overeenkomsten. Regeling van de Minister-President, Minister van Algemene Zaken, van 7 July 2010, nr. 3093917, Stcrt. 2010 nr. 11138.

59 Pres. District Court Den Bosch 10 April 2001, KG 2001, 117, LJN: AB2084 (Degrootewielen.nl), on proof of a reservation of copyright on materials posted on a municipal website. Pres. District Court Arnhem 10 November 2005, 131412/KG ZA 05-570, LJN: AV0526 (Bestek Venlo), on specifications for public procurement in the area of waste management, commissioned by a municipality, where the reservation was made by the consultancy who authored the work (when Art. 15b still applied to non-public sector copyrighted works).

60 In this vein: Visser/Spoor/Verkade, *Auteursrecht*, at 3.65; Gerbrandy, *Kort Commentaar op de Auteurswet 1912*, p. 323.

serve to protect official designs or logos, e.g. the design of the euro, or the design of the logo and house style of the police.<sup>61</sup> The recent development of so-called basic registries, national core datasets that are to be used throughout the Dutch public sector, does seem to have raised awareness within the public sector of copyright issues. For example, the act that regulates the basic registry on addresses and buildings contains a reservation of copyright.<sup>62</sup> For the basic registries ‘Kadaster’ (Land Registry) and ‘Topografie’ (geographic data comprising a digital map of the Netherlands) a reservation was introduced in the Kadasterwet (Land Registry Act),<sup>63</sup> but only of database rights under the Databankenwet (Databases Act).

Particular reservations are routinely made in print publications, but also on many websites of public bodies. Sometimes they are hidden in a help section, or more visibly present on each subpage. There is no consistency in the way copyright reservations are expressed, nor in the scope of the reservation itself. Since 2010, the website of the central government is published under a Creative Commons zero license,<sup>64</sup> a licence promoted by the Creative Commons organization for dedicating works to the public domain. By using this, the state essentially waives all its claims in copyright and related rights in materials contained on the website. For some materials on the website rights may be reserved. The website contains a wide range of materials, including legislative proposals. But legal information is more comprehensibly accessible through another government website *overheid.nl*, which contains rather ambiguous statements about copyright in its contents.<sup>65</sup>

### 2.3 *Developments in case law and doctrine*

That there is little recent case law on Articles 11 and 15b comes as no surprise. One can safely assume that public sector bodies are not quick to assert copyright before courts, for one because the economic interests involved tend to be minor or even absent. What is more, now that Article 15b no longer applies to non-public sector copyrights, there is even less occasion for conflict. Many of the questions raised previously in doctrine concern the interpretation of Article 15b in light

61 Auteursrechtelijk voorbehoud ontwerp EK 2000-munt (*Stcrt.* 2000, 84), Regeling auteursrecht beeldmerk euro (*Stcrt.* 1996, 191), Regeling auteursrecht handboek huisstijl en logo politie (*Stcrt.* 1993, 131), Regelingen voorbehoud auteursrecht (Nederlandse zijde euromunt, *Stcrt.* 1998, 232), Regelingen voorbehoud auteursrecht (Europese zijde euromunten, *Stcrt.* 1998, 232), Voorbehoud auteursrecht logo Nederlandse politie (*Stcrt.* 1993, 2).

62 Art. 33a Wet basisregistraties adressen en gebouwen, *Stb.* 2008, 39.

63 Introduced by the Wet Basisregistraties Kadaster en Topografie: Art. 7v Kadasterwet, rev. *Stb.* 2007, 105.

64 See <http://www.rijksoverheid.nl/copyright>.

65 <http://www.overheid.nl/help/oep/> contains the statement that ‘the Copyright act art.11 provides that no copyright exists in laws, decisions and bylaws. This means that this information may be freely re-used, unless the publication indicates otherwise.’

of the position of a third party author. Who has to make the reservation, the copyright owner or the public sector body? What are the ramifications for public sector body and author when no reservation is made? Does the author retain the ability to exercise (some of) his moral rights? Such questions have lost most of their significance.

There are also other developments in government policy that probably contribute to the fact that copyright in public sector information gives rise to few conflicts and thus cases. One is the progression of 'open government' initiatives, which will be briefly discussed below. Another concerns the public sector competing in commercial markets. Since the mid-1990s, the prevention of unfair competition by public sector bodies has become a policy objective of subsequent governments. The public tasks of large information producing public sector bodies like the Office for Statistics ('CBS'), the Royal Meteorological Service ('KNMI') and the Land Registry ('Kadaster') are more clearly regulated these days. Basically such institutions are no longer allowed to engage in commercial activities. Arguably, copyright as an instrument of control matters less to them. Other public sector bodies also are now bound by specific rules when competing with the private sector. It has taken over ten years to legislate on this matter, but as of March 2011 the Competition Act contains specific rules for public sector bodies engaging in economic activities (undertakings).<sup>66</sup> For our purposes, a key provision is that data acquired in the course of public tasks can only be used for commercial purposes by a public sector body if the same information is also available for re-use by other parties. The Competition Act thus introduced a mandatory licence for certain public sector intellectual property.

