

COPYRIGHT ISSUES AND THE INFORMATION SOCIETY: DUTCH PERSPECTIVES

F. Willem Grosheide*

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1 Access to works online¹

1.1 The right to information

1.1.1 General

It may here be taken for granted that since the second half of the 20th century the Information Society may now be considered as running parallel to the 19th century Industrial Society. One of the striking effects of this development particularly made possible by the spread of digital technology is the commodification of information, i.e. today information, together with physical goods is the raw material of socio-economic and cultural life in the industrialised world. As a consequence, if the question of access to property and ownership of physical goods was a major issue in the 19th century, this became equally true for the question of access to property and the ownership of information in the 20th century.² Besides, since the rapid and broad extension of transborder socio-economic and cultural exchange is another characteristic of daily life in the late 20th century industrialised societies, the effects of the said commodification are at the same time experienced on a worldwide basis.³ Understandably, the indicated development has influenced and still influences the national and international legal environment with regard to access to information. For the Netherlands, belonging to the Western part of the industrialised world, this means that its legal environment has gradually become less determined by domestic and more by European developments. European developments on two levels: that of the Council of Europe, i.e. the European Convention on Human Rights (ECHR), and that of the European Union, i.e. the Treaty of Rome/(EC Treaty). In light of the Treaty of Rome, adaptation of national Dutch law to EU legislative actions in the domain of copyright law and related law should be mentioned. From the various directives that are in force in this respect in particular mention should be made of the recent Copyright Harmonisation Directive (CHD). Apart from this, the legal environment has to be constantly adapted to transnational developments such as those instigated by (non-) governmental bodies like UNO, WTO and the WIPO. The

* Dr. F. Willem Grosheide is Professor of Private Law and Intellectual Property Law, Molengraaff Institute/Center for Intellectual Property Law University Utrecht (www.cier.nl) and practising lawyer at Van Doorne Amsterdam.

1. An effort is made to write this paper as strictly as possible following a questionnaire prepared by Professor Xavier Linant de Bellefonds, General Reporter, Faculté de Droit de Paris XII, France, adding, however, issues that seem of particular interest from a Dutch perspective.

2. An early account of this development can be found in E.W. Ploman, L. Clark Hamilton, *Copyright-intellectual property in the information age* (London 1980).

3. From the already abundant literature on this subject the following sources may be mentioned: Debora J. Halbert, *Intellectual Property in the Information Age – The Politics of Expanding Ownership Rights* (Quorum Books London 1999); Jeremy Rifkin, *The Age of Access - How the Shift from Ownership to Access is Transforming Modern Life* (Penguin Books London 2000).

Universal Declaration of Human Rights (UDHR), Treaty of New York (BUPO), TRIPS Agreement (TRIPS), and the WIPO Copyright Treaty (WCT) are examples of this state of affairs.⁴

Evidently, the commodification of information in today's society has transformed it into a primary good which can be ranked alongside other primary goods such as rights, liberties, powers, opportunities, income and wealth.⁵ In the same way as individuals are assumed to want rights, liberties, powers and so on, they can also be assumed to want information. In fact, taking the different definitional approaches to information for granted, it may be said that when taken together they have a cumulative impact suggesting that information is a primary good that is a foundation for the other kinds of primary goods mentioned.⁶ It may here be noted that the commodification of information is only one aspect of – what Rifkin calls – the metamorphosis in the organization of human relations from the production and commercial exchange of propertied goods to access to commodified service relationships.⁷ As a consequence physical property is less relevant than in the past as it is no longer the sole reference point by which to measure economic activity. The advent of electronic commerce is a determining factor in this respect, transforming physical goods into services, while services themselves are now less perceived being comparable to sales and more as long-term relationships between servers and clients. How crucial information is in this respect is reflected by the fact that transactions with regard to information can be made using the computer network simultaneously for the formation of the contract and as a pipeline for the delivery thereof. Texts, music, software and images offer examples of information products that are traded in such a way.⁸ Particularly these products fit rather well within the terminology used by the EU with regard to electronic commerce: *Information society services*.⁹

The commodification of information and the fact that it has become a primary good has appeared to have a major effect on the access to information since it changed its status from mere factual into simultaneously legal. Today, from a legal point of

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4. An interesting analysis of this state of affairs is offered by Anthony d'Amato, Doris Estelle Long, *International Intellectual Property Law* (Kluwer Law International 1997).
 5. According to J. Rawls, *A Theory of Justice* (London Oxford New York 1972), p. 72, primary goods can be natural or social. In the context of this paper the notion of primary goods refers to social primary goods.
 6. Compare Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Aldershot 1996), p. 173-175. It is of course clear that there is no one comprehensive definition of information with a transdisciplinary validity. On the contrary, the multitude of approaches to information indicates that it has a number of functions and roles to play, which differ according to the perspective from which information is approached..
 7. Rifkin, referred to in note 3, pp. 84-85.
 8. Compare F.W. Grosheide, K. Boele-Woelki, *Articles on International Commercial Contracts and Intellectual Property – E Commerce Issue*, Molengrafica 1999/2000 (Vermande Lelystad 2000); P.B. Hugenholtz (ed.) *Copyright and Electronic Commerce* (Kluwer Law international The Hague London Boston 2000).
 9. Comp. T.P. Heide, *Access Control and Innovation under the Emerging EU Electronic Commerce= Framework*, in F.W. Grosheide, K. Boele-Woelki, referred to in footnote 8, pp. 189-235.

view, information is perceived as a legal object in two different but related respects: information as (the object of) a human right on the one hand, and information as (the object of) a property right on the other. In a European context this means: information in the sense of Article 10 ECHR and related national constitutional law on the one hand, and information in the sense of Articles 33, 81 and 82 EC Treaty and related national private law and competition law on the other. Obviously, the notions of access to and a right to information have a different meaning depending on the terms of reference. From the perspective of human rights, access to and a right to information refer to every individual's ability to participate in the public debate in order to benefit from a society's reservoir of information. At stake here is the passive side of the free flow of information principle. From the perspective of private law and competition law access to and a right to information refer to the possibility of fencing information in order to commercially exploit it using the legal technique of a property right. It is at this point that copyright law and related law such as the legal protection of databases – in the EU extensively regulated through various Directives - come into play. The catch-phrase coined, which is usually in this respect determines that guaranteeing the free flow of information does not necessarily mean that access to information should be free.

