

## ALAI 2011 – Dublin Congress

### Questionnaire – Boundaries and Interfaces

**Answers by the Dutch ALAI Group (Mireille van Eechoud, Stef van Gompel, Lucie Guibault, Bart van der Sloot, Bernt Hugenholtz – Institute for Information Law, Amsterdam)**

#### 1. The subject Matter of Protection – Works

- 1.1 How do your legislators or caselaw define a literary work? In particular, how is speech protected? Is ex tempore speech a literary work and what are the conditions for protection?

Article 1 in conjunction with article 10 of the Dutch Copyright Act defines the subject matter of copyright as a literary, scientific or artistic work, which includes ‘any production in the literary, scientific or artistic fields, whatever may be the mode or form of its expression’. It is implicit that such productions must be original in order to be protected. ‘Originality’ (or ‘oorsponkelijkheid’) is in Dutch practice typically used as short hand for a two-pronged test elaborated by the Supreme Court. The work must have an ‘own, individual character’ and ‘bear the personal stamp of the author’. See question 2 for details. For a creation to be a work, it must be expressed in a manner perceptible to the senses (‘zintuiglijk waarneembaar’). No requirement of fixation exists.

As regards criteria for protection, the Act does not distinguish between literary, scientific or artistic works as such. Article 10 (1) contains a non-exhaustive list of categories of works, based on article 2(1) of the Berne Convention. Following harmonisation at the EU level, this list has been extended to explicitly cover the categories of computer programmes and databases. The Dutch Copyright Act does not ‘assign’ each type of production to a main category (literary/scientific/artistic).

#### *Non-original or ‘impersonal’ writings*

An important exception to the requirement that a production be original can be found in the literary domain. The exception is based on article 10(1) sub 1 of the Dutch Copyright Act, which states that the subject matter protected under this Act includes ... ‘books, brochures, newspapers, periodicals *and all other writings*’ (emphasis added). The Supreme Court has elaborated that ‘other writings’ include (alphanumeric) texts which lack original character, but the scope of protection for non-original writings is limited. Such ‘impersonal writings’ are only protected against direct and (almost) complete copying. They must be published or destined to be published in order to benefit from protection.<sup>1</sup>

The Copyright Act does specify that computer programmes and *sui generis* databases are not ‘writings’ within the meaning of article 10(1) sub 1 of the Copyright Act. Therefore, software that is not original cannot benefit from the specific protection of ‘impersonal writings’. Courts have considered non-original databases as ‘impersonal writings’, but only if the database does not qualify for *sui generis* protection (under the *Databankenwet*, which implemented the EU Database Directive) due to a lack of substantial investment in the obtaining, verification or presentation of the contents (see point 2.4).

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<sup>1</sup> Supreme Court (*Hoge Raad*), 17 april 1953, *Het Radioprogramma*, NJ 1954, 211, note D.J. Veegens; Supreme Court (*Hoge Raad*), 27 January 1961, *Explicator*, NJ 1962, 355, note Hijmans van den Bergh; and Supreme Court (*Hoge Raad*), 25 June 1965, *Televizier*, NJ 1966, 116, note Hijmans van den Bergh. See also Supreme Court (*Hoge Raad*) 25 June 1965, NJ 1966, 116 (*Televizier*), Supreme Court (*Hoge Raad*) 8 February 2002, NJ 2002, 515 (EP Controls/Regulateurs) and Supreme Court (*Hoge Raad*) 22 March 2002, NJ 2003, 149 (El Cheapo)

## Speech

Different genres of speech may qualify as a copyrighted work if they pass the originality test. This includes lectures, declamations, set speeches, recitations, sermons, addresses, statements at press conferences, and interviews. Article 10(1) of the Copyright Act explicitly names as works ‘mondelinge voordrachten’, literally translated ‘oral recitations’. Most genres of speech for which copyright seems relevant involve preparations, often in written form. The actual delivery amounts to a rendering of a pre-existing work. But an address, talk, interview or other type may also be impromptu, spontaneous speech. By itself, the fact that speech is *ex tempore* is no reason to refuse copyright protection, in the same vein that a musical improvisation can constitute a work.

There is not much case law that specifically deals with speech. Courts have accepted copyright claimed in notes dictated by a lecturer to students during class,<sup>2</sup> in structured interviews, even in (semi-structured) conversations.<sup>3</sup> A recurring question with interviews and by extension any speech genre involving conversation/discussion is who qualifies as author. Depending on the extent to which the interviewer guides the respondent and, accordingly, gives form and substance to the dialogue, the copyright in the interview can be owned by the interviewer, the respondent or the interviewer and the respondent jointly.<sup>4</sup> A much more difficult question is where the boundaries lie between speech as protected work and communication which attracts no exclusive rights. The most recent Supreme Court case in the Netherlands which provides at least some answers, albeit controversial, is the *Endstra* case.<sup>5</sup>

The *Endstra* case dealt with the question of whether copyright subsists in (transcripts of taped) conversations. These conversations took place during a series of secret meetings between police officers and Endstra, a real estate broker who was later murdered. The police asked some questions but predominantly listened to Endstra talking of his dealings with a suspected criminal. The tapes were transcribed into official police reports, a copy of which found its way to crime reporters who published the transcripts with minor edits in a book. The sons of the murdered businessmen sought to stop publication by claiming copyright in the conversations.

Both the District Court and the Court of Appeal dismissed the claim because the conversations did not amount to an original work. The Court of Appeal applied the criteria that for a work to be protected it must have ‘own, individual character’ and ‘bear the personal stamp of the author’. It held that it is implicit from the latter that the author has conceived of the work as a coherent creation. The nature of the conversations was more that of an ‘oral transfer of spontaneous matter-of-fact information.’ Since Endstra had not consciously phrased his answers in certain form, or intended to produce an intellectual creation, there was no work. The Supreme Court read the Court of Appeals decision as setting a requirement of intent on the part of the author, with respect to creating a work, the creative choices made and the form chosen. For this reason the judgment was quashed.

The Supreme Court held that the ‘own, original character’ and ‘personal stamp’ must be evident from the work itself. This is why the Court clarified it cannot be a separate requirement that the author has *set out* to create a work, or made *conscious* creative choices, which it added would be difficult to prove for the author. The Court further added that excluded from copyright at any rate is anything that has a form so ordinary or trivial, that it does not point to any type of creative labour of any kind being involved.

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<sup>2</sup> District court (*Rechtbank*) 's-Gravenhage, 29 March 1967, *Tan Ping Lam v. Albers*, LJN: AB6313, *NJ* 1967, 481.

<sup>3</sup> District court (*Rechtbank*) Amsterdam, 13 December 1978, *De Groot v. NOS*, *AMR* 1981, p. 12, note D.W.F. Verkade.

<sup>4</sup> J.H. Spoor, D.W.F. Verkade & D.J.G. Visser, *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*, 3rd ed., *Recht en praktijk* 42 (Deventer: Kluwer, 2005), p. 99.

<sup>5</sup> Supreme Court (*Hoge Raad*), 30 May 2008, *Zonen Endstra v. Nieuw Amsterdam*, LJN: BC2153, *NJ* 2008, 556, note E.J. Dommering.