As is often the case with buzz terms, what 'open government' is exactly no one knows.<sup>67</sup> By most accounts one of its characteristics is that public sector bodies actively publish information. Not only information of the sort that is relevant in terms of accountability for their own functioning, but also information or 'raw' data that civil society and businesses can use for their own purposes.<sup>68</sup> Open government initiatives in the Netherlands until now have operated largely within the existing legal framework. So far such initiatives have led to little change in the citizen's statutory rights to access, notably under the Freedom of Information Act.

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66 Aanpassing Mededingingswet ter invoering van gedragsregels voor de overheid, Stb. 2011, 162.

67 See for a comparative analysis made for the Dutch Government: Tijs van den Broek, Noor Huijboom, Arjanna van der Plas, Bas Kotterink en Wout Hofman, *Open Overheid - Internationale beleidsanalyse en aanbevelingen voor Nederlands beleid*, TNO rapport 35440, 2011.

68 For a good introduction and analysis of current open government data movements, see Access-Info Europe and Open Knowledge Foundation, *Beyond Access: The Right to (Re)Use Public Information*, Jan. 2011 [[http://www.access-info.org/documents/Access\\_Docs/Advancing/Beyond\\_Access\\_7\\_January\\_2011\\_web.pdf](http://www.access-info.org/documents/Access_Docs/Advancing/Beyond_Access_7_January_2011_web.pdf)].

The relationship between freedom of information law and copyright in public sector information has been a minor but recurring theme in copyright doctrine since the original *Wet Openbaarheid van Bestuur* was enacted in 1978.<sup>69</sup> Notably, scholars have asked the question whether if citizens have a statutory right to access certain government information, the actual giving of access constitutes openbaarmaking within the meaning of Article 15b Copyright Act. The answer is yes for information that a public sector body discloses at its own initiative, so-called active disclosure under Article 8 *Wet Openbaarheid van Bestuur*. It provides that ‘the administrative authority directly concerned shall provide, of its own accord, information on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance.’ For ‘passive disclosure’, i.e. information that is disclosed only upon request, there is no clear prevailing view in doctrine whether that constitutes openbaarmaking and thus triggers Article 15b.<sup>70</sup> A working group of civil servants from different departments did posit that complying with a freedom of information request generally does not implicate Article 15b.<sup>71</sup>

It is somewhat unsatisfactory that the operation of Article 15b is made dependent on whether a public sector body initiates publication itself, or complies with its statutory duty to grant access upon a request for information. After all, the Freedom of Information Act contains a limited number of grounds for non-disclosure. Some are absolute, such as state security. Others are relative, which means that the public interest in disclosure is balanced against a competing interest, i.e. law enforcement, or privacy. But the same grounds apply to ‘active’ and ‘passive’ disclosure.<sup>72</sup> If none apply, the information is considered public. The *Wet Openbaarheid van Bestuur* operates on an access for one is access for all basis: once information has been supplied to one person upon his or her request, it is public and cannot be withheld from another.<sup>73</sup> Also, the use of electronic

69 See for example A. Backx, ‘Openbaarheid als beperking van het auteursrecht’, *NJB* 1986; D. W. F. Verkade, ‘Wob en auteursrecht’, *Mediaforum* 1993/1 p. 2-6; M. Reinsma, ‘Wijziging artikel 15b Aw: de angel eruit?’, *AMI* 2006/4, p. 119-122; D.J.G. Visser, ‘Beperking art. 15b Aw juist wél een goed idee’, *Mediaforum* 2005/10, p. 332.

70 Spoor/Verkade/Visser (*Auteursrecht*, p. 143) state that the legislator clearly did not intend that granting a freedom of information request should trigger Art. 15b. See however a more nuanced position in Verkade, ‘Wob en Auteursrecht’, p. 4. See also: S. van der Hof et al, *Openbaarheid in het Internettijdperk*, The Hague: SDU Uitgevers 2006, p. 110-111; M. Reinsma, in: *Intellectuele Eigendom* (losbl.) Au II-Art. 15b-5. D.J.G. Visser in *Tekst & Commentaar Intellectuele eigendom*, Aant. Bij 15b notes that the relationship between the Wob and Art. 15b is unclear.

71 Rapportage van de werkgroep ‘WOB-Auteursrecht’, 29 June 1999, Annex to Beleidslijn Naar optimale beschikbaarheid van overheidsinformatie, Kamerstukken II 1999/2000, 26 387 nr. 7.

72 ABRvS 31 May 2006, 200505388/1, AB 2006/329.

73 The ‘access for one is access for all’ principle is a staple in judgments of the highest administrative court. See e.g. ARRvS 13 August 2003, AB 2003/446, ARRvS 14 May 2003, AB 2003/241, ABRvS 25 April 2000

media (portals, search facilities, push information services) by government increasingly blurs the distinction between active and passive disclosure. There are no longer good reasons to treat active and passive disclosure differently for copyright purposes, if ever there were good reasons, that is. This is the more so now that Article 15b only applies to information in which the public sector itself owns copyright.