It follows that access to information, depending on the perspective taken, refers to either a consumer's or a producer's right to information. Paradoxically both rights are acknowledged and guaranteed by international and national legal instruments. It is up to international and national governmental bodies to strike a balance between the conflicting interests at stake. Things are even more complicated since governmental bodies have an interest of their own as prominent suppliers of public information.¹⁰

1.1.2 The Netherlands

In the Netherlands over the years the debate on the indicated issues has kept pace with the European and international discussion. This is well documented in many studies of a fundamental as well as a technical nature.¹¹ For a balanced insight into the mainstream of Dutch thinking in this respect reference should be made to two reports issued by the Dutch Ministry of Justice's standing official advisory committee on copyright law and related issues. In these reports from respectively 1998 and 2001 the Commissie Auteursrecht provides its views on the future of Dutch copyright law and related law in the light of the new international legal instruments that, at the time of publication were either already in force or were forthcoming. Particularly the general points of departure taken by the committee in its 2001 report are worth being quoted here.¹²

10. F. Willem Grosheide, Copyright Law from a User's Perspective: Access Rights for Users. *EIPR* Vol. 23 Issue 7 (2001), p. 321-325.

11. Caroline Uyttendaele, *Openbare informatie* (Maklu Antwerpen 2002).

12. See, in addition to the already mentioned sources, the following studies:
- dissertations

F.W. Grosheide, *Auteursrecht op maat* (Kluwer Deventer 1986); AA Quaedvlieg, *Auteursrecht op techniek* (Tjeenk Willink Zwolle 1987); P.B. Hugenholtz, *Auteursrecht op*

In its advice, the Copyright Committee has used some general points of departure on the basis of which it has developed the specific parts of the advice. Firstly, the Committee sought to retain, where possible, the text and the system of the current 1912 Copyright Act. For the large part, this concerns ‘open’ terms that have stood the test of time. In this context, the Committee has put forward proposals to formulate the legislation in this field, preferably in a technology-neutral (or media-neutral) manner. On the other hand, the Committee has tried to keep up with the technology used in the Copyright Directive, along the lines of Instruction 56 of the Instructions for Rules and Regulations. After all, it must be prevented that the result of the Directive will be that the frameworks of terms in force in the laws and regulations of the Member States will diverge even more than they do already, while the intended objective of the Directive is harmonization. In addition, the Committee is of the opinion that no unnecessary amendments must be made in the context of the implementation. The Committee therefore recommends that the exploitation rights remain intact insofar as this is possible. The Committee also advises that the existing exemptions should be retained, at least where this is allowed by the Directive. This aspect is examined in further detail under 2.4.¹³¹⁴

Rejecting the notion of as well as the need for a fundamental revision of the existing Dutch Copyright Act (DCA) (e.g. combining it with the Neighbouring Rights Act (NRA)) the committee has retained to its previous advice in which it was of the opinion that the existing two-tier approach under the DCA, providing the copyright owner with the reproduction right (*verveelvoudigingsrecht*) and the publication right (*openbaarmakingsrecht*) sufficient in order to cope with the three tier approach of the WCT and the CHD, providing for a reproduction right, a right of communication to the public, and a distribution right.

Some other views by the Commissie Auteursrecht taken with regard to specific

informatie (Kluwer Deventer 1989); D.J.G. Visser, Auteursrecht op toegang (Vuga Den Haag 1997).

- monographs

F.W. Grosheide, Paradigms in Copyright Law, in Brad Sherman, Alain Ströwel, Of Authors and Origins (Clarendon Press Oxford 1994), pp. 204-233; idem, Toegang tot informatie, in F.W. Grosheide, Communicatie- en Mediarecht (Ars Aequi Libri 2000), pp. 213-264; Egbert Dommering a.o., Informatierecht (Otto Cramwinckel Amsterdam 2000); P.B. Hugenholtz, The future of copyright in a digital environment (Kluwer Law International The Hague, London, Boston 1996)

- articles

There are abundant of articles dealing with the subject at issue. They are mainly published in specialised legal journals such as AMI (formerly Informatierecht/AMI); IER; Mediaforum.

13. Copyright Committee, Advice concerning Copyright, Neighbouring Rights and New Media (The Hague 1998); Copyright Committee, Advice on the Implementation of the EC Directive copyright and related rights in the information society (The Hague 2001), also admissible on www.minjust.nl/a_beleid/auteurswet/uk/. On this website can also be consulted text in the English language of legislation in force on copyright law and related law. See also E.J. Arkenbout, E. van Dijk, P.W. van Wijck, Auteursrecht in de informatiemaatschappij – Bouwstenen voor een Justitie strategie (Ministerie van Justitie Den Haag 2002).

