

# Copyright

in 28 jurisdictions worldwide

Contributing editors: Stuart Sinder,  
Jonathan Reichman and James Rosini

# 2009



Published by  
*Getting The Deal Through*  
in association with:

- Aavik & Partners Law Office
- ABBC – Azevedo Neves, Benjamim Mendes, Bessa Monteiro, Carvalho & Associados, Sociedade de Advogados RL
- Adams & Adams
- Advokatfirman NorelidHolm
- AKD Prinsen Van Wijmen
- Anand and Anand, Advocates
- Anderson Mōri & Tomotsune
- Awapatent AS
- Cabinet Bruno Ryterband
- Cavelier Abogados
- David Garrick, Kayode & Co
- Deris Patents & Trademarks Agency AS
- Deris Law Office
- Dorda Brugger Jordis
- E Blum & Co AG
- Freehills
- Garcia Magliona y Cia Ltda
- Hammonds LLP
- Hoet Pelaez Castillo & Duque
- Kenyon & Kenyon LLP
- Kim & Chang
- Marx Van Ranst Vermeersch & Partners
- MGAP Attorneys at Law
- Olivares & Cia
- Preu Bohlig & Partner
- Ridout & Maybee LLP
- Sár and Partners Attorneys at Law
- Thompson Associates

## Copyright 2009

**Contributing editors:**  
Stuart Sinder, Jonathan Reichman and James Rosini  
Kenyon & Kenyon LLP

**Business development manager**  
Joseph Samuel

**Marketing managers**  
Alan Lee  
Dan Brennan  
George Ingledew  
Edward Perugia  
Robyn Hetherington  
Dan White  
Tamzin Mahmoud  
Ellie Notley

**Subscriptions manager**  
Nadine Radcliffe  
Subscriptions@  
GettingTheDealThrough.com

**Assistant editor**  
Adam Myers

**Editorial assistants**  
Nick Drummond-Roe  
Charlotte North

**Senior production editor**  
Jonathan Cowie

**Senior subeditor**  
Kathryn Smuland

**Subeditors**  
Jonathan Allen  
Laura Zúñiga  
Ariana Frampton  
Sarah Dookhun

**Editor-in-chief**  
Callum Campbell

**Publisher**  
Richard Davey

**Copyright 2009**  
Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
© Law Business Research Ltd  
2009

No photocopying: copyright  
licences do not apply.

ISSN 1748-8257

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of July 2009, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0870 897 3239