The Wet Openbaarheid van Bestuur and Archiefwet (Archives Act) are generic instruments that regulate public access to government information. Specific information obligations exist however under a wide variety of acts and regulations, for example in the area of planning, environmental protection, health and public registries (companies register, land registry, etc.). Access to public held information is increasingly recast as an issue of human rights. The European Court of Human Rights in recent years has repeatedly recognized a right to access government information under Article 10 ECHR (freedom of expression) or Article 8 ECHR (right to privacy).<sup>74</sup>

An increasingly pertinent question is whether once citizens or businesses have obtained information under freedom of information laws, the public sector can still exercise its intellectual property rights to the fullest? In other words, does a right of access bring with it certain freedoms to use the information? Or does it not extend beyond a right to read/view, and is permission required for all uses that copyright law restricts? And if freedom of information rights do trump copyright, does it make a difference how the information came to a public authority, or who can claim intellectual property rights in it? The Wet Openbaarheid van Bestuur is silent on the matter. And beyond Articles 11 and 15b, so is the Copyright Act. Past cabinets have repeatedly announced their intention to regulate the relation between the Wet Openbaarheid van Bestuur and the Auteurswet, but a legislative proposal has yet to materialize.

If previously scholarly writings on government copyright were few and far between, the past years show a marked rise in interest. It is fuelled by the public sector drive towards increased transparency and the development of a framework for commercial exploitation of public data. The fact that notably intellectual

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(Voetbalvandalen III), JB 2000/142.

74 Wouter Hins & Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights', *European Constitutional Law Review*, 2007, 3, p. 114-126; recent cases in which access to government held information was recognized as protected by Art. 10 ECHR: ECHR 14 April 2009, *Társaság a Szabadságjogokért v. Hungary* (Appl. No. 37374/05); ECHR 26 May 2009, *Kenedi v. Hungary* (Appl. no. 31475/05); The Council of Europe Convention on Access to Official Documents (Tromsø, 18 June 2009) stresses the importance of access rights for the exercise of fundamental rights; see Explanatory Report, Strasbourg, CETS No. 205. Available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>.

property law, administrative law, constitutional law and competition law are implicated in the regulation of public sector information, forces legal scholars to consider the consistency and coherence (or lack of it) of norms that results from these diverse areas of the law.<sup>75</sup> If there is one overriding tendency, it is that copyright and other intellectual property rights are considered primarily for their role as a legal tool to help implement public sector information policies. With it goes an instrumental take on copyright, rather than a rights-based one.

The interplay of administrative law and copyright law equally affects the judiciary. If a public sector body wants to enforce its intellectual property rights it must bring its claim in a civil action. Typically however, if a person or business disagrees with how a public sector body exercises its copyright it will end up arguing its case before an administrative court, because the obligation to allow re-use of government information is an obligation under administrative law. In 2008, the highest administrative court gave its first ever 're-use' judgment in *Landmark v. B&W Amsterdam*. The city of Amsterdam claimed intellectual property rights in environmental information as a basis for setting what the information services company Landmark considered unlawful terms for re-use. Most of the court's judgment is taken up by its application of the Databankenwet, and its interpretation has caused some surprise among intellectual property lawyers.<sup>76</sup> The 2011 introduction of special competition rules for public sector bodies also spells out the involvement of yet another competent authority, namely the NMA (Competition Authority) and on highest appeal the College van Beroep voor het bedrijfsleven (CBB). The interplay of intellectual property law, competition law and administrative law and its application by different types of courts arguably makes the outcome of disputes less predictable. The Courts of Justice of the EU

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75 M. van Eechoud, 'Friends or Foes? Creative Commons, Freedom of Information Law and the European Union Framework for Reuse of Public Sector Information', in: L. Guibault & C.J. Angelopoulos (eds), *Open Content Licensing: From Theory to Practice*, Amsterdam: Amsterdam University Press 2011, p. 169-202; M.M.M. van Eechoud, 'Het hergebruikregime voor overheidsinformatie in de Wob: een tussenstand', *Mediaforum*, 2008/1, p. 2-10; M.M.M. van Eechoud, 'Vreemde bedgenoten: de Wob en de Richtlijn hergebruik overheidsinformatie', *Mediaforum* 2005, p. 291. M. van Eechoud, 'Commercialization of public sector information. Delineating the issues', in: L. Guibault & P.B. Hugenholtz (eds), *The Future of the Public Domain - Identifying the Commons in Information Law*, The Hague: Kluwer Law International 2006; Katleen Janssen & Jan Kabel, 'Commercialisering van overheidsinformatie door de overheid: rechtspraak en wetgeving in België en Nederland. De honden blaffen, maar de karavaan trekt voort.' *Computerrecht*, 2005/3, p. 117-129; J.J.C. Kabel, Chr.A. Alberdingk Thijm & P.B. Hugenholtz (m.m.v. D.J.B. Bosscher), *Kennisinstellingen en informatiebeleid. Lusten en lasten van de publieke taak*, Otto Cramwinckel: Amsterdam 2001; M.M.M. van Eechoud, 'Openbaarheid, exclusiviteit en markt: commercialisering van overheidsinformatie', *Mediaforum* 1998/6, p. 177-184.

76 Afd. Bestuursrechtspraak Raad van State (Administrative Jurisdiction Division of the Council of State) 29 April 2009 (*B&W Amsterdam v. Landmark*), *AMI* 2009/6, p. 233-237, Comment M. van Eechoud; see also case note Grandia in *Computerrecht* 2010, 5.

of course may have the final say on many aspects of copyright law, competition law and also interpret the Public Sector Information Directive. However, since the regulation of access and re-use of public sector information is still largely a domestic affair, in practice divergent interpretations of the relevant law by Dutch courts will not be ‘cured’ by the EU Courts.