The Endstra case does not imply that all ‘spontaneous’ oral communication, or indeed prepared speech is copyright protected.<sup>6</sup> It leaves rather open how to deal with the large ‘grey area’ of speech which is not ordinary or trivial (e.g. ordering bread at the bakery), but does not obviously involve creative labour either. The Supreme Court has been criticized for focusing exclusively on the originality criterion, and not taking into account that the ‘work’ concept and its limitation to the literary, artistic and scientific domains also plays a role in separating protected communication from ‘free’ human communication (or other activity for that matter).<sup>7</sup>

1.2 For short works – headlines in a newspaper, phrases (including slogans), book titles, for example; are these covered by statute? Does case-law provide guidance on protection? Is this issue dealt with by de minimis rules? [In the EU discuss Infopaq and how the case is accommodated in national law].

The length of a production is as such not a criterion for protection, but obviously for short works it may be difficult to show the required ‘own, original character’ and ‘personal stamp of the author’.<sup>8</sup> There are several judgements, mainly from lower courts, about the copyrightability of titles, slogans and (single) words. These decisions do not make for a consistent picture. Courts have granted copyright to titles and slogans that to the casual observer may appear rather simple and straightforward.<sup>9</sup> In other cases, copyright has been refused to apparently similar titles or slogans for the reason that they lack sufficient originality.<sup>10</sup>

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<sup>6</sup> See e.g. protection denied to witness statements made in course of investigation into airplane crash: District court in summary proceedings (*Vzr. Rechtbank*) ’s-Hertogenbosch, 6 November 2009, *Eisers v. Matheeuwsen (Boek Herculesramp)*, LJN: BK2290, *AMI* 2010-3, nr. 11, note N. van Lingen.

<sup>7</sup> See e.g. P.B. Hugenholtz, ‘De Endstra-tapes’, annotatie bij Hoge Raad 30 mei 2008, LJN: BC2153 (zonen Endstra / Nieuw Amsterdam), *Ars Aequi*, November 2008, p. 819-822; M.R.F. Senfleben, *AMI* 2008-5, p. 139-142; E.J. Dommering, *Nederlandse Jurisprudentie*, 2008-556.

<sup>8</sup> Spoor, Verkade & Visser 2005, *op. cit.*, p. 118-119.

<sup>9</sup> See e.g. District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 29 March 1946, *Ik zie, ik zie wat jij niet ziet, NJ* 1947, 73; District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 26 March 1954, *De dokter en het lichte meisje*, published in E. Bogaart, *Titelbescherming* (Amsterdam: De Geïllustreerde Pers, 1960), p. 30; District court (*Rechtbank*) ’s-Gravenhage, 5 July 1968, *ESO v. Novaline (Bevrijdt uw auto – vliegensvlug – van vastgevlagen insecten)*, LJN: AB7048, *NJ* 1969, 67; District court (*Rechtbank*) Amsterdam, 4 July 1979, *Hoe sterk is de eenzame fietser*, *AMR* 1980, p. 12; Court of Appeal (*Hof*) Leeuwarden, 14 January 1981, *Bakken in de koelkast*, *BIE* 1982, nr. 82, p. 243; District court in summary proceedings (*Pres. Rechtbank*) Utrecht, 16 April 1982, *Verzamelen is ook een kunst*, *AMR* 1982, p. 84; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 20 December 1983, *BMW maakt autorijden geweldig*, *AMR* 1985, p. 74; District court (*Rechtbank*) Amsterdam, 2 January 1985, *Te vinden bij Inden*, *AMR* 1985, p. 74; District court (*Rechtbank*) Rotterdam, 4 April 1986, *Mölnlycke v. Vergalex*, *BIE* 1990, nr. 54, p. 175; Court of Appeal (*Hof*) Amsterdam, 29 October 1987, *Meer dan schilderen alleen*, *BIE* 1990, nr. 7, p. 19; Subdistrict court (*Kantonrechter*) Nijmegen, 17 July 1987, *Sla de plank niet mis*, *IER* 1987, nr. 55, p. 109; Subdistrict court (*Kantonrechter*) Tilburg, 7 January 1988, *Eindelijk een drankje dat nergens op lijkt*, *BIE* 1989, nr. 7, p. 19; and District court in summary proceedings (*Vzr. Rechtbank*) Haarlem, 21 May 2002, *De Echte Bakker (Echt ... je proeft het)*, LJN: AE3263, *IER* 2002, nr. 40, p. 246.

<sup>10</sup> See e.g. District court in summary proceedings (*Pres. Rechtbank*) Rotterdam, 24 June 1969, *7 Day Beauty Plan*, *BIE* 1971, nr. 108, p. 345; District court (*Rechtbank*) Amsterdam, 2 May 1974, *De Schuilplaats*, LJN: AB6835, *NJ* 1974, 474; District court in summary proceedings (*Pres. Rechtbank*) Breda, 8 February 1977, *Victoria Bronwater lest best*, *BIE* 1978, nr. 1, p. 5; District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 19 April 1979, *Keramische siertegel*, *BIE* 1979, nr. 45, p. 242; District court in summary proceedings (*Pres. Rechtbank*) Utrecht, 6 January 1983, *Kijk op calorieën en joules*, *BIE* 1983, nr. 63, p. 176; District court in summary proceedings (*Pres. Rechtbank*) Rotterdam, 26 January 1983, *Compactluiers*, *BIE* 1984, nr. 43, p. 145; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 20 January 1986, *Het veld van eer*, *IER* 1986, nr. 10, p. 34; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 17 February 1989, *Rock Ballads*, *BIE* 1989, nr. 70, p. 232; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 23 February 1990, *We gaan naar Rome*, *BIE* 1991, nr. 51, p. 194; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 29 May 1990, *The Businessman’s First Choice*, *IER* 1990, nr. 52, p. 106, note S. de Wit; District court in summary proceedings (*Pres. Rechtbank*) Arnhem, 24 December 1992, *Felix v. Loesje*, *IER* 1993, nr. 13, p. 56; Court of Appeal (*Hof*) ’s-Hertogenbosch, 22 March 1995, *Osram v. Ormalight (In het licht van de toekomst)*, *KG* 1995, 193; District court (*Rechtbank*) Amsterdam, 10 May 1995, *Drie dwaze dagen*, *AMI* 1995, p. 177; District court (*Rechtbank*) Amsterdam, 18 November 1998, *Terug naar de kust*, *AMI* 1999, p. 66, note J.F. Haeck; District court in summary proceedings (*Pres. Rechtbank*) ’s-Gravenhage, 26 May 1999, *Ik ben KPN*, *BIE* 1999, nr. 113, p. 450; District court (*Rechtbank*) ’s-Gravenhage, 4 October 2000, *Tripp Tripp stoel*, *IER* 2000, nr. 67, p. 319; District court in summary proceedings (*Pres. Rechtbank*) ’s-

Whether copyright is conferred on a title or slogan depends on the degree of originality, as established by its (non-obvious) combination of words, the play of words which puts an existing phrase in a new light, and the association that the title or slogan brings to mind.<sup>11</sup> A title or slogan is not original if it consists of, or includes, common (pre-existing) expressions and sayings.<sup>12</sup> Courts may also take account of the wider context: e.g., the coherence between a title and the work of which it is part,<sup>13</sup> the context in which a slogan is used, the public's perception of it,<sup>14</sup> and its function (e.g., whether the slogan makes an informative or descriptive claim for a good or service).<sup>15</sup> Whether the Supreme Courts' insistence that the originality must be evident from the work itself (in the 2008 Endstra case) will change how lower courts deal with short works is unclear. Caselaw so far shows that the decision to qualify a slogan or title as work is very case-specific and not made on the basis of consistent or uniform standards.