14. Copyright Committee, Report 2001 (no 23).

issues such as fair compensation, limitations, protection against the circumvention of technological measures, and obligations with respect to information on rights management, will be taken into account in this paper in Sections 2 and 3.

It is of note that a proposal for implementation legislation was recently drafted and this is largely based on the 2001 report of the Commissie Auteursrecht.¹⁵

In accordance with the report by the Commissie Auteursrecht no special attention will be given in this paper to the legal status of public data in view of copyright law and related law. It suffices to mention here that the Dutch government takes the view that publicly gathered and held data should be freely (i.e. against production costs) available to the public and should not in any way be commercialised by public authorities.¹⁶

1.2 *New informational works and the Internet*

1.2.1 General

The inherent property of the new computer technology to provide information in a digital form has placed a strain on the functioning copyright law and related law in two respects. First, in reaction to the need of the day, i.e. the need for exclusive right protection of the computer programs and chips industry, digitising *per se* became an issue of concern for the intellectual property community. Focusing primarily on copyright protection for computer programs and *sui generis* protection for chips, the outcome of that debate is well known and has been extensively documented; it does not have to be repeated here.¹⁷ It suffices here to recall that on a worldwide basis the courts first and national and international legislators second, overruled arguments holding that computer programs (and chips) would be better protected by the technology-related regime of patent law. That discussion has got *momentum* again since the US recently introduced patent law protection for business formats and the like. The question is also much debated nowadays in the EU.¹⁸ Secondly, the digitising of traditional works such as texts, images and music and making them available through new physical carriers such as CD Roms or through transmission over the Internet raises various questions with regard to the appropriateness of applying the existing legal i.e. copyright regime to them. Concepts and principles such as the originality criterion, fair use or the exhaustion rule have to be reconsidered. They are the subject of a great deal of debate with regard to database

15. This proposal can be consulted on the website indicated in footnote 13. The proposal and the draft legislation are much criticized by interested parties such as Stichting Auteursrechtbelangen (Commentaar November 2001) and het Nederlands Uitgevers Verbond (Copyright Notice 2001/4, pp. 17-27).

16. J.J.C. Kabel, *Communicatie & Commerce* (Kluwer Deventer 1997); F.W. Grosheide, *Toegang tot informatie*, referred to in footnote 12.

17. The debate is well described from a Dutch perspective in Quaedvlieg, referred to in footnote 12.

18. See e.g. H.W.A.M. Hanneman, *Over de octrooibaarheid van methoden voor de bedrijfsvoering*, BIE 2000/2, pp. 40-45.

protection and music distribution on-line.¹⁹ With reference to the actual importance of both database protection and music distribution on-line it seems appropriate to devote somewhat more attention to these issues here.

Databases

As far as database protection is concerned the following may be stated: for decades, the question of what legal protection should be given to databases has figured prominently on the agenda of international and national governmental and non-governmental bodies.²⁰ Since databases are prone to full-scale misappropriation, a lack of adequate legal protection could have a range of damaging effects on everyday life. Databases are subject to misappropriation because the information contained therein is highly vulnerable. Information, by its very nature, is ubiquitous, inexhaustible, and indivisible. As a consequence, the second use of some particular new information does not diminish or exhaust it. Once disclosed to the public, information can generally be used, ignoring contractual or tortious liability, without charge and without the database provider's permission or any obligation to reimburse him for his investment. This holds equally true for the off-line as well as the on-line market. Paradoxically, providing protection to one database provider creates a legal barrier for other potentially competing database providers attempting to enter the market. This barrier is particularly effective in the case of sole source database producers. It becomes clear that the need for protection should be balanced against the need for competition. However, it is not only the particular interests of the database industry that are at stake. Equally involved is the public interest in the dissemination of culture and knowledge in today's society requiring full access to all types of information. The above state of affairs demands a coherent and firm strategy by the governmental and non-governmental bodies in charge on both a national and international level. It is essential to realize that the legal protection of databases should not be dealt with in isolation, but should be seen as part of the legal protection of intellectual property rights in the Information Society in general. Considering that databases have not always fitted within existing legal systems and leaving contract law aside, there have been three ways in which to offer legal protection: copyright law, unfair competition law, and *sui generis* law. In 1996, the EU finally adopted the EU Database Directive. The Directive created a two-tier protection scheme for electronic and non-electronic databases. Member states are required to protect databases by copyright as intellectual creations, or to provide a novel *sui generis* right in order to prevent the unauthorized extraction or reutilization

19. Placed in an international context and with appropriate source references the relevant issues are discussed from a Dutch perspective in among others F.W. Grosheide, Mass-market Exploitation of Digital Information by the Use of Shrink-wrap and Clip-wrap Licenses, in F.W. Grosheide, K. Boele-Woelki, Molengrafica 1998 (Vermande Lelystad 1998), pp. 263-319, L. Guibault, Copyright Limitations and Contract (Kluwer Law International, The Hague, London, Boston 2002).

