



NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

The Digitalizing of Literary and Musical Works

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1. Exclusive Rights

1.1.

According to Article 13a of the Dutch Copyright Act ('DCA') temporary reproductions fall outside the scope of the reproduction right. Although Article 13A DCA is based on Article 5.1 of the Directive 2001/29/EG (hereafter 'Directive'), it has a different taxonomy. Temporary reproductions are not part of the exclusive right as an exemption or limitation to the reproduction right, but fall outside the scope of this right.

1.2.

The DCA provides the right to make works available through digital networks on the basis of an interpretation of Article 12 DCA (the general right to communicate the work to the public) and not through an explicit provision. The Law on Neighbouring Rights ('LNR') of the performing artists, phonogram producers, film producers and broadcasting organisations has included an explicit definition of communication to the public through digital networks in accordance with Article 3 of the Directive.

2. Limitations and Exceptions

2.1.

In the context of the implementation of the Directive the Dutch legislator amended to a greater and lesser extent most of the existing limitations of the DCA and added a few new limitations. Furthermore, the limitations have been worded in a technology-neutral way.

2.2.

The limitation of reproduction by the press on current topics (Art. 15 DCA) has been amended. This exception is now worded in a technology-neutral way in order to

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include electronic reproduction. The provision of access to copyrighted works forming part of the collections of public libraries, museums and archives for the purpose of research or private study (Art. 15h DCA) is included as a new limitation. The exception concerning reproduction or publication for the sole purpose of illustration for teaching or scientific research (Art. 16 DCA) has been amended. This exception is now also applicable to digital use. Digital reproduction for private use (Art. 16c DCA) and digital reproduction for preservation purposes made by publicly accessible libraries, museums or archives (Art. 16n DCA) are included as new limitations. Ephemeral recordings by broadcasting organisations by their own means and for their own broadcasts and the preservation of recordings with an exceptional documentary character in official archives (Art. 17b DCA) have been amended along the lines of the wording of the Directive.

2.3.

Analogue reproduction for private use (Art. 16b DCA) and digital reproduction for private use (Art. 16c DCA) are subject to different conditions and restrictions. The main differences are that (a) digital reproductions for private use are subject to fair compensation while analogue reproductions are not (yet) and (b) reproducing on the instruction of third parties for their private use is allowed for analogue reproductions but not for digital reproductions. Furthermore, the DCA sets specific restrictions on the analogue reproductions of writings on paper, including musical scores and parts. Only a small portion of these works may be reproduced, except in the case of works of which, in all probability, no new copies are made available to third parties for payment of any kind or short articles, news items or other texts which have appeared in a daily or weekly newspaper or other periodical.

3. Relation between Limitations and Contracts

3.1.

Under Dutch law it is in principle legally possible to extend the copyright protection by rendering the limitations of the DCA inoperative by contractual provisions. However, in a certain case testing against the principles of freedom of information and freedom of competition could lead to a denial of a claim to such contractual provisions.

4. Technical Measures and Rights Management Information

4.1.

Article 29a DCA implements Article 6 of the Directive. Those who circumvent effective technological measures and know or should reasonably know that they are pursuing such an objective are acting unlawfully. Under Dutch law those who provide services or manufacture, import, distribute, sell, rent, advertise for sale or rental, or possess for commercial purposes devices, products or components which (a) are promoted, advertised, or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of technological measures, are acting unlawfully.

The Dutch legislator has explicitly chosen for civil sanctions and not for criminal sanctions: an injunction (subject to a penalty upon default), damages, seizure, claim

and destruction of technologies, devices, products or components in the case of a breach of the technical measures.

4.2.

Article 29b DCA implements Article 7 of the Directive. Those who (a) knowingly and without authority remove or alter electronic rights-management information or (b) distribute, import for distribution, broadcast, communicate or make available to the public works for which electronic rights-management information has been removed or altered without authority are acting unlawfully, provided such persons know or have reasonable grounds to know that by doing so they are inducing, enabling, facilitating, or concealing a copyright infringement.

The DCA only provides for civil sanctions and not for criminal sanctions in the case of a breach of electronic rights-management information provisions.

4.3.

Article 29a (4) DCA provides for a regulation that stipulates that by means of an order in council the allowance of technical protection can be limited if this protection impairs the meaning or rationale of the limitations for (a) people with a disability, (b) educational purposes, (c) private use, (d) reproductions on paper or any similar medium, (e) reproduction for preserving purposes, (f) ephemeral recordings by broadcasting organisations and (g) use in administrative and judicial proceedings. According to this regulation right holders can be obliged to ensure that, in spite of the technical protection, users are provided with the necessary means in order to benefit from the limitations, provided, however, that such users have legal access to the protected material. Furthermore, this regulation does not apply to the provision of interactive on-demand services governed by contractual arrangements.

To our knowledge there have not yet been any agreements, court cases or factual problems in this respect.

4.4.

The DCA does not take into account the extent to which technical measures preventing private reproduction are in fact employed in respect of the remuneration for private reproduction. Up to now the Dutch legislator has left this issue to the interested parties in the market. The regulation on remuneration for private use makes a distinction between the DVD+R/RW and DVD-R/RW with regard to the remuneration for private reproduction. Because the DVD+R/RW offers the copyright holders more possibilities for technical protection of their works, the remuneration for this information carrier is lower compared to the remuneration for DVD-R/RW.¹

5. Interpretation of Licensing Contracts concluded before the Digital Age

5.1.