Although some legal commentators suggest that neologisms and words that are written in a specific, unusual and, therefore, original manner may perhaps receive protection under Dutch copyright law,<sup>16</sup> case law reveals that protection is not easily conferred on single words.<sup>17</sup> The courts either reason that

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Gravenhage, 3 July 2001, *Vinden zonder zoeken*, IER 2001, nr. 51, p. 285; District court in summary proceedings (*Vzr. Rechtbank*) Amsterdam, 10 June 2002, *No meat today*, IER 2002, nr. 41, p. 249; District court in summary proceedings (*Vzr. Rechtbank*) Amsterdam, 10 October 2002, *The world's local brewer*, IER 2003, nr. 4, p. 30; and District court in summary proceedings (*Vzr. Rechtbank*) Utrecht, 16 August 2005, *Twynstra c.s. v. Capgemini (Anders denken, gewoon doen)*, AMI 2005, nr. 19, p. 215.

<sup>11</sup> See e.g. District court (*Rechtbank*) Amsterdam, 2 January 1985, *Te vinden bij Inden*, AMR 1985, p. 74; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 20 January 1986, *Het veld van eer*, IER 1986, nr. 10, p. 34; Subdistrict court (*Kantonrechter*) Tilburg, 7 January 1988, *Eindelijk een drankje dat nergens op lijkt*, BIE 1989, nr. 7, p. 19; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 17 February 1989, *Rock Ballads*, BIE 1989, nr. 70, p. 232; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 29 May 1990, *The Businessman's First Choice*, IER 1990, nr. 52, p. 106, note S. de Wit; District court in summary proceedings (*Vzr. Rechtbank*) Amsterdam, 10 October 2002, *The world's local brewer*, IER 2003, nr. 4, p. 30; and District court in summary proceedings (*Vzr. Rechtbank*) Utrecht, 16 August 2005, *Twynstra c.s. v. Capgemini (Anders denken, gewoon doen)*, AMI 2005, nr. 19, p. 215.

<sup>12</sup> See e.g. District court in summary proceedings (*Pres. Rechtbank*) Breda, 8 February 1977, *Victoria Bronwater lest best*, BIE 1978, nr. 1, p. 5; District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 19 April 1979, *Keramische siertegel*, BIE 1979, nr. 45, p. 242; District court in summary proceedings (*Pres. Rechtbank*) Haarlem, 23 February 1990, *We gaan naar Rome*, BIE 1991, nr. 51, p. 194; and District court in summary proceedings (*Pres. Rechtbank*) Arnhem, 24 December 1992, *Felix v. Loesje*, IER 1993, nr. 13, p. 56.

<sup>13</sup> See e.g. District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 26 March 1954, *De dokter en het lichte meisje*, published in E. Bogaart, *Titelbescherming* (Amsterdam: De Geillustreerde Pers, 1960), p. 30; District court (*Rechtbank*) Amsterdam, 4 July 1979, *Hoe sterk is de eenzame fietser*, AMR 1980, p. 12; District court in summary proceedings (*Pres. Rechtbank*) Utrecht, 16 April 1982, *Verzamelen is ook een kunst*, AMR 1982, p. 84; and District court (*Rechtbank*) Amsterdam, 18 November 1998, *Terug naar de kust*, AMI 1999, p. 66, note J.F. Haeck.

<sup>14</sup> See e.g. District court (*Rechtbank*) 's-Gravenhage, 5 July 1968, *ESO v. Novaline (Bevrijdt uw auto – vliegensvlug – van vastgevlagen insecten)*, LJN: AB7048, NJ 1969, 67; Court of Appeal (Hof) Amsterdam, 29 October 1987, *Meer dan schilderen alleen*, BIE 1990, nr. 7, p. 19; Subdistrict court (*Kantonrechter*) Nijmegen, 17 July 1987, *Sla de plank niet mis*, IER 1987, nr. 55, p. 109; and District court (*Rechtbank*) Amsterdam, 10 May 1995, *Drie dwaze dagen*, AMI 1995, p. 177. But see District court in summary proceedings (*Vzr. Rechtbank*) Utrecht, 16 August 2005, *Twynstra c.s. v. Capgemini (Anders denken, gewoon doen)*, AMI 2005, nr. 19, p. 215.

<sup>15</sup> See e.g. District court in summary proceedings (*Pres. Rechtbank*) Rotterdam, 26 January 1983, *Compactluiers*, BIE 1984, nr. 43, p. 145; District court (*Rechtbank*) 's-Gravenhage, 4 October 2000, *Tripp Trapp stoel*, IER 2000, nr. 67, p. 319; and District court in summary proceedings (*Vzr. Rechtbank*) Amsterdam, 10 June 2002, *No meat today*, IER 2002, nr. 41, p. 249.

<sup>16</sup> See e.g. Spoor, Verkade & Visser 2005, *op. cit.*, p. 118.

<sup>17</sup> See District court in summary proceedings (*Vzr. Rechtbank*) Utrecht, 3 February 2004, *Kolk c.s. v. Ernens*, AMI 2004-2, p. 86, recognizing copyright protection in the word 'SIngle' in the specific way in which the word is written, namely with the number '1' replacing the letter 'i'. However, in the ensuing judgment on the merits of the case, the Court ruled that the word 'SIngle' does not have an 'own, original character' and therefore does not qualify for copyright protection. See District court (*Rechtbank*) Utrecht, 18 January 2006, *SIngle*, LJN: AV0068, BIE 2006, nr. 85, p. 431.

copyright does not extend to names and single words,<sup>18</sup> or hold that the word is not original enough to qualify for protection.<sup>19</sup>

The existing Dutch case law on the copyrightability of titles, slogans and words seems consistent with the CJEU's judgement in the *Infopaq* case.<sup>20</sup> Note however that this ruling was not so much about whether short works are by themselves protected by copyright, but rather about the question<sup>21</sup> of whether copying a sentence or 11 word sequence from a newspaper article constitutes a reproduction (in part) of that article within the meaning of art. 2 Information Society Directive.

In that context, the CJEU emphasizes that to be protected a work must be 'original in the sense that it is its author's own intellectual creation'. It was not in dispute that newspaper articles constitute literary works. The originality of such articles lies 'in the form, the manner in which the subject is presented and the linguistic expression. [...] Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation. Words as such do not, therefore, constitute elements covered by the protection.'<sup>22</sup>

There is reproduction in part when the text copied 'contains an element of the work which, as such, expresses the author's own intellectual creation'.<sup>23</sup> The copying of 11 words of a newspaper article could therefore in exceptional cases constitute a reproduction within the meaning of art. 2 Information Society Directive: 'the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive'.

That single words are not protected against copying is as we have seen commonly accepted by courts (and doctrine) in the Netherlands, although newly 'invented' words could potentially attract copyright. Whether the originality criterion established by the Dutch Supreme Court is in line with the originality criterion introduced by the CJEU, is discussed in point 2.1).

### 1.3 How does your legislation define an artistic work? A closed and defined list of works? Open-ended definitions for greater flexibility?

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<sup>18</sup> See e.g. District court (*Rechtbank*) 's-Gravenhage, 7 April 1959, *Sjors van de Rebellenclub*, NJ 1962, 149; District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 19 January 1961, *Twen*, NJ 1961, 181, *BIE* 1961, nr. 45, p. 111; District court in summary proceedings (*Pres. Rechtbank*) Zwolle, 3 June 1982, *Bakkerskwaliteit*, *BIE* 1984, nr. 7, p. 26.