20. See generally F.W. Grosheide, Database Protection – The European Way, Washington University Journal of Law and Policy, Vol. 8 (2002) (forthcoming), broadly discussing the EC Database Directive 96/9.

of the contents of a database. The difference between the two is that copyright infringement implies copying the structure, while the *sui generis* right infringement implies copying the contents themselves, irrespective of their 'copyrightability'. The notion of one's own intellectual creation serves as a criterion for the determination of the object of protection under copyright law. No database is copyrightable if its structure does not reflect the author's own intellectual creation of its author. It is said that this notion, which in its terminology differs from expressions like originality, personal stamp, and the like mainly used to indicate the threshold of the protection, has taken from the French *Pachot* case.²¹ According to Article 7 (1), the *sui generis* protection only applies if the producer of a database has made a qualitatively or quantitatively substantial investment. This limited application seems to illustrate that the *sui generis* right solely protects the investment, for example, sweat of the brow. Recitals 39 and 40 also seem to express this view. From a conceptual point of view, it may be more accurate to say that the investment as incorporated in a database is protected. However, when it comes to substantiating the amount of investment required in order to obtain *sui generis* protection, the Directive offers little guidance. Indeed, it seems to be presumable that in order to keep in line with the previously existing thin copyright protection in some European countries, a relatively low investment threshold may suffice. But assuming that a more or less abstract statutory definition is not possible, setting the terms is up to the courts. Recently, some national courts in the EU member states have been asked to address the issue of what constitutes a substantial investment. In doing so, the courts are also faced with another factor indicated in Article 7(1), that is that the substantial investment must be expended in either the obtaining, verification, or presentation of the contents of the database.²²

It is clear that the two-tier system of protection which the Directive introduces derives its significance from the new *sui generis* right, since most databases will not be eligible for copyright protection, no matter how low the standard of originality may be. However, it is quite possible that both copyright and the *sui generis* right will simultaneously apply. In that case, both rights will run and can be exploited independently. If one copies or distributes the contents of such a double protected database without the consent of the copyright owner, the copyright owner can, in these circumstances, instigate legal proceedings for copyright and *sui generis* right infringement.

Music distribution on-line

21. Cass.ass.plén. Mar. 7, 1986, JCP 86, II, 20631 Comp. Michael Lehman, *The European Database Directive and Its Implementation into German Law*, IIC 776, 776-93 (1998) (stating "[t]his specification of a Europe-wide 'standard of originality' also serves to harmonize copyright in the EU since certain countries will be obliged to raise their requirements for protection, such as Holland and the United Kingdom, while others will generally have to be lowered, such as Germany"); see for an appraisal of the new originality criterion in the context of the Computer Program Directive. Report from the commission to the council, the European Parliament and the Economic and Social Committee on the Implementation and Effects of Directive 91/EEC (2000) 199 final (Apr. 10, 2000).

22. See for an account of such court decisions Grosheide referred to in footnote 20.

Next comes music distribution on-line.²³ From a legal point of view musical works have been protected by copyright law ever since the establishment of modern intellectual property law at the end of the 19th century and the national and international recognition thereof (in the Great Conventions of 1883 and 1886). Copyright law grants the rightowners in musical works, either fixed in print or on a sound recording, as well as their performances, prerogatives with regard to reproduction, distribution and communication to the public. Similar prerogatives are today granted to the performers of musical works (Rome Convention 1961). Such prerogatives nevertheless have to be exercised with due regard to the exceptions and limitations set by the law in view of the interests of society at large. Obviously the indicated prerogatives were developed in a historic perspective for the off-line world successively for sheet music, gramophone records, and radio transmissions. As long as the developments in this respect concerned modernization and adaptation of existing analog technologies (e.g. long-playing sound recordings, television), some 'stretching' of the established legal framework sufficed in order to cope with those new developments.

However, things changed considerably from the moment when computer technology began to spread, particularly from the moment that the Internet became the main vehicle for on-line music distribution. Indeed, distribution of music on-line is one of those new transactions which can be executed entirely by electronic means through the Internet. Not surprisingly, such distribution has increasingly become a major part of so-called electronic commerce. Understandably, music distribution on-line is of vital interest to the established music industry. Yet the record companies are not the only ones who have an interest in this distribution. This equally applies to the new dotcoms that provide intermediary distribution services, to consumers and not least to musicians and performers. However, the interests of those involved do not coincide in every respect. As a consequence, legislators and courts both on an international and national level are challenged to balance the interests at stake by providing, on the one hand, sufficient legal protection to copyright owners of music for the legitimate exploitation of their vulnerable digital products, while on the other hand ensuring that particularly consumers, *i.e.* society at large, have appropriate rules to access these products. It may be said that until recently the music industry has failed to serve the need for tailor-made music distribution on-line at reasonable prices. This factor, together with an ideologically inspired view of Internet music distribution that confronts the monopolistic approach of the big producers, has resulted in the advent of a host of alternative dotcom music distributors.

It is notably this development in connection with the introduction of a new technology known as MP3 and the way in which it changed the on-line distribution of musical works that shook the foundations upon which the record industry had traditionally controlled the distribution of music. MP3 technology and related technologies are altering the way in which composers and performers release their work, the way record companies sell it, and the way the public consumes it. Legally speaking, the MP3 technology has given rise to serious controversy with regard to

23. See for an overview of the state of affairs per ultimo 2001 F.W. Grosheide, *Is the Appropriate EU Legal Framework in Place for Music Online?* IIC 2002/ (forthcoming).

the application of the traditional legal framework to the distribution and consumption of musical works in the Internet environment. On the one side, the established industry is arguing that many MP3 distribution sites are purely illegal, the music being uploaded for unlimited use, and distributed by intermediaries and downloaded by consumers who do not pay the royalties due for such use. Allowing MP3 technology, the argument goes, will destroy the record industry, since it will undercut the profits of all involved by backing music piracy. On the other side, one finds independent musicians and others running dotcom companies, and in particular individual consumers who see the Internet as a possibility for offering and sharing music. This promotes what is called a more democratic digital music distribution system and takes a stand that is directly opposite to what is considered to be a monopolistic and price-manipulating industry. In particular this side protests and rejects the unwillingness of the major record companies to agree to discuss licensing their back catalogues to dotcom on-line electronic music distributors. Besides, today's consumers have high expectations of the benefits they will receive from on-line access to content. Things have become even more complicated since established and newly set up broadcasting organisations have started using MP3 technology for a new form of broadcasting which is called streaming(-audio).