### 3. European context

As is obvious throughout this book, EU law has a great impact on Dutch copyright law. But the protection of government works is one area where it is so far absent. Certainly the text of Articles 11 and 15b was not informed by EU directives. The only court case in which harmonized law played a role was *Landmark*, but there the issue were sui generis database rights of a municipality, not copyright proper.

It is difficult to ascertain to what extent EU directives affect copyright in government works. None of the relevant EU directives explicitly address the copyright status of public sector information.<sup>77</sup> One might argue this implies that public sector information should be treated as any other copyrighted subject matter, to which the same rights and exemptions laid down in the various directives apply. The problem with such a reading is that it ignores the special position government information has in domestic laws. Certain exclusions of official texts from copyright exist in most member states, and restrictions with respect to other government works that do qualify for protection vary.

The status of government information thus raises questions of subsistence of copyright, and of limitations (to be discussed below). As for subsistence, until very recently the generally held opinion was that the EU directives to date only harmonize certain specific questions as regards subject matter, notably on the criteria for protection of databases and computer programs. Recently however, the European Court of Justice seems to have applied in particular the standard of originality used in the Database Directive and the Computer Programs Directive to other types of works. More importantly it is busy elaborating a harmonized idea of the ‘work of authorship’ in *Infopaq* (2009), *BSA* (2010), *Football Association* and *Painer* (both 2011),<sup>78</sup> with more cases pending.

In many countries, legislation, administrative and judicial decisions are excluded from copyright altogether, explicitly as is the case in the copyright acts of the Netherlands and for example those of Belgium, Germany, Slovenia

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<sup>77</sup> In the context of the legislative procedure leading to the sui generis database right, there was debate about public sector information, notably whether the Database Directive should provide for compulsory licensing in case of data monopolies (not seldom a public sector monopolist).

<sup>78</sup> Case C-5/08, Case C-393/09, Joined Cases C-429/08 and C-403/08 and case C-145/10 respectively.

and Italy or implicitly as in France. Based on the black letter laws, the scope of these exclusions varies. Other types of information produced by the public sector may either fall under the member states' default rules, or be subject to a 'lighter' copyright regime. Some national copyright laws provide for exclusive rights in government information specifically, such as the UK's Copyright Act with its provisions on so-called Crown Copyright (s. 163 Copyright, Designs and Patents Act). What to make of this diversity in light of harmonized copyright law, especially in light of the European Court of Justice's recent interventionary attitude?

Most likely the answer is that until very recently, intellectual property rights in public sector information were not on the European lawmaker's mind. The only explicit reference to works from public authorities is in the Explanatory Memorandum to the 1993 Term Directive. The Memorandum recognizes that laws differ with respect to the subsistence of copyright in government information. It states that existing special national provisions on the term of protection for works of public authorities are not harmonized by the Directive.<sup>79</sup> If the intention was to leave diversity of the duration of protection intact, surely the question to what extent copyright exists in public sector information in the first place remains a matter for member states to decide. Another sign that the copyright status of government works is largely unharmonized is that the European Commission has never initiated infringement procedures against member states to end the diversity in national copyright acts.<sup>80</sup>

If however, the European Court of Justice keeps to its path of harmonizing the work concept through the backdoor, presumably at some time it will be called upon to clarify the status of government works. From the recent judgments it does not follow that national provisions which deny official texts work status necessarily run counter to a harmonized work concept. But it will presumably take a rather intricate argument to square harmonized standards for the existence of copyright with the domestic exclusions.

The relationship between access to government-held information and the exercise of intellectual property rights in it, suffers from the same ambiguity at the EU level as it does in Dutch domestic law.<sup>81</sup> Provisions like Article 15b Copyright

79 Explanatory Memorandum to the original proposal for the Term Directive (COM (92) 33 final), Brussels: European Commission 23 Mar. 1992, p. 10.

80 See Van Eechoud et al, *Harmonizing European Copyright*, esp. paragraph 2.3.2.4.

81 Note however that, with regard to access to documents held by EU institutions, the Access Regulation in Art. 16 provides that '[t]his Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents'. Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L145/43.

Act are squarely informed by the objective of enabling maximum public access and can be viewed as freedom of information provisions *avant la lettre*. However, the only explicit reference to freedom of information is in recital 60 of the Information Society Directive. It says the provisions of the Directive do not prejudice national provisions on public access. Arguably then, not only freedom of information provisions in the Copyright Act, but more broadly laws like the *Wet Openbaarheid van Bestuur* could grant an effective right to information – i.e. one that includes possibilities to actually use the information obtained, beyond reading it – without running afoul of EU copyright law. But would such use rights effectively not operate as copyright limitations? What to make then of the purportedly exhaustive regulation of limitations in the Information Society Directive? The black letter seems to leave member states hardly any discretion to have, or indeed introduce, limitations with respect to the exercise of copyright in public sector information. The current list of limitations contains no exemption specifically aimed at access or re-use of government information, casting doubt on whether Article 15b type provisions are even in conformity with EU law. And the ‘leftovers’ provision for minor limitations in Article 5(3) sub o Information Society Directive is of no use as it only allows a limitation for analogue uses.<sup>82</sup> Again, judging by the absence of any discussion of a possible special status of government information in the preparatory materials, the issue simply was not considered.