<sup>19</sup> See e.g. District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, 18 October 1979, *Spaarbank Rotterdam v. ABN (Junior Sparen en Junior Spaarrekening)*, *BIE* 1980, nr. 47, p. 176; District court in summary proceedings (*Pres. Rechtbank*) Zwolle, 3 June 1982, *Bakkerskwaliteit*, *BIE* 1984, nr. 7, p. 26; Court of Appeal (*Hof*) Amsterdam, 26 November 1987, *Raymond Leduc*, *BIE* 1989, nr. 3, p. 10; District court in summary proceedings (*Pres. Rechtbank*) Zwolle, 3 June 1996, *Flevonet*, *IER* 1997, nr. 9, p. 30; District court in summary proceedings (*Pres. Rechtbank*) Assen, 11 January 2001, *Actium v. Woonconcept (Wonerije)*, LJN: AA9426, *AMI* 2001, p. 44.

<sup>20</sup> Court of Justice of the EU, judgment of 16 July 2009, *Infopaq International A/S v. Danske Dagblades Forening* (case C-5/08), *ECR* 2009 I, p. 6569.

<sup>21</sup> The second question was: if there is reproduction, is it exempt under art. 5(1) Information Society Directive.

<sup>22</sup> *Ibid.*, paras 37 and 44 to 46.

<sup>23</sup> *Ibid.*, para 48.

What has been said above about categories of works also applies to works of art. Article 10 of the Dutch Copyright Act does not distinguish between productions in the literary, scientific or artistic domains, but contains an open-ended definition of the subject matter of copyright, which is accompanied by a non-exhaustive list of categories of works (see the general remarks at point 1.1). Genres explicitly listed include drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like; as well as photographic and cinematographic works.

1.4 Have court decisions provided any rulings on the availability of copyright protection for contemporary forms or types of artistic expression e.g.

- Surveillance art, installations, collage.
- Performance art.
- Conceptual art

In the Netherlands, case law on copyright protection for contemporary art forms is sparse. There are a few cases involving moral rights for artistic expression which – directly or indirectly – touch upon the question of the subject matter of protection.<sup>24</sup> Most of these cases have been decided by lower (e.g., first instance) courts, often in summary proceedings.

One case involved a statue commemorating the author of the first Dutch encyclopaedia. The artist had designed and positioned the sculpture so that it pointed to the spot where the vicarage had stood in which the author had written the encyclopaedia. Later a local charity erected a statue, also commemorating the author, at the exact same spot. The artist of the first statute, which now pointed to the second statute, claimed her copyright was infringed. The artist asserted that the imaginary line and the surroundings of the former vicarage formed an essential part of her work of art. The Court however refused protection to these conceptual elements of the work. It held that protection does not extend to ideas and concepts, but only to the form in which these ideas and concepts have been expressed and are perceptible to (human) senses.<sup>25</sup>

In two other cases, the spatial area was considered to be an essential part of the artistic work. The first case concerned a work of minimal art, the elements of which were positioned, according to the artist's vision, at specific, designated places in the front garden of the city hall. The elements were placed in such a way that there was coherence, and even interaction, with the front of the city hall and the main entrance, in particular. For pedestrians walking in the front garden, the artistic work would repeatedly change the view of the city hall. The Court held that, in a spatial composition, the surrounding area is of utmost importance. Only when walking around and in it, the work comes truly alive. If other elements are placed in the same area, it could disturb the visual interplay between the spatial composition and the front of the city hall. Hence, when the municipality decided to place a fountain in front of the main entrance of the city hall, the artist could rightfully invoke his moral right to oppose

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<sup>24</sup> In addition to case law, there are some interesting scholarly writings on the question of availability of copyright protection for (contemporary) art. See e.g. E.J. Dommering, 'Vormen handelend en arbeid een "werk"?' , *Informatierecht/AMI* 1986, nr. 3, p. 72-76, J.J.C. Kabel, 'Beeldende kunst en auteursrecht', in *Kunst en beleid in Nederland*, vol. 5, ed. by H. van Dulken (Amsterdam: Van Gennep, 1991), p. 67-125 and J.J.C. Kabel, 'Auteursrechtelijke grenzen aan de vrijheid van de beeldende kunstenaar', in *Hoe vrij is kunst?*, ed. by T. Pronk & G.A.I. Schuijt (Amsterdam: Otto Cramwinckel, 1992), p. 68-86.

<sup>25</sup> District court in summary proceedings (*Pres. Rechtbank*) Groningen, 20 October 1993, *Chiffrun v. Rotary*, *AMI* 1994, p. 114. See also District court (*Rechtbank*) 's-Hertogenbosch, 31 maart 1977, *Arons v. Gemeente Helmond*, *NJ* 1977, 479 (denying copyright to a scheme for painting the hall of a meeting place as a circus tent, because the form of the scheme lacks sufficient determination) and District court in summary proceedings (*Pres. Rechtbank*) Amsterdam, *Henneman v. McCann-Erikson*, *BIE* 1980, nr. 25, p. 98, note D.W.F. Verkade (finding no infringement in an artistic work for which similar pencil techniques and shadow effects and a comparable theme was used, because copyright does not prevent an artist from getting inspiration from, or incorporating elements of style and form, from another artist in a new creation).

any distortion, mutilation or other impairment of the work that could be prejudicial to his name, reputation or dignity.<sup>26</sup>

The other case concerned the artist Peter Struycken's light art in the arcade under the newly constructed building of the Dutch Institute of Architecture (NAI) in Rotterdam. The artwork was specifically designed for the arcade. It consists of a computer operated light system that causes the grey concrete pillars of the curved arcade to be lit in a temporal and spatial continuously changing composition of colours. Without consulting Struycken, paintings were temporarily hung on the pillars in the context of a new exhibition. Struycken claimed infringement of his copyright, stating that the visual effect of his work of light art was distorted by the paintings on the pillars. The Court accepted this claim, arguing that the projection of the coloured light on the colour-neutral concrete pillars of the arcade was essential for achieving the desired effect of Struycken's light composition.<sup>27</sup>

For the remainder, there is – to our knowledge – no other case law on surveillance art, installations, collage, performance art or conceptual art.<sup>28</sup> Whether this indicates that there are few conflicts over such art, or that there are reasons why disputes that do arise do not end up in court, is difficult to say without further analysis. It could be that for example, in art forms that focus on the ephemeral or that value ideas above their execution and/or that seek to criticize the commercialisation of art (e.g., some types of land art), the artist may have no desire to claim -let alone enforce- copyright.

#### 1.5 Are there any judicial decisions/ academic opinions on other forms of expression, whether protected or not (e.g. Perfumes)?

The most striking recent cases in the Netherlands about copyrightable subject-matter concern perfumes, kinetic schemes, and the Endstra case (on conversations) already described above.