It is precisely the described state of affairs that inspired national and international legislators to take action on behalf of copyright owners and related right holders, leading to the strengthening of the available protective legal instruments such as a broader reproduction right and a specific communication to the public right. However, it appeared that the strengthening of exclusive rights alone was not sufficient in order to discipline what from a rights holders' perspective was and is seen as infringing free rides. This is due to the fact that in the Internet environment content is rarely, if ever, distributed directly from the rightowners to the end-users. Usually, a whole range of hosting providers act as middlemen. It raises the question of the legal position of these intermediaries, generally known as the question of on-line intermediary liability. Since this question lies at the heart of electronic commerce it is dealt with in the context of drafting new legal instruments for that purpose such as the US DMCA and the EU E-commerce Directive. In accordance with most of the already existing national case law, the US and EU legislators have chosen to exempt access and network providers from liability for the damage done to Copyright and other rightholders with regard to copyrighted and otherwise legally protected materials (the *mere conduit* principle). Liability may, however, apply in cases in which the service provider knows of or reasonably ought to have known (e.g. after having notice from a rightholder) of any infringing information being passed through its service. In doing so, the promotion of e-commerce and freedom of communication have been given priority over the protection of rightholders.²⁴

Search engines, webpages and hyperlinks

The first step taken has been to protect software and chips through ip regimes. Not

24. See for an overview of this development Kamiel Koelman, On-line Intermediary Liability, in Hugenholtz, Copyright and Electronic Commerce, referred to in footnote 8 pp. 7-57, coming to terms with EC Directive 2000/31 on electronic commerce.

surprisingly, in the slipstream thereof other technologically determined devices such as search engines, webpages, hyperlinks (and metatags) have been offered for protection under the same regimes. Although the developments in this respect are far from clear both on a national and on an international level and lacking any international legal instruments, some tentative observations with regard to emerging tendencies may be made.

With regard to webpages it may be said that their *copyrightability* depends on compliance with existing copyright law requirements such as, in particular, the originality criterion. So the combination of text, image and music that, generally speaking, is at stake here, should itself comply, as well as with regard to its components, with the applicable copyright rules.²⁵

The question of the *copyrightability* of search engines, hyperlinks (and metatags) has to be answered according to the requirements for the copyright protection of software in a given national jurisdiction. However, published case law in this respect mainly concerns the use of one's own hyperlink in order to obtain access to another's copyright protected information. Well known is the Scottish case *Shetland Times v. Shetland News*.²⁶ In that case a news service (Shetland News) made use of headings and captions applied by a publication (The Shetland Times) to its articles as hyperlinks in order to guide its customers to the respective articles in that publication. As a consequence of this so-called deep-linking the impression was created that the news service and The Shetland Times were partners in some way or another. Under the circumstances The Shetland News was ordered to shut down the hyperlinks. It may be said that the decision is based upon a form of tortious liability, not on copyright infringement. Shetland News did not reproduce or communicate material of which the Shetland Times was the copyright owner.

The same seems *mutatis mutandis* to be true for search engines and metatags.

Multimedia works

A final observation should be made with regard to whether a new exclusive rights regime should be established for multimedia works. Again this is a very uncertain area where different and sometimes conflicting approaches and opinions are presented.²⁷ Many questions have to be answered here, such as: can we still speak of the author of a work when taking into account of the fact that many people contribute to the making of a multimedia work? what does the dissolution of the work (concept) into smaller and smaller units mean for the notion originality? In addition the question arises whether the applicable legal regime for multimedia works would consist of a system of concurring sub-regimes, e.g. one for text, one for images, one for music etc. or would be tailor-made.

1.2.2 The Netherlands

25. Marjut Salokannel, *Ownership of Rights in Audiovisual Productions – A Comparative Study* (Kluwer Law International, The Hague, London, Boston).

26. Scotland Court of Session (Opinion of Lord Hamilton) 24 October 1999, S.C.L.R. 160.

27. See generally Marjut Salo Kannel, referred to in footnote 25.

Generally speaking, the Netherlands follows the international developments both in its legislation and its case law.

Databases

The Netherlands has partly implemented the Database Directive in its DCA and partly in the *sui generis* Databases (Legal Protection) Act (Databankenwet [DBW]). However, since implementation means the transposition of EU law into Dutch domestic law it is primarily up to the Dutch courts to interpret the DBW and, in doing so, the underlying directive. One of the most debated questions in that respect has been (and still is) what should be understood by the notion of *qualitative and quantitative investment*. Relying on an observation by the then Minister of Justice during the implementation debate in Dutch parliament, some courts have denied compliance with the substantiality requirement based on the *spin-off* argument. According to this argument no investment (in effort and skill, but particularly money) should be taken into account with regard to the production of an electronic database, as such an investment would already have been made with regard to a database for the main activity, when that database (or a part of it) is also used for other purposes (e.g. a digitised version). In a recent decision the Dutch Supreme Court, although not dealing with the *spin-off* argument as such, has ruled that investments of whatever nature already incurred in a product upon which the electronic database was built, ought to be taken into account in the light of compliance with the substantiality criterion.²⁸ However, in the end it is up to the European Court of Justice to make a final pronouncement on the matter.

Music distribution on-line

With regard to the two specific issues at stake in the case of music distribution on-line: the liability of intermediaries and the special status of music, the following may be said.