The EU itself has set the stage for curbing copyright prerogatives of public sector bodies, not in the copyright directives conceived by the European Commission’s DG Market, but through the PSI Directive initiated by DG Information Society. Although its recital 22 states the PSI Directive does not affect intellectual property rights in public sector information, ‘public sector bodies should, however, exercise their copyright in a way that facilitates re-use.’ The terms of the PSI Directive themselves already affect the exercise of rights, because *if* information is made available for re-use, it must be made available on transparent and non-discriminatory terms and conditions. Royalty payments (or flat fees for that matter) must conform to the requirement that any charges for information must be cost based and not exceed integral costs including a reasonable return on investment.

Whether the review of the PSI Directive, initiated in 2010, will lead to further changes that will directly affect copyright is uncertain. Among the top concerns voiced in the public consultations were the significant barriers to re-use that remain because of unclear and overly restrictive licensing terms and

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82 See Sentfleben and Guibault on limitations, Chapters 13 and 15 below.

prohibitive pricing. But more importantly surely, the lack of available datasets and information in open formats was seen as a major obstacle.<sup>83</sup> The EU's Digital Agenda for Europe policy marks out both PSI re-use and copyright as key actions for achieving the Digital Single Market.<sup>84</sup> Presumably then, the relationship between access, re-use and the exercise of copyright in public sector information will at some stage be addressed in a more coherent manner. Perhaps the EU legislator will take inspiration from the Wittem group's European Copyright Code.<sup>85</sup> Its Article 11.2 excludes from copyright the familiar categories of official texts similar to those listed in Article 2(4) Berne Convention: official texts of a legislative, administrative and judicial nature, including international treaties, as well as official translations of such texts. In addition, and probably much more controversial, all 'official documents published by the public authorities' would not be copyrighted. For now however, the status of public sector information under EU copyright law remains unclear.

#### 4. Assessment and future developments

The provisions in the current Copyright Act have changed little over time. Essentially they date from an era of small, pre-welfare, 'pre-e' government. At the time, the focus was on the copyright status of laws and 'official' texts associated with the classic lawmaking and enforcement functions of the 19th and early 20th century state. Since then, the public sector has of course expanded steadily and considerably. Particularly in recent decades it has come to collect and generate vast amounts of information. Coupled with the continuous expansion of copyright subject matter, this warrants the conclusion that today copyright and database rights exist in an unprecedented number of government works.<sup>86</sup>

83 See EC DG Information Society, Full report of the on-line public consultation on the PSI Directive. March 2011. [[http://ec.europa.eu/information\\_society/policy/psi/docs/consultations/cons2010/Results%20of%20the%20online%20consultation%20of%20stakeholders%20final.doc](http://ec.europa.eu/information_society/policy/psi/docs/consultations/cons2010/Results%20of%20the%20online%20consultation%20of%20stakeholders%20final.doc)].

84 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, COM/2010/0245/f2.

85 <http://www.copyrightcode.eu/>

86 The sui generis database right of Directive 96/9/EC, implemented in the Databankenwet (Stb. 1999, 303) has a regime for government databases (Art. 8) similar to that of Arts 11 and 15b Copyright Act. Still contentious is to what extent a database produced by or on behalf of a public sector body in the course of its public task meets the level of 'substantial investment' required for sui generis protection. See generally on the substantial investment requirement Annemarie Beunen, *Protection for Databases*, Nijmegen: Wolf Legal Publishers 2007, p. 105-146; Mark J. Davison & P. Bernt Hugenholtz, 'Football fixtures, horse races and spin-offs: the ECJ domesticates the database right', *EIPR* 2005, No. 3; M. van Echoud, comment on Afd. Bestuursrechtspraak Raad van State 29 April 2009 (B&W Amsterdam v. Landmark), *AMI* 2009/6, p. 233-237.

A sceptic might say the regime in the current Copyright Act still ‘works’ after a century because it regulates so little. But there is certainly something to be said for having a light touch statutory regime for government works. The term ‘government’ or ‘public sector’ denotes what in reality is of course a highly complex network of organizations with a wide variety of tasks and associated information collection and production activities. Government information policies necessarily reflect this diversity, and the reservation regime of the Copyright Act accommodates a variety of dissemination and use models.

There are two clear trends across the public sector which affect intellectual property. One is political in nature, towards ever more transparency. In today’s deliberative democracy, citizens take on an increasingly active role in decision-making. Indeed such an active role is expected of them. This requires access to information, and public sector bodies use the possibilities that ICT offers to facilitate such access. A second trend is more economic. The public sector recognizes the economic potential of information and data it holds, for the development of new information products and services by the private sector. Both trends result in a government that more actively pushes information into society. This in turn has implications for copyright policy with respect to government works.

#### *Access to government information*

In policy documents on access, the government tends to refer to ‘basic information of the democratic state’ as a category of information that should be freely available online.<sup>87</sup> It includes legislation and administrative decisions at all levels of government, and judicial decisions (including of foreign origin with legal effect in the Netherlands) as well as reports of the (public) sessions of parliament and other representative bodies.<sup>88</sup> Official translations of such documents are also considered ‘basisinformatie’.

