

GETTING THE DEAL THROUGH

# Copyright

in 27 jurisdictions worldwide

Contributing editors: Stuart Sinder,  
Jonathan Reichman and James Rosini

# 2011

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

AKD

Anand and Anand

Armengaud & Guerlain

Atsumi & Sakai

Benjon Oy

Çağa & Çağa

Castillo & Castillo

Cavelier Abogados

David Garrick, Kayode & Co

Dorda Brügger Jordis Rechtsanwälte GmbH

E Blum & Co AG

Freehills

Garcia Magliona y Cia Limitada Abogados

Hoet Pelaez Castillo & Duque

Johnston Wassenaar LLP

JWP Attorneys at Law in association with  
JWP Patent & Trademarks Attorneys

Kenyon & Kenyon LLP

Lassen Ricard

Malamis & Malamis Ltd

MGAP Attorneys at Law

Nestor Nestor Diculescu Kingston Petersen

Olivares & Cia SC

Reynolds Porter Chamberlain LLP

Saiger Rechtsanwälte

Suarez de la Dehesa Abogados

Thompson Associates

Yulchon, Attorneys at Law



# Netherlands

Martin Hemmer

AKD

## 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 copyrighted 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 and photographic works, and computer programs. 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.

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. It is not required that the author actually envisaged creating a (copyrighted) work. There is currently no consensus in the Netherlands about whether the criteria answering the question of what constitutes a copyrighted work have been harmonised by the Infopaq/DDF case in the European Court of Justice.

### 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 the Berne Convention, for example, 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).

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, eg, 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 permanently in a public place, like most architectural works, publication of pictures depicting the architectural work in its normal environment does not infringe the architect's copyright (article 18).

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

Performance rights are covered by the Neighbouring Rights Act.

### 11 Are other '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 broadcasting organisations and performers and producers of records and films.

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

The Netherlands have implemented European Directive 1987/54 relating to the protection of topographies of semiconductors in the Dutch Act of 28 October 1987 relating to topographies of semiconductors.

**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 which 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. An author can, however, give a person the possibility of exercising the author's moral rights after his death in (a rider with) his last will. Moral rights can only be partly signed away; 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?**

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, such use is widespread and advisable, eg, 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, as 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 be proven otherwise, there are no negative consequences for not depositing a work in the Netherlands.

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

Registration is not required and there is no 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?**

Generally, the author is the original owner of the copyright. The Copyright Act creates two exceptions to this rule.

In the first exception, 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?**

For a hiring party to become the owner of a copyrighted work made by an independent contractor, both parties will have to expressly agree that the copyright will be transferred to the hiring party. A transfer must be in writing. This need not necessarily be the case for some designs for industrially designed objects such as packaging.

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

The copyright to a work may be co-owned. Co-ownership can, for example, exist in the 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 would generally be considered a combination of works, as would 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, while the moral rights will remain with the author.

Co-ownership may very well lead to problems regarding the 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 (article 2). The copyright can be assigned in whole or in part. 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 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 17(a) 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. To date, this has not 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 transfers 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 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 the case of joint authorship, copyright lasts 70 years from the year of death of the last surviving author.

In the 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 or 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)). 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 is there any 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.

**37** Does secondary liability exist for indirect 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, as shown in the *Pirate Bay* case, for example. The basis for such a claim is not copyright but general tort law.

**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. A higher level of urgency is required for ex parte injunctions than for normal short notice proceedings.

**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, in addition to 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** Can attorneys' fees and costs be claimed in an action 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 should be considered reasonable. Generally speaking, in IP cases the losing party will have to bear all of the opposing party's legal costs. The past year has seen cost awards of over €100,000 in patent cases, but also quite straightforward IP cases in which the judge felt that claimed costs of around €10,000 were unreasonable. For IP short notice proceedings which are considered to be relatively simple by the court, standard compensation of up to €6,000 will be awarded unless the specific circumstances make higher compensation reasonable.

**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.

**Update and trends**

The Dutch government has proposed changes in copyright contracting law that aim to strengthen the position of authors in relation to publishers. Initially these plans even included making the complete transfer of copyright impossible; this element, however, has been abandoned. The new proposals include a 'bestseller' provision and a provision that enables an author to require a publisher to commercialise its work, for example digitally (*non usus* provision). Please note that these examples do not yet have any official status and at the time of writing no texts of the legal provisions were available.

- 43** Are there any specific liabilities, remedies or defences for online copyright infringement?

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 would apply as in a 'normal' infringement.

The Dutch Civil Code (DCC) provides for exceptions of liabilities based on the E-commerce Directive (2000/31 EC) for internet service providers (ISPs), in particular when an ISP did not initiate the transmission, did not modify the information, or did not have actual knowledge of the unlawful activity or information (article 6:196c DCC).

- 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.



**Martin Hemmer**

**mhemmer@akd.nl**

PO Box 4714  
4803 ES Breda  
Netherlands

Tel: +31 88 253 5916  
Fax: +31 88 253 5945  
www.akd.nl