**Law**  
**Business**  
**Research**

<b>Overview</b> Justin Kyal, Stuart Sinder and Jonathan Reichman <i>Kenyon &amp; Kenyon LLP</i>	<b>3</b>
<b>Australia</b> Kristin Stammer and Helen Macpherson <i>Freehills</i>	<b>4</b>
<b>Austria</b> Axel Anderl <i>Dorda Brugger Jordis</i>	<b>9</b>
<b>Belgium</b> Jan Ravelingjen and Pieter De Grauwe <i>Marx Van Ranst Vermeersch &amp; Partners</i>	<b>14</b>
<b>Canada</b> Janet M Fuhrer, D Paul Tackaberry and David Lam <i>Ridout &amp; Maybee LLP</i>	<b>18</b>
<b>Chile</b> Claudio Magliona <i>Garcia Magliona y Cia Ltda</i>	<b>24</b>
<b>Colombia</b> Daniel Peña <i>Cavelier Abogados</i>	<b>30</b>
<b>Denmark</b> Thorbjørn Swanstrøm <i>Awapatent AS</i>	<b>35</b>
<b>Estonia</b> Elise Vasamäe <i>Aavik &amp; Partners Law Office</i>	<b>40</b>
<b>France</b> Bruno Ryterband <i>Cabinet Bruno Ryterband</i>	<b>46</b>
<b>Germany</b> Astrid Gérard and Stefan Schweyer <i>Preu Bohlig &amp; Partner</i>	<b>53</b>
<b>Hungary</b> Katalin Horváth <i>Sár and Partners Attorneys at Law</i>	<b>59</b>
<b>India</b> Pravin Anand and Munish Mehra <i>Anand and Anand, Advocates</i>	<b>67</b>
<b>Japan</b> Yasufumi Shiroyama <i>Anderson Mōri &amp; Tomotsune</i>	<b>72</b>
<b>Korea</b> Jay Young-June Yang, Jai-Wook Lee and Chang-Hwan Shin <i>Kim &amp; Chang</i>	<b>77</b>
<b>Malaysia</b> Benjamin J Thompson <i>Thompson Associates</i>	<b>81</b>
<b>Mexico</b> Luis C Schmidt <i>Olivares &amp; Cia</i>	<b>85</b>
<b>Netherlands</b> Martin Hemmer <i>AKD Prinsen Van Wijmen</i>	<b>91</b>
<b>Nigeria</b> Olugboyega Kayode <i>David Garrick, Kayode &amp; Co</i>	<b>95</b>
<b>Portugal</b> César Bessa Monteiro <i>ABBC – Azevedo Neves, Benjamim Mendes, Bessa Monteiro, Carvalho &amp; Associados, Sociedade de Advogados RL</i>	<b>99</b>
<b>Russia</b> Yuriy Korchuganov and Ekaterina Ermakova <i>MGAP Attorneys at Law</i>	<b>105</b>
<b>South Africa</b> Charné le Roux and Vuyiswa Dlamini <i>Adams &amp; Adams</i>	<b>110</b>
<b>Spain</b> Fernando González and Hector Romero <i>Hammonds LLP</i>	<b>115</b>
<b>Sweden</b> Hans-Olov Dahlén <i>Advokatfirman NorelidHolm</i>	<b>120</b>
<b>Switzerland</b> Brendan Bolli, Sven Capol, Barbara Gehri and Felix Locher <i>E Blum &amp; Co AG</i>	<b>125</b>
<b>Turkey</b> M N Aydin Deris, Banu Barbur, Okan Can and Elif Dincer <i>Deris Patents &amp; Trademarks Agency AS</i> <i>Deris Law Office</i>	<b>131</b>
<b>United Kingdom</b> Patricia Jones <i>Hammonds LLP</i>	<b>137</b>
<b>United States</b> Jonathan Reichman <i>Kenyon &amp; Kenyon LLP</i>	<b>143</b>
<b>Venezuela</b> Magdaly Sanchez-Aranguren and Patricia Hoet Limbourg <i>Hoet Pelaez Castillo &amp; Duque</i>	<b>149</b>

# Netherlands

**Martin Hemmer**

AKD Prinsen Van Wijmen

---

## Legislation and enforcement

### 1 What is the relevant legislation?

In the Netherlands, copyright law is primarily codified in the Copyright Act, the Neighbouring Rights Act, the Supervision of Collecting Societies Act, and partly in the Database Act. Additionally, there are several relevant implementing regulations.

### 2 Who enforces it?

Copyright can first of all be enforced by an author, or his or her successors in ownership of the copyright. According to article 27 of the Copyright Act the author can, even after transfer of the copyright, claim damages in the case of infringement. Licensees can only claim damages where the right to do so has been explicitly agreed. Copyright can also be enforced by collecting societies such as SENA and Stichting de ThuisKopie.

---

## Agency

### 3 Is there a centralised copyright agency? What does this agency do?

There is no official Copyright Agency at which one can register copyright works.

---

## Subject matter and scope of copyright

### 4 What types of works are copyrightable?

Copyright protection is awarded to 'works of literature, science and art'. Article 10 of the Copyright Act gives a non-exhaustive list of works that can qualify for copyright protection. This list includes dramatic works, speeches, choreographed works, works of fine art including works of architecture, sculptures, geographical maps, photographic works and computer programs.

In June 2006, the Dutch Supreme Court decided in *Kecofa v Lancôme* that a scent can also qualify for copyright protection where general copyright requirements are met. This is the case when a work has 'personal character' and bears the personal stamp of the author. It is not clear whether these requirements are exactly the same as the requirement of an 'intellectual creation' given in several European Directives such as the Database Directive.

The Copyright Act also awards limited protection to simple pieces of writing that do not meet the requirements of personal character and a personal stamp of the author such as timetables and simple rules of play.

### 5 What types of rights are covered by copyright?

According to article 1 of the Copyright Act, the author or his or her successors have the exclusive right to publish and reproduce the

work. Unlike for example the Berne Convention, the Copyright Act does not provide a list of more specific forms of exploitation.

A reproduction includes every adapted version of the work as long as the adaptation does not qualify as a new original creation (article 13 Copyright Act).