The liability of intermediaries in an Internet setting had already arisen before the Dutch courts in the *Scientology Church* case of 1999.²⁹ The outcome of the case is generally in accordance with the *mere conduit* approach under the EU E-commerce Directive.

Music distribution on-line has been a much debated question in the Netherlands over the last five years and also in the light of the WCT and the CHD. It may be said that the prevailing view which was already held under Dutch copyright and neighbouring rights law before the implementation of the CHD, is that from a substantive law point of view, under Dutch law the same results were to be expected as those already

28. Dutch Supreme Court 22 March 2002 (NvM v. De Telegraaf [22 March 2002, Nr. C 01/070 HR]) not yet reported. See for an account of other case law the references in footnote 20.

29. District Court of The Hague 9 June 1999, IER 1999/5, p.p. 237-241 (*Scientology v. XS?ALL*). See for a general account of Internet law in the Netherlands M. Vermeer, Internet, in F.W. Grosheide, *Communicatie- en Mediarecht*, referred to in footnote 12, pp. 175-208.

delivered by the US courts in the *Napster* case.³⁰ In a recent decision by the Amsterdam Court of Appeal in the *Kazaa* case a somewhat nuanced approach seems to have been taken.³¹ It is of note that this case – although Kazaa supplied customers with software which enabled them to share music in a peer-to-peer network – differs from the *Napster* and the *Scientology* cases both from a factual and a legal point of view. First, Kazaa, contrary to Napster does not function as a central database for the exchange of music but only installs special communication software for its customers. Second, the same fact that Kazaa does not function as a central database, also has a legal effect. This is because already since the *Scientology* case and confirmed by Article 12 E-Commerce Directive (drafted) Article 6: DCC the facilitating of copyright infringement in itself does not constitute tortious liability. Since it may be said that Kazaa's communication software which is beyond Kazaa's control can be applied to the legal as well as the illegal sharing of music, such tortious liability does not occur. Indeed, this last argument was used by the Amsterdam Court of Appeal to determine that Kazaa was free from any liability. It has to be seen whether this reasoning is in conformity with the *mere conduit* rule, taking for granted that it is generally known that communication software such as that delivered by Kazaa is primarily used for the exchange and downloading of legally protected music.

Search engines, webpages and hyperlinks

Again, generally speaking Dutch law is in harmony with international norms and the national laws of most European countries. So, in principle, webpages are copyrightable as works of authorship if the requirements for copyright protection have been met. The same is true for search engines, hyperlinks (and metatags): the computer software that is driving and establishing them is copyright protectable if the requirements therefor are met. Besides, also in the Netherlands case law can be referred to with regard to framing and deep-linking.³² Of particular interest here is the *Kranten.com*-case.³³ In that case the President of the District Court of Rotterdam ruled that taking commercial benefits from another's performance without infringing an intellectual property right or acting tortiously in any other respect, is not illegitimate. This is the more so, when – as occurred in the case at hand which in its facts comes close to the *Shetland* case referred to previously – the rightowner of the information to which the hyperlink is addressed, is able to prevent such hyperlinking

30. See e.g. J.M.B. Seignette, *Napster en de controle van de rechthebbende over de distributie van zijn werk*, AMI 2001/2, pp. 29-34; D.J.G. Visser, *De Napster-beslissing van 12 februari 2001 van het Court of Appeal, for the ninth circuit*, AMI 2001/2, pp. 35-38; Q. Kroes, *De stoelendans rond Napster*, Mediaforum 2001/5, p. 145; B.P. Aalberts, H.B. Bannink, *Internet kills the radiostar. Auteurs- en nabuurrechtelijke aspecten van webcasting*, AMI 2001/5, pp. 101-107.

31. Court of Appeal of Amsterdam, 28 March 2002; President of the appeal from the District Court of Amsterdam 29 November 2001, AMI 2002/1, pp. 21-25, note P.B. Hugenholtz.

32. See Vermeer, referred to in footnote 29. See in particular M. de Cock Buning, M. Vermeer, *Hyperlinks and Metatags: Meeliften in Cyberspace*, Computerrecht 1999/4, pp. 166-173.

33. Prs. District Court of Rotterdam 22 August 2000, Informatierecht/AMI 2000/10, pp. 57-62 note K.J. Koelman.

by the use of technical means.

Multimedia works

As for multimedia works it suffices to refer to an observation from the Dutch Copyright Commission in its 1998-report: *The Copyright Commission regards as new media digital data carriers such as CD ROM, CD-I, the digital versatile disk and the cd-recordable, as well as electronic distribution techniques such as the Internet, intranet systems, satellite broadcasting, video-on-demand, interactive teletext (...)*

With regard to the multimedia producer's position, the following applies. For a work recorded on a CD-ROM consisting of different works and/or performances, it will be possible, under the existing rules, to appeal for protection on different grounds: normal copyright (if the work involved has its own, original character with the maker's personal mark), collector's copyright (article 5 Aw), film copyright (articles 45a ff. DCA in conjunction with 4 and 7a NRA), the related film producer's right (article 7a NRA), copyright for databases (under EC directive).³⁴

This approach reflects the general view taken in legal doctrine in this respect.

2 Protection of authors

2.1 The actual concept of an author

2.1.1 General³⁵

Modern copyright law is an invention of the 19th century. It gained its actual shape not later than 1886 in which year the Berne Convention was established. In those days copyright law was part of the public debate and figured on the political agenda all over Europe. Copyright law was no longer a limited concept, relevant only to certain interest groups, as it had been for a long time. The explosion of print culture had thrust it into an environment where immense political, social, cultural and economic forces were operating. And although from the outset it was considered to be in the public interest that copyright law should balance the interests of copyright owners and copyright users, in the continental tradition the users have always come second.