Licensing contracts concluded at a time when internet uses were not yet known are interpreted in a restricted way. According to Dutch case law the author's permission for the exploitation of copyrights is limited to uses that were anticipated at the moment when such permission was given. This was first decided in a case between a Dutch newspaper and freelance journalists. In this case a Dutch court decided that

¹ *Staatscourant* 19 september 2005, nr. 181, p. 16.

permission for publication in a newspaper does not imply permission for digital publication on CD-Rom or the Internet.²

6. Collecting Societies

6.1.

The digital reproduction and publication of works are administered by, respectively, the *Stichting Lira* (for writers and translators), *Musicopy* (for song texts and sheet music), *Stichting Nieuwswaarde* (for the works of journalists), *Stichting PRO* (for publishers' rights), *De Visuelen* (for illustrators' and designers' rights), and *Vevam/Sekam/Sekam Video* (for screenwriters, directors, film and TV producers, film translators). The digital reproduction of works and related subject-matter on a medium for private use (Art. 16c DCA and Art. 10e LNR) are administered by the *Stichting Thuiskopie*. The digital reproduction and publication of neighbouring rights are administered by *SENA*, *Norma* and *Irda*. The digital publication and reproduction of the copyrights of composers, text poets and music publishers are administered by *BUMA Stemra*.

6.2.

Until now collecting societies in The Netherlands have not employed digital rights management.

7. Secondary Liability

7.1.

The Dutch Civil Code, after the implementation of Directive 2000/31/EC on electronic commerce, provides for the liability of internet service providers in the case of electronic transactions (Art.6:196c DCC). This article identifies:

- the transmission in a communication network of information originating with another person, or the provision of access to a communication network (mere conduit);
- the automatic, intermediate and temporary storage of information originating with another person, to the extent that such storage is made for the sole purpose of enhancing the efficiency of the information's onward transmission to other recipients of the service upon their request (caching);
- the storage, upon request, of information originating with another person (hosting).

The article contains numerous exclusions of liability, for instance when a provider of information does not initiate the transmission, does not modify the information or does not have actual knowledge of the unlawful activity or information. This article does not affect the possibility for a court to require the service provider to terminate or prevent an infringement.

Dutch case law confirms that a service provider does not communicate to the public, but acts as a mere conduit. A service provider does not modify or select the information contained in the transmission. Therefore the Court of Appeal did not consider a service provider liable for the information that third parties communicate through its server. However, the service provider under the circumstances (e.g. after

² Rb Amsterdam 24 september 1997, AMI 1997, p. 194.

receiving information about an alleged infringement) may violate the standard of due care which must be observed in society. The service provider is then subject to tortious liability (Art. 6:162 DCC – wrongful act).³

7.2.

In principle a service provider cannot hand over personal data (name, address and place of residence; *NAW-gegevens*) relating to their subscribers for reasons of privacy (the fundamental right of privacy, the Dutch Personal Data Protection Act ('Wbp') and the Telecommunications Act).

However, a provider can be obliged to hand over personal data by an order of a court at the request of an interested party.

If the published information is indisputably wrongful or the obtaining of personal data is necessary to avoid further considerable damage, the provider can be obliged to pass on personal data without a court order.⁴

In addition, the Dutch Supreme Court⁵ has recently ruled that providers are also obliged to hand over personal data if:

- it is sufficiently plausible that the information is wrongful and harmful to a third party;
- the third party has a reasonable interest in obtaining the personal data;
- it is plausible that in this actual case there is no less radical possibility to obtain the personal data;
- weighing the interests between the third party, the provider and the holder of the website implies that the interest of the third party should be given preference.

The reach of this judgment has been limited by the Dutch Supreme Court to this particular case, but can possibly act as an example for other cases.

7.3.

(Deep)linking cannot be considered as a reproduction (*verveelvoudiging*) of a web page. Therefore it does not infringe a copyright. A number of judgments confirm this point of view.⁶ Nor can (deep)linking be considered to be a communication of the linked web page to the public (*openbaarmaking*). Dutch case law confirms the rule laid down in the German Paperboy case:⁷

‘Wer einen Hyperlink auf eine vom Berechtigten öffentlich zugänglich gemachte Webseite mit einem urheberrechtlich geschützten Werk setzt, begeht damit keine urheberrechtliche Nutzungshandlung, sondern verweist lediglich auf das Werk in einer Weise, die Nutzern den bereits eröffneten Zugang erleichtert’.

³ Court of Appeal 's-Gravenhage 4 September 2003, Scientology/XS4ALL.

⁴ Court of Appeal Amsterdam 7 November 2002, LJN, AF0091, Radikal.

⁵ HR (Supreme Court) 25 November 2005, LJN: AU4019, *Lycos/Pessers*.

⁶ E.g. District Court of Rotterdam, 22 August 2000, IER 2000, 55.

⁷ District Court of Arnhem 16 March 2006, LJN: AV5236, *NVM/Zoekallehuizen.nl*; Bundesgerichtshof 17 July 2003, I ZR 259/00.

8. Applicable Law

Private international law does not discern the nature of the underlying intellectual property right that has been infringed. Each country itself sets rules for the origin of these rights, to whom they belong or how they can be enforced.

Under these circumstances the law of the country where the protection is being invoked is applicable. This will mostly be the country where the damage occurs as a result of the infringement. For this reason, right holders will be protected by national law regardless of the origin of the infringement.

Cite as: M. de Cock Buning & F.W. Grosheide, *The Digitalizing of Literary and Musical Works*, vol. 11.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (May 2007), <<http://www.ejcl.org/111/article111-7.pdf>>.