Publication does not include the communication or exposition of the work to a closed circle of persons such as a family.

### 6 What may not be protected by copyright?

Governmental works, such as laws, regulations and court decisions are excluded from copyright protection.

### 7 Do the doctrines of 'fair use' or 'fair dealing' exist?

The Copyright Act does not provide for a general fair use exception. It does however contain (under certain conditions) several statutory limitations to copyright protection such as, for example, use for private purposes, non-commercial educational purposes, citations or quotations and parodies.

### 8 What are the standards used in determining whether a particular use is fair?

Not applicable.

### 9 Are architectural works protected by copyright? How?

Architectural works, including their plans of work, qualify for copyright protection. However, where a work is created to be placed in a public place permanently (like most architectural works), the publication of pictures that depict the architectural work in its normal environment does not infringe the copyrights of the architect (article 18 of the Copyright Act).

### 10 Are performance rights covered by copyright? How?

Performance rights are covered by the Neighbouring Rights Act.

### 11 Are 'neighbouring rights' recognised? How?

Yes, neighbouring rights are protected through the Neighbouring Rights Act, which came into effect in 1993. This Act is mainly based on the Convention of Rome of 1961 and European Directive 92/100. It aims to protect performers and producers of records and films and broadcasting organisations.

The basic term of protection is 50 years, according to article 12 of the Neighbouring Rights Act. For the different categories of protected material, specific rules apply.

**12** Are moral rights recognised?

Article 25 of the Copyright Act sums up the following moral rights:

- to object to publication without mentioning the name of the author (unless this objection is unreasonable) or any publication mentioning the wrong author;
- to object to any modification unless this objection is unreasonable; and
- to object to any distortion, mutilation or other derogatory action in relation to the work, that would be prejudicial to the author's honour or reputation.

It follows from Dutch jurisprudence that this list of moral rights is non-exhaustive.

Moral rights cannot be transferred. Moral rights can only be signed away partly; according to article 25(3), an author can renounce the moral right to have his or her name mentioned and to object to changes.

### Copyright formalities

**13** Is there a requirement of copyright notice?

The use of a copyright notice is not required to obtain copyright protection in the Netherlands.

**14** What are the consequences for failure to display a copyright notice?

Although the use of a copyright notice is not required for obtaining copyright protection, the use is widespread and advisable, for example for the purpose of proper (international) enforcement.

**15** Is there a requirement of copyright deposit?

No such requirement exists in the Netherlands. However, a copyright deposit can be advisable because it can serve to prove priority and may be necessary in some countries to enforce the copyright successfully.

**16** What are the consequences for failure to make a copyright deposit?

If priority can also be proven otherwise, there are no negative consequences of not depositing a work in the Netherlands.

**17** Is there a system for copyright registration?

Registration is not required. Neither is there a registration office, so questions 18 to 21 are not applicable in the Netherlands.

**18** Is copyright registration mandatory?

Not applicable.

**19** How do you apply for a copyright registration?

Not applicable.

**20** What are the fees to apply for a copyright registration?

Not applicable.

**21** What are the consequences for failure to register a copyrighted work?

Not applicable.

### Ownership and transfer

**22** Who is the owner of a copyrighted work?

The author generally is the original owner of the copyright. The Copyright Act creates two exceptions to this rule. First of all, where it is the task of an employee to create certain works, the employer will be considered to be the author and original owner of the copyrighted work unless the employer and the employee have agreed otherwise (article 7).

The second exception regards a work that is originally published by a legal entity as its own work, without mentioning a natural person as the author. In that case, the legal entity will be considered to be the creator and owner of the work unless it is proven that the publication by the legal entity was unlawful (article 8).

**23** May an employer own a copyrighted work made by an employee?

As described above (question 22), the employer automatically owns a copyright where it is the employee's task to create works such as the copyrighted work. It can also be agreed in an employment contract that the employer will become the owner of any work created by an employee.

**24** May a hiring party own a copyrighted work made by an independent contractor?

A hiring party that wants to become owner of a copyrighted work made by an independent contractor will have to expressly agree between them that the copyright will be transferred to the hiring party. A transfer needs to be in writing. Recent jurisprudence has established that this can be different for some designs for industrially designed objects such as packaging (see Update and trends).