And indeed at the level of central government and parliament ‘basic information of the democratic state’ is now published on the Internet, accessible for free and freely usable. The latest and greatest driver has been the decision to move from paper-based publication of official texts to electronic publication. This change was made with the *Wet Algemene Bekendmakingen 2009* (Law on General Proclamations).<sup>89</sup> The official publications of central government –

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87 The use of the term is on the rise in doctrine as well, see e.g. P. Stolk, *Wet Openbaarheid van Bestuur*, Deventer: Kluwer 2009, p. 22.

88 This wide definition first appeared in Nota ‘Naar optimale beschikbaarheid van overheidsinformatie’, Kamerstukken II 1999/2000, 26 387, nr. 7.

89 Stb. 2008, 551, delegated regulations in *Bekendmakingsbesluit* Stb. 2009, 30.

Staatsblad, Staatscourant and Tractatenblad – are no longer published in print, but only in a freely available electronic version.<sup>90</sup> In principle all regulation of central government must be made available electronically, for free, in a consolidated and up-to-date version. The same obligation applies to local authorities, i.e. municipalities, provinces, and water boards. In addition, as of 2011, all local governments are required to publish all their legally binding instruments through a central service ‘CVDR’ (Central Service Local Regulations). These then become available through the central official publications website. The obligation does not include administrative decisions in individual cases, e.g. planning permissions.

The courts have also introduced a system whereby judgments are published (in anonymous form) online, but this concerns only a fraction of all judicial decisions handed down.<sup>91</sup> In that respect there is of course little difference with the traditional practice of legal publishers.

Considering these developments in the availability of official texts, the current Article 11 does lag behind practice because it covers only some basisinformatie. Notably, it does not exempt from copyright preparatory materials such as legislative proposals and reports of debates in parliament or local representative bodies. These are still covered by the limitation of Article 15b rather than the exclusion of Article 11.<sup>92</sup>

That Article 11 is outdated has of course not escaped the attention of policymakers. Already in 1999, after having asked the Commissie Auteursrecht for advice on the matter, the cabinet concluded that Article 11 Copyright Act needed to be updated to reflect the modern ‘diversity’ of official texts and the possibilities ICT offers to use it.<sup>93</sup> More than ten years on however, a legislative proposal has yet to be tabled.

<sup>90</sup> A print copy is still available upon request (Art. 10 Bekendmakingswet).

<sup>91</sup> The extent to which judicial decisions are public and made public is considered in detail in ‘Toegang tot rechterlijke uitspraken – Rapport van de VMC-studiecommissie Openbaarheid van rechtspraak’, Amsterdam 2006. Figures on cases brought are available in the annual reports of the Raad voor de Rechtspraak ([www.rechtspraak.nl](http://www.rechtspraak.nl)).

<sup>92</sup> The government’s webmasters are not always very clear on the distinction between materials covered by Art. 11 and Art. 15b themselves it seems. The Help-file to the website ‘official publications’ conflates Art. 11 and 15b where it states: ‘Art. 11 Copyright Act provides there is no copyright in laws, decrees and ordinances ... This means this information may be freely used, unless the publication states otherwise’. (‘De Auteurswet (art. 11) bepaalt dat er geen auteursrecht rust op wetten, besluiten en verordeningen, door de openbare macht uitgevaardigd. Dit betekent dat deze informatie vrij mag worden hergebruikt, tenzij dat in de publicatie anders is aangegeven.’). Contradicting copyright statements also occur: e.g. the Lower House explicitly prohibits any use other than personal use of information on its website, which in part contains the same information as other government sites which do not make such a reservation (agendas, voting lists, meeting reports). See <http://www.overheid.nl/help/oep> and <http://www.tweedekamer.nl/applicaties/disclaimer.jsp> [accessed 07.06.2011].

<sup>93</sup> Nota ‘Naar optimale beschikbaarheid van overheidsinformatie’, Kamerstukken II 1999/2000, 26 387, nr. 7. Item III.1.2

In the context of transparent lawmaking, the question is how far the Article 11 exemption should go. A modern version presumably would include legislative proposals and parliamentary records, but what about other background materials such as impact assessments and public consultations? And would not metadata, which helps trace the evermore complex relations between instruments and revisions, have to be included? Obviously, the relationship between Articles 11 and 15b would have to be revisited. Article 11 could also do with an update reflecting the growing importance of legal norms and decisions emanating from the EU and international organizations.

### *Re-use of public sector information*

That basisinformatie is to be made available for free online and without restrictions is uncontroversial. But basisinformatie as conceived of by recent cabinets predominantly concerns legal texts. There is a public interest, both economic and democratic, to access and use a much wider range of information. As we have seen, the Wet Openbaarheid van Bestuur is the primary instrument that regulates access to government information. It also provides the general framework for (commercial) re-use of public sector information, because its Chapter V-A implements the EU's Public Sector Information Directive.

The PSI Directive in many respects 'harmonizes' the rules for re-use in a minimal way. It does not determine which information or data is public, nor does it prescribe that re-use of public data must be allowed. The Wet Openbaarheid van Bestuur does oblige public sector bodies to make public information available for re-use. But like the PSI Directive, the Wet Openbaarheid van Bestuur currently leaves public sector bodies wide discretionary power to set terms of use of information in which they own intellectual property rights, as long as the terms are non-discriminatory and transparent. The cabinet wants to rein in this power. On the eve of the Copyright Act's centenary, two White Papers<sup>94</sup> announced a new policy that would basically prevent public sector bodies from exercising their copyright or database rights. It would also cap the charges for re-use at the costs of copying of the information requested.