Since these early days things have not changed very much during the largest part of the 20th century. The same issues still inflamed the public debate and dominated the political agenda, albeit in a more articulate way. An articulation that found its origin mainly in societal and technological developments leading to the collapse of the equally sided established *golden triangle*³⁶ *between the author, publisher and reader*

34. Copyright Commission, Report 1998, referred to in footnote 13 pp. 1; 55. See also Dirk Visser, *Naar een multimedia bestendig auteursrecht, I Ter (Samson Alphen a/d Rijn 1998)*, pp. 3-81.

35. This paragraph concurs with the EIPR-article referred to in footnote 10.

36. Barbara Ringer, *Le droit d'auteur et l'avenir de la création intellectuelle, Le Droit d'Auteur 1976*, p. 158-163.

that according to some observers served as a role model for the relationship between producers and users of copyrightable material until the 1950s.

The side of the golden triangle that first came under strain was the one connecting authors and publishers to each other. In fact, there has always been tension between the two, the story that for a long time authors and publishers formed a real partnership never being completely true. Indeed, if in the old days there existed some special bond between the two this was mainly since authors simply lacked the skills and facilities to be their own publishers.

So issues concerning the rights of authors and the role of publishers must always be set in the context of the relationship between these two groups over time. The first thing to notice in this respect is that with regard to exploitation authors and publishers have always taken and still take different approaches to time, risk and reputation. As pointed out by Towse for modern times but equally valid, it seems, for earlier periods, authors are likely to have a shorter time-horizon, to be more risk-averse and to have other concerns with reputation than publishers.³⁷ Besides, authors and publishers are driven by different motives. For authors the importance is appearing in print, making works of good quality or reaching a particular audience. From their side, publishers will have one or more of the following motives: to fulfil certain social, cultural and political needs and simultaneously to optimize financial revenue and economic efficiency. Besides, in terms of organizational objectives, publishers being interested in the supply to the market of information goods, tend to become larger, to develop a good image and to compete with other publishers.

It is precisely this economic flow back that has puzzled authors. Taken as individuals acting solely on their own behalf, authors having always been the weaker parties in their relationship with publishers and felt uneasy with their share in the profit making by their publishers. Indeed, giving authors a stronger stand in the relationship with their publishers was really the driving force behind the establishment of the Berne Convention. And although the Berne Convention substantially strengthened the position of authors in this respect, it took more than half a century to bring to an end the still pertaining general practice of total assignment of copyright against an outright fee or a fixed royalty, leaving authors unrewarded if their products became a big success.

It was not until the last part of the 20th century that this situation really changed, mainly as a consequence of the sticking together of authors in collectives representing their common interests when negotiating better terms and conditions for the exploitation of their works. This articulation of the authors' interests in relation to their publishers marks the collapse of that side of *the golden triangle*. This in close connection with other new societal and technological developments such as universities publishing their own materials and individual authors acting as self-publishers.

Evidently, as is clear from the foregoing paragraph, the application of copyright law to a large extent centres on regulating the relationship between authors and publishers. But copyright law has a further function: to regulate the uses to which a work is put, thus its flow and dissemination. In other words: it concerns the

37. R.M. Towse, Copyright and Economic Incentives. An Application to Performers' Rights in the Music Industry, *Kyklos*, 52:3, p. 369-390.

relationship between, on the one hand, authors and publishers and, on the other, individuals and institutions who together make up the public and society at large. It is to this side of *the golden triangle*, left out of the picture so far, to which attention will now be given. It is noteworthy here that the notion *user* in this respect primarily refers to individual users and those institutions like libraries, universities and the like that function in the general interest.

Obviously strict application of copyright as an exclusive and absolute right would lead to the socially unworkable situation requiring for whatever form of use the prior authorisation of either the author, the publisher or both. In order to provide for a socially workable situation international and national copyright law use the construction of what are called *limitations, exceptions or fair uses*.

It should be kept in mind that the civil law copyright tradition and the common law copyright tradition differ in this respect in as far as the one does not know of a fair use principle constructed as a rather open norm which is done in the other. However, on the other hand both traditions share the principle of exhaustion, in the common law tradition usually referred to as first sale doctrine. Taking account of this state of affairs, and leaving aside dogmatics as well as complicating particularities of the two traditions, it seems appropriate to use in what follows the fair use notion in a broad and general sense. It is taken for granted that fair use encompasses in this respect also free flow of information and that free access not necessarily means access for free.

It may be said, then, that the fair use principle taken in that sense during the first 65 years or so since the Berne Convention functioned rather well in order to serve users. Apparently, the normal exploitation of copyrightable material from which the fair use principle exempted certain forms of use, was not endangered. This arguably not in the last place since the then available technology for reproduction and dissemination of works did not offer users the means to do harm to the market for information goods. So for example the second hand booktrade or the private use exception was generally speaking no threat to the normal trade in books or phonorecords. Moreover, it may be said that the relatively safe position of authors and publishers was due to a rather general societal acceptance of copyright law. Users, so to say, did not care much that at least in the continental copyright law tradition their side of the *golden triangle* was only dealt with by way of limitations and exceptions.