**25** May a copyrighted work be co-owned?

The copyright to a work may be co-owned. Co-ownership can, for example, exist in case of co-authorship. The copyright to a work is jointly owned by its co-authors where the contributions that have been made by the co-authors cannot be separated. If works exist after separation, there is no co-ownership but a combination of works. A movie and the music composed for it will generally be considered as a combination of works, just like a song and its lyrics and a book and its illustrations.

Co-ownership can also be the result of inheritance and of marriage. In the case of marriage, the exploitation rights may fall within the marital community, the moral rights will remain with the author.

Co-ownership may very well lead to problems with regard to exploitation and enforcement of rights. All co-owners will have to agree to the reproduction, publication or licensing of the copyrighted work.

**26** May rights be transferred?

Copyright can be assigned. A signed deed of assignment is required for a valid transfer (Copyright Act, article 2). The copyright can be assigned in whole or in parts. Where it is the intention of the parties to transfer all usage and exploitation rights, it is advisable to mention this explicitly in the deed. According to most legal authors, it is not necessary to explicitly mention all the specific rights that are covered by copyright. If it is not mentioned whether all usage and exploitation rights are transferred, the transfer will generally be interpreted as to include all such rights. This can, however, depend on the specific circumstances.

27 May rights be licensed?

Copyrights can also be licensed in whole or in part. It is not required that the licence is laid down in a written agreement. A licence can even be granted tacitly.

28 Are there compulsory licences? What are they?

According to article 17a of the Copyright Act, the Dutch government can issue an implementing regulation to introduce a compulsory licence for the purpose of broadcasting by broadcasting organisations and cable transmissions, something that has not to date been done.

The compulsory licence described in article 13 of the Berne Convention does not exist in the Netherlands.

29 Are licences administered by performing rights societies? How?

Not applicable.

30 Is there any provision for the termination of transfers of rights?

The Dutch Copyright Act does not contain a specific provision regarding the termination of a transfer of rights.

31 Can documents evidencing transfers and other transactions be recorded with a government agency?

There is no official registration agency for registration of copyrights or for documents evidencing transfers.

### Duration of copyright

32 When does copyright protection begin?

A work is copyright-protected from the date of its creation.

33 How long does copyright protection last?

Copyright protection lasts 70 years from the end of the calendar year in which the author died.

In case of joint authorship, copyright lasts 70 years from the year of death of the last surviving author.

In case of a cinematographic work, copyright lasts 70 years from the year of death of either the principal director, the author of the screenplay, the author of the dialogue and the author and the composer of any music specially created for and used in the film.

Where the author of the work is considered to be a legal entity on the basis of article 7 or 8 of the Copyright Act (see question 22), copyright lasts 70 years from the end of the calendar year in which the work was lawfully published (article 38(2) of the Copyright Act). Where the work of a legal entity is not published within 70 years of its creation, the copyright will expire.

34 Does copyright duration depend on when a particular work was created or published?

See question 33.

35 Do terms of copyright have to be renewed? How?

The term of protection is fixed. There is no renewal requirement nor possibility of renewal.

### Copyright infringement and remedies

36 What constitutes copyright infringement?

Any unauthorised publication or reproduction is an infringement unless a limitation of copyright (such as personal use) is applicable.

### Update and trends

In February 2009 the Amsterdam Court of Appeal rendered a judgment (*Voortman/HS Design*) that leads to the conclusion that in some cases a hiring party should be considered as the maker or designer of a copyrighted work actually created by a contractor (unless agreed otherwise). The judgment is the result of a ruling of the Benelux Court of Justice of 22 June 2007 (*Electrolux/SOFAM*) about section 3.8.2 of the Benelux Convention concerning Intellectual Property (Trademarks and Designs) of 25 February 2005. The hiring party should be considered the maker and copyright owner in case the hiring party plans to industrially produce and trade the object that is to be designed by the contractor.

37 Does secondary liability exist for copyright infringement? What actions incur such liability?

Under some circumstances the structural facilitation of copyright infringement can be considered unlawful and could therefore lead to liability against rightholders.

38 What remedies are available against a copyright infringer?

The main remedies are the following. The copyright holder can:

- ask for injunctions to stop the infringement (ex parte and in contentious short notice proceedings);
- seek monetary damages;
- seize infringing goods and evidence relating to the infringement;
- request the destruction of the goods;
- ask for a recall; and
- where applicable, ask for rectification.