The justification given is that any type of condition imposed by a public sector body hinders re-use, and the more so in situations where the re-user sources information from various public sector bodies which each impose different conditions. The White Papers propose that in the future public sector bodies would not be allowed to condition in any way the further use (in copyright terms:

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94 Kamerstukken II 2010/11, Kamerbrief 31 May 2011, 'Wob beleid' and 'Hergebruik en Open Data: naar betere vindbaarheid en herbruikbaarheid van overheidsinformatie'.

reproduction and communication to the public) of information to which citizens have a statutory right of access under freedom of information law.<sup>95</sup> As the *Wet Openbaarheid van Bestuur* covers a very broad range of public authorities and a broad range of information, such a prohibition would essentially become the primary determinant of the copyright status of government information.<sup>96</sup> It would technically not bar public authorities from making a reservation under Article 15b Copyright Act (or Article 8 Databases Act), but obviously a reservation is of little value if the copyright prerogatives cannot be exercised because of the *Wet Openbaarheid van Bestuur*.

If this sweeping plan materializes and is made into law, Article 15b will become pretty much a dead letter. The obligation to allow unfettered re-use will only apply to information in which a public sector body (rather than a third party) owns rights. The new system therefore still supposes that public bodies have the information management capabilities to distinguish data they completely own from data in which others have intellectual property rights. Remember that statutory access under the *Wet Openbaarheid van Bestuur* is to information ‘held’ by public sector bodies, regardless of whether it is copyrighted and who owns the intellectual property. If the orphan works problems of public cultural heritage institutions – currently not covered by the *Wet Openbaarheid van Bestuur*’s re-use regime – show us anything, it is that even for the historically fairly IP-savvy organizations rights management is a formidable challenge.

One can easily imagine that to avoid any risk associated with infringing third party rights, a public sector body will be careful to claim it has (sole) ownership, thus avoiding having to allow free re-use. Either of information it actively distributes, or of information it discloses on request. After all, in principle copyright status does not affect citizens’ and businesses’ right to *access* a document under freedom of information law, but it does impact the subsequent permitted uses by the recipient. So a public authority that discloses content under the caution that a third party copyright may exist in it, still complies with its transparency duty. The recipient will be none the wiser about what he can or

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95 An exception will be made for the Land Registry, Companies register and other public sector bodies that have to operate under a cost recovery model i.e. charge users for the information services they supply. Kamerstukken II 2010/11, Kamerbrief 31 May 2011, ‘Wob beleid’, p. 11.

96 Information must be contained in documents pertaining to administrative matters covering all information somehow connected to the development of policies, their implementation and enforcement. The term ‘administrative’ refers to government in all its aspects, and only little information is regarded as not pertaining to the exercise of public tasks (e.g. certain HRM-information about staff). As to the type of public sector bodies it covers, broadly speaking that is any body that is part of a legal entity established under public law, or another person or board invested with any public authority. Legislative bodies and the judiciary are excluded from the Freedom of Information Act, but are subject to separate rules.

cannot do with the information. Even more problematic, a strict prohibition on terms and conditions can also cause public sector bodies to be less inclined to actively make information or datasets available. Surely a system that allowed for a wider range of terms of use would be less likely to backfire.

The recent White Papers rephrase intellectual property in and access to public sector information as an issue of ‘open government data’ policy. But in their zeal to make progress on the re-use front, the responsible policymakers seem to put much emphasis on *eliminating* licences altogether, for all but a few information providers. That data must be ‘license free’ is indeed one of the eight Open Government Data principles formulated by an American group of open government advocates.<sup>97</sup> Under those principles it means that ‘[d]ata are not subject to any copyright, patent, trademark or trade secret regulation.’ Considering that US federal copyright law excludes works of the federal government from copyright, such a position is not really controversial. The principles do not however rule out that other restrictions of use may apply (privacy, security and privilege restrictions).

The ‘no copyright principle’ is only the last of the eight principles; the first seven address other characteristics which arguably are much more important, i.e. data must be primary (‘raw’<sup>98</sup>), complete, timely, machine readable, in open format, electronically accessible for all, and access must be non-discriminatory. The Open Knowledge Foundations’ much-referenced definition of ‘open’ knowledge as applied to government focuses more on the manner of distribution. Open government knowledge means inter alia: access at maximum the marginal cost, online and with no technological restrictions (e.g. open formats), and free redistribution is allowed. But licence terms that ensure proper attribution or integrity of the information for example, are considered to be consistent with open government.

As the comments on the Open Government Data principles observe: ‘Because government information is a mix of public records, personal information, copyrighted work, and other non-open data, it is important to be clear about what data is available and what licensing, terms of service, and legal restrictions apply. Data for which no restrictions apply should be marked clearly as being in the public domain.’<sup>99</sup> Such positive affirmation of use rights is a central characteristic of online ‘open content licences’, the Creative Commons licences being of course a well-known example. The PSI Directive encourages public authorities to use

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97 See <http://www.opengovdata.org/home/8principles>.

98 Obviously, ‘raw data’ is not necessarily the type of information that is valuable to citizens under classic freedom of information laws.