##### *Perfumes*

In 2006, in the *Kecofa v. Lancôme* case, the Supreme Court ruled that the scent of a perfume can be a work in the meaning of the Dutch Copyright Act. It emphasized that the definition of 'work' in article 10 of the Act is put in general wording and does not exclude scents. In the opinion of the court, the scent is the work and has to be distinguished from the mixture of substances of which a perfume is composed. According to the Court, a scent can be protected if it is perceptible to the human senses (i.e. olfactory senses), has an own, individual character and bears the personal stamp of the author. The Court argued that scents are copyrightable, irrespective of the fact that the human olfactory organs have a limited ability to distinguish scents, that the degree to which separate scents can be distinguished differs from one person to the other and that, due to the specific nature of scents, not all provisions and restrictions of the Copyright Act can apply (e.g., the right owner's permission would not be required to wear a perfume even if the person wearing it thus 'disseminates' the protected scent).<sup>29</sup>

##### *Technical information / Know how*

In the same year, the Supreme Court was asked to rule about the copyrightability of a kinetic scheme, i.e. a schematic representation of certain chemical reactions. In this case the (longstanding) dispute concerned the use of a kinetic scheme which lies at the heart of software used in the production process of ethylene and propylene in the petrochemical industry. That copyright exists in the software

<sup>26</sup> Court of Appeal (*Hof*) 's-Hertogenbosch, 24 February 1993, *Gemeente Eijsden v. Devens*, AMI 1994, p. 116.

<sup>27</sup> District court in summary proceedings (*Pres. Rechtbank*) Rotterdam, 10 September 1998, *Struycken v. NAI*, IER 1999, nr. 3, p. 22, note J.J.C. Kabel.

<sup>28</sup> A tangentially related decision worth mentioning is here Court of Appeal Amsterdam, 9 December 1999, *Top Scan v. Sound Machine*, BIE 2001, No. 87, p. 415 (design and 'windmill motion' of fairground attracting not considered original work for lack of personal stamp).

<sup>29</sup> Supreme Court (*Hoge Raad*), 16 June 2006, *Kecofa v. Lancôme*, LJN: AU8940, NJ 2006, 585, note J.H. Spoor, at 3.3.2.

was not an issue before the Supreme Court. The question before it was whether the Court of Appeal had applied the correct test in its determination that the kinetic scheme itself did not constitute a work.

The kinetic scheme consisted of a collection of chemical reaction equations and represents their interaction. According to the Court, these elements by themselves are ‘objective, scientific facts’ and cannot be copyrighted. The Supreme Court held that the Court of Appeal was right in assessing whether the selection of the equations for the scheme, out of all possible chemical reactions, constituted an individual, original character, bearing the personal stamp of the author. This requirement can be met even though the selection is based on scientific or technical knowledge, insight and experience; concerns objective scientific data and laws; and aims to achieve scientific or technological objectives. The Court of Appeal did not adequately motivate why the originality criterion was not met. The Supreme Court points to the testimony of the actual scientist who co-developed the scheme, in which it sees the strong potential that the selection was the result of the personal vision of the authors, a vision based on experience and analytical skills.<sup>30</sup> The decision of the Supreme Court has been criticized in legal literature for resulting in the overbroad protection of (industrial) know-how through copyright.<sup>31</sup> According to other commentators<sup>32</sup> however the Supreme Court’s holding should be narrowly construed in the light of the facts and procedure of the case, and does not imply a general recognition of ‘technical works’ as subject matter protected under copyright.<sup>33</sup>

1.6 Is there case-law related to the protection of sporting events (soccer game, marathon race, ice skating competition, etc.)? What is the basis of the protection? (dramatic or choreographic work, other?)

In the Netherlands, sports events as such are not protected by copyright or related rights. This does not seem to exclude the possibility that in sports that involve choreography, like gymnastics competitions, figure skating or synchronized swimming, individual routines are copyrighted as choreographies.

A guiding decision is *Nautic/Decca*, in which the Supreme Court elaborated what is known as the ‘negative reflex effect’ of statutory intellectual property rights. Profiting from someone else’s achievements or investments<sup>34</sup> is in principle not an act of unfair competition (i.e. a tort under the general tort provision of 6:162 Dutch Civil Code). At the very least, the achievements in question should be on a par with subject matter which is protected by statutory intellectual property rights. In addition, the special circumstances of the case should warrant protection.<sup>35</sup> It should be noted that the *Nautic/Decca* decision of 1986 predates the introduction of the Act on Neighbouring Rights (WNR 1993).

The Supreme Court has since ruled in two decisions that the organisation of sports events is not an achievement that warrants protection under unfair competition law against profiting by others. Instead, the basis for control over access to and communication of sports events derives from ownership rights in the venue where the event is held (e.g., a soccer stadium), and the ensuing ability

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<sup>30</sup> Supreme Court (*Hoge Raad*), 24 February 2006, *Technip v. Goossens*, LJN: AU7508, *NJ* 2007, 37; English translation in: *IIC* 2007, 615-622.

<sup>31</sup> A.A. Quaedvlieg, Case Comment *Technip v. Goossens*, *AMI* 2006, p. 155; see also P.B. Hugenholtz, *Auteursrecht op Alles*, *NJB* 2008, 7.

<sup>32</sup> M. de Cock Buning & E.J. Numann, ‘De gestage wildgroei van het auteursrecht. Een hogesnelheidstrein dreigt te ontsporen’, in D.J.G. Visser & D.W.F. Verkade (eds.), *Spoorbundel*, Amsterdam: DeLex, 2007.

<sup>33</sup> See e.g. Supreme Court (*Hoge Raad*), 16 June 2006, *Kecofa v. Lancôme*, LJN: AU8940, *NJ* 2006, 585 (categorically excluding technical features [of perfume] from copyright protection).

<sup>34</sup> The copying of products/services which are not protected by an intellectual property right can in certain circumstances be tortious if it causes confusion with the relevant public as to the origins of the products.

<sup>35</sup> See e.g. Supreme Court (*Hoge Raad*), 27 June 1986, *Holland Nautic v. Decca*, LJN: AD7158, *NJ* 1987, 191, note E.A. Nieuwenhoven Helbach.

to regulate access through contracts.<sup>36</sup> The broadcasting of sports events as well as their first fixation on film is protected by articles 7a and 8 of the Dutch Neighbouring Rights Act of 1993.

## 2. Creativity – the Originality Standard

### 2.1 How does your legislation set out the requisite originality standard?

As has been set out above (point 1.1), the Dutch Copyright Act does not contain an explicit requirement of originality. However, it is settled case law that only original works are eligible for copyright protection. Over time, the Supreme Court has used different terms to describe the originality test. In recent years the Supreme Court uses a composite test: a work must have an ‘own, original character’ and ‘bear the personal stamp of the author’.<sup>37</sup> In the *Endstra* case, it clarified that the first means ‘the form may not be derived from another work’. The work must be discernible from other works and not have been copied. Novelty is not a requirement.<sup>38</sup> The requirement that the production must ‘bear the personal stamp of the maker’ means ‘that the form must be a result of creative human labour and thus of creative choices, so that it is a production of the human mind.’<sup>39</sup>

The required level of creativity is not high. In *Endstra*, the Supreme Court held that ‘excluded at any rate is anything that has a form so common or trivial, that it does not point to any type of creative labour of any kind.’ Such absence of creative labour is not readily assumed, for a variety of productions. Dutch courts have accepted copyright in the already mentioned kinetic scheme (see point 1.5),<sup>40</sup> but also inter alia in passport photographs, striped wallpaper, the design of simple games like ‘four in a row’ and designs for basic holiday homes.<sup>41</sup>

Courts do not seem to regard the originality test as developed by Dutch courts to be at odds with the CJEU’s decision in *Infopaq*.<sup>42</sup> As in other jurisdictions, opinions differ as to whether *Infopaq* actually harmonizes the originality criterion for all works.<sup>43</sup>

### 2.2 Does the legislation or case-law suggest a different test of originality is imposed for different kinds of work?

Despite forceful arguments made in Dutch scholarly literature in favour of ‘tailored’ copyright protection,<sup>44</sup> it is generally assumed that the same originality criterion is to be applied to all work

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<sup>36</sup> Supreme Court (*Hoge Raad*), 23 October 1987, *NOS v. KNVB*, LJN: AD0055, *NJ* 1988, 310, note L. Wichers Hoeth; and Supreme Court (*Hoge Raad*), 23 May 2003, *KNVB v. Feyenoord*, LJN: AF4607, *NJ* 2003, 494.