39 Is there a time limit for seeking remedies?

The Copyright Act does not provide a specific time limit. In specific circumstances enforcement may be considered unreasonable, which might lead to forfeiture of rights.

In short notice proceedings, a judge will generally accept that a copyright owner has an interest in obtaining injunctive relief, as long as an infringement is ongoing.

40 Are monetary damages available for copyright infringement?

The copyright holder can claim the damages he or she has suffered as a result of the infringement; besides that the copyright holder can claim surrender of profits made by the infringer. A damages claim (based on lost sales) and a claim to surrender profits cannot be aggregated, according to the Dutch Supreme Court. The copyright holder will have to choose the best option or ask the court to award the highest amount. For the collection of damages it is required that the infringement is imputable to the infringer.

41 Are attorneys' fees and costs available for copyright infringement?

As a result of the implementation of the European Enforcement Directive, 'reasonable' attorneys' fees and costs are available, however, it is still not completely clear which costs are to be considered reasonable. Generally speaking, the losing party will have to bear all legal costs of the opposing party in IP cases. In the past year we have seen cost awards of over €100,000 in patent cases, but there have also been quite straightforward IP cases in which the judge was of the opinion that claimed costs of around €10,000 were unreasonable.

**42** Are there criminal copyright provisions? What are they?

The Copyright Act contains several criminal copyright provisions relating to deliberate infringement and false statements to collecting societies.

**43** Is online copyright infringement actionable?

In cases of online copyright infringement, it is important to first of all establish whether the website on which the infringement takes place aims at the Dutch market. When this is the case, the infringement is considered to take place in the Netherlands and the same rules apply as apply as in a 'normal' infringement.

**44** How may copyright infringement be prevented?

In a digital environment, copyright owners can take technical measures.

In a legal sense there are also options to prevent copyright infringement. In the Netherlands one can obtain injunctive relief against a future infringement where one can establish that it is likely to occur.

Another way to prevent infringing goods from entering the Dutch market is to file an application for action by Dutch or European customs on the basis of the European Anti-Piracy Regulation.

**Relationship to foreign rights****45** Which international copyright conventions does your country belong to?

The Netherlands is party to the following international copyright conventions:

- the Paris Convention;
- the TRIPs Agreement;
- the Berne Convention for the Protection of Literary and Artistic Works;
- the Universal Copyright Convention;
- the WIPO Copyright Treaty;
- the WIPO Performance and Phonograms Treaty;
- the Rome Convention, adopted by the Netherlands in 1993; and
- the Geneva Convention, adopted by the Netherlands in 1993.

The Netherlands is also bound by several European Directives and Regulations relating to copyright and enforcement of IP rights in general.

**46** What obligations are imposed by your country's membership of international copyright conventions?

The most important obligations are those of national treatment as indicated in the Berne Convention, and the obligation not to require any formalities to acquire copyright protection.

## AKD Prinsen Van Wijmen

**Peter Claassen**  
**Martin Hemmer**

**pclaassen@akd.nl**  
**mhemmer@akd.nl**

Postbus 4714  
4803 ES Breda  
Netherlands

Tel: +31 88 2535000  
Fax: +31 88 2536006  
www.akd.nl

**GETTING THE DEAL THROUGH®**

**Annual volumes published on:**

- Air Transport
- Anti-Corruption Regulation
- Arbitration
- Banking Regulation
- Cartel Regulation
- Construction
- Copyright
- Corporate Governance
- Dispute Resolution
- Dominance
- e-Commerce
- Electricity Regulation
- Environment
- Franchise
- Gas Regulation
- Insurance & Reinsurance
- Intellectual Property & Antitrust
- Labour & Employment
- Licensing
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil Regulation
- Patents
- Pharmaceutical Antitrust
- Private Antitrust Litigation
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Restructuring & Insolvency
- Securities Finance
- Shipping
- Tax on Inbound Investment
- Telecoms and Media
- Trademarks
- Vertical Agreements

**For more information or to  
purchase books, please visit:  
[www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com)**



Strategic research partners of  
the ABA International section



THE QUEEN'S AWARDS  
FOR ENTERPRISE  
2006



The Official Research Partner of  
the International Bar Association