99 <http://www.opengovdata.org/home/8principles/annotations>.

standard online licences, without prescribing the actual terms. Obviously, terms of use which are both standardized and liberal make public data a more attractive resource, particularly when the re-user needs to integrate information from different sources.

Governments increasingly use open content licences for actively published information and both the Netherlands and the UK are frontrunners in Europe. Since 2010, a primary web portal of the Dutch central government states that by default the ‘Creative Commons zero’ public domain declaration applies to its content.<sup>100</sup> ‘Open datasets’ available for re-use are catalogued at Data.overheid.nl. The UK uses an ‘open government licence’ for a growing body of content such as datasets available through the data.gov.uk portal. The licence is akin to the Creative Commons Attribution licence since it allows free use but does require proper attribution.<sup>101</sup> The open government licence is part of a more comprehensive scheme, which caters to a variety of public sector information providers, including those that need to charge for information because they operate under a cost-recovery model. It takes account of EU rules, especially of the PSI Directive as implemented in the UK, and of the INSPIRE framework on access and sharing of spatial data.<sup>102</sup> At the EU level, national initiatives such as those in the United Kingdom and the Netherlands are taken as a model to develop European-wide data portals.<sup>103</sup>

Undoubtedly, the implementation of policies aimed at facilitating private sector re-use in the online environment (with linked open data) will make organizations in the public sector increasingly copyright aware. The trend towards data sharing among public sector bodies at the national and European level also, will go hand in hand with more sophisticated frameworks for managing rights in information. Management of public sector copyright through standard licences seems the more likely way in which ‘the’ public sector across Europe will move forward. In that light, a Dutch one-size-fits-all approach in the shape of an outright ban on public sector bodies exercising any intellectual property rights in ‘public’ information may not be the most productive.

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100 See <http://www.rijksoverheid.nl/copyright>. The one additional requirement is that when quoting content, users must not suggest that the public authorities endorse the adapted content.

101 See <http://www.nationalarchives.gov.uk/doc/open-government-licence/>

102 See <http://www.nationalarchives.gov.uk/information-management/government-licensing/the-framework.htm>.

103 See [http://ec.europa.eu/information\\_society/policy/psi/open\\_data/index\\_en.htm](http://ec.europa.eu/information_society/policy/psi/open_data/index_en.htm).

## **5. Conclusion**

The current special treatment of government works is informed by the ‘classic’ lawmaking and enforcement functions of the nation state. That is why core legal texts are exempt from copyright altogether, and the presumption for other information is that once published by public authorities, it can be used freely by all unless a reservation was made. By and large, the current provisions in the Copyright Act have withstood the test of time. They are flexible enough to be in line with contemporary public sector information policies and their diverse objectives. Three major objectives are to make government more efficient, transparent and accountable, to enable and encourage citizen participation, and to realize the economic potential of public sector information by fostering its re-use by the private sector. The first two objectives have a long history, the third is fairly recent. Together they feature prominently in what in today’s public administration vocabulary is called ‘open government’ policy. Key regulatory instruments are the *Wet Openbaarheid van Bestuur* with its access and re-use provisions, and the *Auteurswet* (and *Databankenwet*).

The exercise of intellectual property rights in information held by public sector bodies is one element that determines the success of open government. But there is quite some way to go before we can say there is a coherent approach to access and control, both at the national and European level. Notably the relations between copyright and freedom of information law remain unclear. The Public Sector Information Directive, which is the EU’s primary instrument aimed at fostering re-use, complicates matters further and brings in competition law issues as well. The PSI Directive could well become a pivotal piece of legislation that deeply affects the exercise of government copyright. If, that is, it acquires more teeth as a result of the current or future reviews.

What complicates the development of national policy, and certainly its translation into legal norms, is the unclear status of government information in EU copyright law. Arguably, beyond software and databases, this subject matter is not, and certainly not exhaustively, harmonized. But rights to a very large extent are, and for limitations no useful national discretionary powers seem to remain if one accepts that such is indeed the effect of the Information Society Directive. If the recent Dutch policy initiative to discourage public sector bodies from exercising their intellectual property rights is to be given a stronger legal basis, the more attractive option is to amend the *Wet Openbaarheid van Bestuur*. After all, freedom of information law still is very much the domain of member states. The EU is generally not competent to legislate statutory access rights,

except with respect to documents held by its institutions.<sup>104</sup> Having said that, European norms are on the rise here too. This is evident at the EU level in the area of environmental and spatial information. But also on a broader European scale, from the European Court of Human Rights judgments mentioned above, and the Council of Europe Convention on Access to Official Documents.<sup>105</sup>

It may not be long before public sector information copyright rises not just on the agenda of the European Commission's DG Market (copyright unit), but on the agendas of DG Justice (access), DG Environment (access to and sharing of spatial data) as well as on that of DG Information Society (re-use). The provisions on government works, for a century a calm backwater in the Dutch Copyright Act, could soon be taken mainstream in the Europeanization of intellectual property law.

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<sup>104</sup> An exception is access to environmental information, see Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, OJ 2003, L41 p. 26.

<sup>105</sup> Council of Europe Convention on Access to Official Documents (CETS No.: 205), Tromsø, 18 June 2009 (not yet in force). In spite of its open government rhetoric, the Dutch Government has no plans to sign the treaty.