<sup>37</sup> Supreme Court (*Hoge Raad*) 4 January 1991, *Van Dale v. Romme*, *NJ* 1991, 608.

<sup>38</sup> Supreme Court (*Hoge Raad*), 16 June 2006, *Kecofa v. Lancôme*, LJN: AU8940, *NJ* 2006, 585, note J.H. Spoor, at 3.4.2.

<sup>39</sup> Supreme Court (*Hoge Raad*), 30 May 2008, *Zonen Endstra v. Nieuw Amsterdam*, LJN: BC2153, *NJ* 2008, 556, note E.J. Dommering.

<sup>40</sup> Court of Appeal (*Hof*) Den Haag 28 September 2010, B9 9121 / LJN: BN8795 (*Mol/Technip*).

<sup>41</sup> *Ktr Haarlem*, 07 July 2010, LJN: BN0985 (pass port photograph), District Court (*Rb.*) Den Haag 6 March 2009, KG ZA 08-1667 (striped wall paper); Supreme Court (*Hoge Raad*) 29 June 2001, *NJ* 2001, 602 (*Impag/Hasbro*); Supreme Court (*Hoge Raad*) 8 September 2006, *NJ* 2006, 493 (*Timans/Haarsma en Agricola*).

<sup>42</sup> References to *Infopaq* are still sparse, but include Court of Appeal (*Hof*) Den Haag 22 December 2009, LJN: BL2812; the Advocate General in his opinion on Supreme Court (*Hoge Raad*), 29 January 2010, *Gavita v. Puutarhaliike Helle*, LJN: BK1599, *RvdW* 2010, 223; District Court Arnhem 25 March 2009, *De Rode Roos*, LJN: BI0225.

<sup>43</sup> See K.J. Koelman, Case comment in *AMI* 2009, p. 198-205, D. Visser, *Endstra ingehaald door Infopaq. Auteursrechtelijke beschermingsdempel Europees geharmoniseerd*, <http://www.boek9.nl/index.php?/Elf+woorden+////23217/>.

<sup>44</sup> F.W. Grosheide, *Auteursrecht op maat*, Deventer: Kluwer 1986.

genres.<sup>45</sup> However, no systematic analysis of case law has been made to see if in practice application of the originality test by courts reflects different standards for certain genres of works. Obviously, when applying the originality test, courts assess what creative choices are available to the author within the restraints of genre. The more a work has to meet functional or technical needs (e.g. industrial design, topographic map, scientific article), the less creative freedom its author has.

In their analyses courts tend to make a distinction between ‘objective’ and ‘subjective’ characteristics of an (alleged) work. Choices which are completely or largely dictated by the need to achieve a certain technical or functional effect result in ‘objective’ characteristics which do not count towards the required level of originality. The ‘subjective’ characteristics are those that reflect the personal tastes, views, habits or preferences of the author.<sup>46</sup> Whether the originality requirement is met depends on whether the author had enough ‘creative space’ (and used it so that the work shows sufficient subjective characteristics). As is evident from the Technip case discussed above, personal views (and presumably habits, preferences and tastes) can also arise from the author’s (professional) expertise and experience. This implies that ‘skill’ is a relevant factor.

2.3 For compilations / collections is the standard identical to that provided for in relation to works? [For common law jurisdictions there are significant differences on the standard e.g. IceTV (Aust) CCH (Canada). How has “sweat of the brow” been treated in recent case-law?]

The standard for normal copyright protection also applies to collections of works (explicitly mentioned in art. (10(2) Copyright act). Because of the nature of collections, the focus in applying the originality criterion tends to be on whether the selection of the materials involved creative choices, i.e. choices not largely dictated by functional or technical demands. That collections of data also fall within the scope of the Copyright Act had previously been argued, and was first confirmed by the Supreme Court in the *Van Dale/Romme* case. The issue there was whether a collection of words (some 100.000 entries of a dictionary) constituted an original work. The Supreme Court ruled it could, in this particular case if the selection (of words which individually are public domain) can be said to express a personal view of the author(s).<sup>47</sup>

2.4 Does your legislation/case law recognise copyright protection for collections such as television listings, yellow pages/white pages telephone directories? If yes, what is protected (headings, content, or both?) If not, why is protection denied (e.g. spin-off theory, competition law considerations).

As was set out above (point 1.1-1.2) there are three ways in which a collection of data or compilation may be protected. The first is through ‘normal’ copyright, if the database meets the relevant substantive criteria. The second is through the sui generis database right, which was introduced in Dutch law with the Databankenwet 1996 (Databases Act). The third is through the ‘non-original’ or ‘impersonal writings’ protection.

#### *Sui generis database right*

With regard to the sui generis database rights, Dutch courts routinely refer in their decisions to the relevant judgments of the CJEU, esp. the *William Hill* and to a lesser extent the *Fixtures Marketing*

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<sup>45</sup> Under the (old) Benelux Design Act, courts used to set a higher standard of originality for (concurrent) copyright protection because the wording of the Design Act implied that only designs of a ‘clearly artistic’ character could attract copyright. The Supreme Court ruled in *Screenprints/Citroen* that no higher standards should be set for designs (Supreme Court 29 November 1985, NJ 1987, 880).

<sup>46</sup> See Advocate General in Supreme Court (*Hoge Raad*), 29 January 2010, *Gavita v. Puutarhaliike Helle*, LJN: BK1599, RvdW 2010, 223. The issue was whether copyright exists in the design of light fittings for (professional) greenhouses.

<sup>47</sup> See i.a. Spoor/Verkade/Visser, *Auteursrecht*, p. 62, 136; A. Beunen, *Protection for Databases*, p. 77-78.

cases.<sup>48</sup> Before the CJEU delivered its first judgments on the Database directive, controversy existed in the Netherlands on the question which type of investment counts towards the required ‘substantial investment in either the obtaining, verification or presentation of the contents’ (art. 7(1) Database Directive). Opinion varied –among courts and legal scholars alike- as to whether only those costs should be counted that were primarily directed towards obtaining data. It was argued that when data are created as result of an (economic) activity, such as organising a football competition (resulting in fixtures) or offering telephone services (resulting in data on customers/phone numbers), the costs associated with the creation of such ‘raw data’ should not count towards the ‘substantial investment.’<sup>49</sup> Only costs that can be directly attributed to the production of a database should be taken into account.<sup>50</sup> Controversy has died down a little since the William Hill and Fixtures judgments were handed down by the ECJ in 2004. These provided at least a partial answer, by clarifying that investments in the ‘creation’ of data (e.g. organising a football competition which of necessity produces fixtures) do not count towards the required substantial investment. Dutch courts seem to be satisfied with relatively modest levels of investment.<sup>51</sup>

### *Non original writings*

The Explanatory Memorandum to the Dutch Databases Act explicitly mentions the possibility that collections of data that do not qualify for copyright protection (because they are not original works) or for sui generis database right protection (because the substantial investment requirement is not met) can still be protected under ‘non original writings protection’ (see 1.1). Legal scholars have argued that maintaining *geschriftenbescherming* for such collections amounts to an incomplete implementation of the Database directive.<sup>52</sup> The District Court in Utrecht recently appeared inclined to share that view, when it held that an interpretation of Dutch law in keeping with the Database directive would amount to handing down a contra legem decision.<sup>53</sup>

Claims by public broadcasters seeking protection for TV listings of their programs have been at the center of older Dutch case law on non-original writings protection for collections of data. See cases listed in point 1.1, in which the Supreme Court ruled that TV listings were protected as non-original writings. The position of broadcasters was strengthened by a provision in the Dutch Media Act (currently art. 2.140). It presumes that whoever reproduces or communicates data concerning tv programmes produced by or for public broadcasters infringes the broadcasters copyright, unless the user can show the data were acquired from another source, or has a license.<sup>54</sup>

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<sup>48</sup> Case C-203/02, ECR 2004, I-10145; Cases C-46/02, ECR 2004, I-10365; C-338/02, ECR 2004, I-10497 and C-444/02, ECR 2004, I-10549.

<sup>49</sup> For a discussion of early case law and doctrine, see A. Beunen, Protection for Databases (2007), p. 105-116.

<sup>50</sup> See eg. Mark. J. Davidson & Bernt Hugenholtz, Football fixtures, horse races and spin-offs: the ECJ domesticates the database right, EIPR 2005/3.

<sup>51</sup> E.g. List of 50 hyperlinks suffices (Pres. District Court Amsterdam 19 December 1999, Mediaforum 2000/2. Comment D. Visser; Equivalent of 3 man months of work suffices (Pres. District Court Den Haag (ex parte) 10 June 2009 (AD Misdaardmeter), B9 7959; website with some 15.000 online advertisements for yachts managed through CMS (Pres. District Court (ex parte) Den Haag 2 June 2009 (WorldYacht).

<sup>52</sup> See A. Beunen, Protection for Databases (2007), p. 79-80.

<sup>53</sup> District Court (Rb.) Utrecht 28 July 2010, LJN BN2268. Also questioning compliance of Dutch law with database directive: President District Court Rechtbank Alkmaar, 7 August 2007, LJN: BB1207, AMI 2007-5, Nr. 18 (*Stichting Baas in eigen huis/Plazacasa*).

<sup>54</sup> Recently an advisory Committee on Media policy has advised the relevant Minister to make the licensing of public service broadcasting listings to third parties mandatory. The current Dutch government plans to make tv programme information more readily available to third parties. See Kamerstukken II 2009/10, 31 777, nr.18 (Brief van de Minister van Onderwijs, Cultuur en Wetenschap over het rapport commissie-Brinkman), p. 20 and <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2010/09/30/regeerakkoord-vvd-cda/regeerakkoord-vvd-cda.pdf>>.

### 3. Achieving Access for the visually impaired

- 3.1 Does your national legislation provide exceptions or limitations in favour of the visually impaired? For wider categories of disabled persons? On what condition: is there a remuneration right or right to compensation?
- 3.2 What kind of works are or would be subject to limitations or exceptions? Literary works only? Works and performances fixed in sound recording? Will the visually impaired or other beneficiaries of the exceptions or limitations obtain copies of covered works directly, or only via libraries or other institutions?
- 3.3 Are the exceptions and limitations confined to the reproduction of the work? If making available or adaptation is possible, on what conditions?

The Dutch legislator introduced in article 15i of the Dutch Copyright Act a limitation for the benefit of handicapped people as a result of the implementation of article 5(3)b) of the Directive 2001/29/EC on Copyright and Related Rights in the Information Society.<sup>55</sup> This provision reads as follows:

#### **Article 15i**

1. The reproduction or communication to the public of a literary, scientific or artistic work shall not be deemed an infringement of the copyright in such a work provided such reproduction or communication to the public is exclusively dedicated to people with a disability, to the extent required by the specific disability, and provided it is directly related to the disability, and of a non-commercial nature.
2. For the reproduction or the communication to the public referred to in the first paragraph, the author or his successors in title shall receive fair compensation.

As the wording of the provision suggests, the exception for the benefit of persons with a handicap is applicable to all categories of works protected under the Copyright Act and covers both acts of reproduction and communication to the public. The provision also foresees the payment of a fair compensation to the author or his successor in title.<sup>56</sup> A similar provision has been incorporated in article 10i of the Dutch Neighbouring Rights Act. This limitation applies to the rights granted to the four categories of rights owners under the Act, namely performing artists, phonogram producers, film producers and broadcasting organisations.

The Parliamentary history around this provision shows that the underlying idea is to promote access to works for people with a disability (visual or hearing disability) who are unable to use the works themselves, with particular attention to accessible formats (recital 43 to the preamble of the Directive). Examples in the case of the visually impaired are spoken books, works printed in a large font or publications in Braille. With respect to spoken books, it was observed during the Parliamentary process that such books are not exclusively aimed at visually handicapped people but that there is a demand for such a format in the normal commercial market.

Discussion arose in Parliament concerning the scope of the limitation and whether it should serve as a basis for a limitation to the benefit of persons who have mobility problems, like long-term wheelchair users. Given the specific nature of this limitation both in the Directive and article 15i of the Act, the

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<sup>55</sup> Act modifying the Copyright Act 1912, the Neighbouring Rights Act and the Database Act implementing Directive 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 in relation to the harmonization of certain aspects of copyright and related rights in the information society, Gazette (*Staatsblad*) 2004, 409.

<sup>56</sup> The obligation to pay fair compensation was introduced as an amendment to the original bill, see: Chamber of Representatives (Tweede Kamer), 2003–2004, 28 482, no. 25

lawmaker believed that there was insufficient basis to give all persons with mobility problems, whether or not these are based on a handicap, general access to library collections by means of a home connection to a private network. Neither the Directive nor the Act precludes it, but this would require the cooperation of the rightholder(s).<sup>57</sup>

Given the fact that the provision in the Copyright Act contains no definition of the ‘disability’ covered, article 15i seems to have been applied so far only in relation to works made available to persons with a visual handicap. One possible explanation for this could be the fact that long before the entry into force of article 15i of the Copyright Act, Dedicon Netherlands<sup>58</sup> had been producing alternative format material under an agreement with the Federation of Dutch Publishers (NUV). Dedicon Netherlands is the organisation responsible for the production and development of accessible information for people with a print impairment in the Netherlands. Dedicon also carries out a number of coordinating tasks and services for the Alternative Reading Libraries in the Netherlands.<sup>59</sup>

In more recent documents regarding this exception in the Copyright Act, the Dutch Government said to support the organization of a stakeholder forum for people with disabilities. In the forum, attention could be paid to the clarification of the Directive so that a mere shift in format for the disabled (including the translation of a work in Braille) would be possible without payment of compensation.<sup>60</sup> In its response to the EC Green Paper on Copyright in the Knowledge Economy, the Dutch Government identified three other issues that should be addressed in relation to the exception for the benefit of people with a disability. First, the question of the cross-border circulation of works in alternative formats should be settled. Second, consideration should be given to the introduction of an obligation on the publisher to make a work available for conversion into a format that is appropriate according to the person with a disability if a specific request has been made, but taking into account the cost aspect and the importance of adopting adequate measures to prevent other unauthorized uses. And finally, the need to clarify the scope of the exception in terms of disability covered so as to include people suffering from dyslexia and other types of cognitive impairment to be specified, such as aphasia.<sup>61</sup>

#### 3.4 Has your Government expressed a view on support for international initiatives (e.g. World Blind Council Treaty)?

The Dutch Government has expressed no views regarding the Treaty Proposed by the World Blind Union (WBU) or any other initiative regarding the visually handicapped.

#### 3.5 On an extra-legal basis, are there any market initiatives, or business practices, that your national group are aware of?

There exists in the Netherlands, especially among publishers and organizations representing disabled people, a very satisfactory practice of self-regulation for the use of protected works.<sup>62</sup> Dedicon Netherlands has been producing alternative format material under an agreement with the Federation of Dutch Publishers (NUV). Under the agreement there is no distinction between types of accessible format, although there is a small distinction between leisure titles and study material as the latter are exempt from a licence fee. The NUV has advised all members to cooperate and allow production and

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<sup>57</sup> Senate, 2003–2004, 28 482, C, p. 4.

<sup>58</sup> See website at <http://www.dedicon.nl/catalogus.do?objectId=88084&parentId=71>

<sup>59</sup> Study on Copyright Limitations and Exceptions for the Visually Impaired, Geneva, WIPO, SCCR/15/7, Feb 20, 2007, p. 75-76.

<sup>60</sup> Chamber of Representatives, 2009–2010, 22 112, nr. 969

<sup>61</sup> Chamber of Representatives, 2008–2009, 29 838, nr. 11, The Hague, 4 November 2008, pp. 8-9.

<sup>62</sup> Chamber of Representatives, 2008–2009, 29 838, nr. 11, The Hague, 4 November 2008, pp. 8-9.

distribution of material in alternative formats for people with a print disability. In turn, Dedicon is required to ensure that accessible copies are only used by people with a print disability, although this covers not only visually impaired people but also people with other handicaps such as spasm or dyslexia. The changes to copyright law in the Netherlands made in September 2004 mirror the agreement between Dedicon and NUV.

#### 4. **Access to the Internet as a Human Right**

4.1 Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

According to Article 1.3a of the revised EU Framework Directive<sup>63</sup>, 'Measures taken by Member States regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Implementation of the Directive is currently pending in the Dutch parliament. However, no explicit implementation of Article 1.3a is deemed necessary by the Dutch legislature.

4.2 Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

No.

#### 5. **Orphan Works**

5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

There are no extant legislative provisions on orphan works in Dutch copyright law.

5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

N/A.

5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

Although the Nordic extended collective licensing model is attracting increasing interest in the Netherlands as a possible solution to the orphan works problem,<sup>64</sup> there are currently no government proposals for introducing legislation on orphan works in the Netherlands. The Dutch government has announced that it supports the European Commission in its initiative to draft a Directive on orphan

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<sup>63</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ("Citizens' Rights" Directive).

<sup>64</sup> See D.A. Korteweg & P.B. Hugenholtz, 'Digitization of audiovisual materials by heritage institutions: Models for licences and compensations', study commissioned by Images for the Future/Knowledgeland, April 2011, summary in English available at [http://www.ivir.nl/Publicaties/hugenholtz/110503IVIR\\_summary\\_final%20\(1\).pdf](http://www.ivir.nl/Publicaties/hugenholtz/110503IVIR_summary_final%20(1).pdf).

works, provided that such Directive stimulates the progress of mass digitization projects.<sup>65</sup> Should a Directive on orphan works be adopted, the Netherlands may be required to implement specific legislation on orphan works.

## 6. Graduated Response Laws or Agreements

- 6.1 Within the specific context of p2p file sharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?

Dutch law currently does not provide for a graduate response procedure. The government has explicitly excluded the possibility of introducing such a system into Dutch law.<sup>66</sup>

- 6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

N/A.

- 6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

In the light of the implementation of the safe harbour rules of the e-Commerce Directive in the Dutch Civil Code,<sup>67</sup> a court may order the termination of a user’s account.<sup>68</sup>

- 6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services ?

The Dutch BREIN foundation, the joint anti-piracy unit of authors, artists and producers of music, film and interactive software,<sup>69</sup> assesses that the total amount of damage done by illegal downloading of entertainment content is somewhere around 180 million euro per year.<sup>70</sup> Since there are no general measures in place to terminate the internet access of repeat infringers, it is hard to estimate the effectiveness of the sporadic judicial injunctions to terminate the account of specific users.

- 6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a

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<sup>65</sup> Parliamentary Report of the Dutch Lower Chamber, 2010/2011, 21 501-34, no. 155, p. 16.

<sup>66</sup> See answer of the Minister of Foreign Affairs (Rosenthal) to parliamentary questions, 10 November 2010, 2010Z15253, <<http://bit.ly/i6U5AK>>.

<sup>67</sup> Article 196c book 6 of the Civil Code.

<sup>68</sup> Distr. Court of The Hague, 5 January 2007 (*Brein/KPN*), *LJN* AZ 5678. O. L. van Daalen, *AMI* 2007-2, nr. 9, p 55-58. L. A. R. Siemerink, *Computerrecht* 2007-2, p. 108/113. R. D. Chavannes, ‘Brein/KPN: Het gevaar van een bagatel?’ *Mediaforum* 2007-6, p. 174-178.

<sup>69</sup> <<http://www.anti-piracy.nl/english/english.asp>>.

<sup>70</sup> <[http://www.anti-piracy.nl/piraterij/omvang\\_schade.asp](http://www.anti-piracy.nl/piraterij/omvang_schade.asp)>.

court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

Some online intermediaries have decided to block (child)pornography, viruses etc. on their own initiative.<sup>71</sup> Since these activities imply control over the content transmitted over their networks, these providers have been sporadically subjected to judicial obligations to filter or block copyrighted material as well.<sup>72</sup>

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to “3-strikes” laws?

No. There is a Code of Conduct regarding the Notice and Takedown procedure, signed by most internet intermediaries. However, it does not contain a provision on the termination of the account of repeat infringing users.<sup>73</sup>

## 7. **Private Agreements and UGC**

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of “best practices” regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

As far as could be established, and apart from the private agreements entered into with hosts of UGC sites operating from outside the Netherlands, no such agreements have been established in the Netherlands. Dutch government authorities do not encourage the adoption of accords requiring filtering.

7.2 How is the filtering to be accomplished?

N/A

7.3 Have there been any cases concerning such agreements or “best practices”?

N/A

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as “take down, stay down”?

Court-ordered injunctions in the Netherlands usually have prospective effect in that the injunction also applies to future conduct by the defendant. However, such injunctions are not taken to imply any obligation on the part of UGC hosts to apply preventive filtering.<sup>74</sup>

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<sup>71</sup> <<http://www.meldpunt-kinderporno.nl/>>. <<http://www.ecp.nl/platform-internetveiligheid/>>. Van Eijk et. al. ‘Op weg naar evenwicht. Een onderzoek naar zorgplichten op het internet’, Universiteit van Amsterdam 2010.

<sup>72</sup> Distr. Court of Utrecht, 26 August 2009, *LJN* BJ 6008.

<sup>73</sup> <[http://www.samentegencybercrime.nl/UserFiles/File/NTD\\_Gedragscode\\_Opmaak\\_Engels.pdf](http://www.samentegencybercrime.nl/UserFiles/File/NTD_Gedragscode_Opmaak_Engels.pdf)>.

<sup>74</sup> Distr. Court of Zwolle, 3 May 2006, *LJN*: AW6288 (Stokke / Marktplaats). See also Distr. Court of Amsterdam, 24 November, HA ZA 09-185 (Kim Holland Productions/123 Video).