However, things changed drastically and ever so dramatically after the Second World War. From the 1950s onwards consumerism alongside with new user-friendly reproduction and dissemination technologies (e.g. photocopying, taperecording, fax) paved their way into society. This concerned not only the primary exploitation of copyrightable material but also affected uses made under the fair use principle. All at once private users manifested themselves as a real menace with regard to the normal exploitation of primarily printed and audiovisual matter. Interesting enough the reaction of authors and publishers was divided. Whereas the latter already on their way to becoming the entrepreneurs to be dealt with in the following paragraph, unvariably asked for more and better protection of their interests, the first were more nuanced in their reactions. Academic authors for example generally speaking did welcome the abundant albeit irregular use of their works instead of blaming it. It was never more so than at this particular moment when it became clear that authors and

publishers promoted different interests.

And although those concerned with the production of copyrightable material never succeeded in convincingly proving their alleged losses due to users' infringement, it is clear that the hard line they promoted was taken up by international and national legislators. In addition it is fair to say that their line received firm support from governmental and non-governmental institutions such as the European Commission and WIPO. Consequently, *the rise of the user* as the discussed development may be called, particularly from the 1970s onwards is accompanied by an ever growing pressure for more and better enforcement of copyright law. According to copyright owners and co. this should be done not in the least by adjusting, i.e. narrowing the scope and applicability of the beared limitations and exceptions to copyright.

So if finally the user came to the forefront in the domain of copyright law it was in order to take a position in his own right, clearly marking the collapse of the publisher/user side of *the golden triangle*. Not surprisingly it is also since the beginning of the end of last century that numerous consumer and user organisations have taken part in the debate both in Europe and the United States.³⁸

It is now time³⁹ to turn the perspective again towards the publisher since in what has been said so far one factor of major importance has been left out of the picture. That factor is *the advent of entrepreneurial copyright law*. Certainly, publishers have always been entrepreneurs in as far as they were exploiters of copyrighted material. But traditionally in doing so they were invariably representing authors in the first place. If they were promoting their own interest it was based on the exploitation of the rights in the works of authors. This was and still is the situation in many instances, even after the emancipation of authors towards publishers. However, entrepreneurial copyright law in the sense meant here, refers to a different state of affairs. Since the last twenty-five years or so a development has persevered which has given birth to a new type of exploitation of copyrights. Basically this type of exploitation may be called copyright without authors. All this alongside the expansion of the copyright law domain now encompassing subject matter such as computer software and computerized databases, and accompanied by an adjustment of the scope of protection, for example limiting the private use exception with regard to electronic use as has been done in the respective EU directives.

It is this new type of so-called entrepreneurial copyright that merits attention in this paragraph. It appears to have two main characteristics. The first characteristic concerns the new way in which publishers dispose of traditional copyrights for traditional purposes. Bill Gate's company Corbis forms a good example of this new mode of exploitation. Corbis consists of a huge catalogue of both copyrighted and public domain graphic material licensed to all sort of customers for different traditional purposes. New here is that the business acts entirely on its own behalf, not

38. See www.consumersfederation.org.

39. Comp. L. Ray Patterson/Stanley W. Lindberg, *The Nature of Copyright – A Law of User's Rights* (University of Georgia Press Athens/London 1991), p. 232-241. See with regard to the danger of overstretching the Protective regime for entrepreneurs too much, underestimating the interests of competitors who improve products by synthesizing new information by improving on the known, Micheal D. Pendleton, *The danger of Protecting Too Much: A Comparative Analysis of Aspects of Intellectual Property in Hong Kong, Britain and the United States*, EIPR 2000, p. 69-78.

representing any dead or living author whatsoever. The second characteristic leads away from traditional copyright law. It concerns the state of affairs according to which companies that do not have anything to do with copyright as their core business, use copyright law in cumulation and concurrence with trademark and patent law as a marketing tool in competition with other entrepreneurs.

It may well be understood that in particular the first form of entrepreneurial copyright law, since it concerns mass-market exploitation of information goods, has had a big influence on the publisher/consumer relationship at stake here. Whereas in the analogue world over the years users of works have not been considered as part of the exploitation process (e.g. the buyer of a book does not come under any special obligations other than paying the price and respecting copyright law) this is no longer the case since shrink-wrap licenses and click-through licenses are governing the exploitation of digital information goods. Bound by special contractual bonds, layed upon users in addition to copyright law, users are drawn into the exploitation process. The consequences of this may be illustrated by the following example. The individual exchange of the physical embodiment of the literary text or the musical composition against the fixed or negotiated price sufficiently authorizes the buyer of the book or the phonorecord to use it as he wishes. By contrast, transactions with regard to digitized information may not all involve a direct sale between the copyright owner and the user. On the contrary, they may involve a non-negotiated mass-market license with regard to the copyrighted content (i.e. the intangible asset) which accompanies the transfer of title by factual delivery of the physical carrier (i.e. the tangible thing) or by virtual delivery via the Internet.

2.1.2 The Netherlands

It may be said that the prevailing view concerning the concept of an author in the Netherlands favours the author as an individual creator of works.⁴⁰ That may be the reason why legal authors do not pay much attention to developments leading to - what has been called in paragraph 2.1.1 - entrepreneurial copyright.⁴¹ Since the same approach is taken by international *gremia* it is understandable that the Copyright Commission has not elaborated any further on this issue. However, the committee has indeed come to terms with the issue of balancing private interests in the light of existing and possible new exceptions and limitations. It is worth quoting the committee on this point, observing that here the committee does not express a generally accepted view:

A solution should be sought which also fits within the obligations resulting from the international treaties. For those cases where the law does not provide specific legal limitations (i.e. the limitations discussed above in 3.3. to 3.7) but which nevertheless may involve doubt as to the desirability of the execution of rights, the largest possible majority of the Copyright Commission recommends

40. J.M.B. Seignette, *Challenges to the Creator Doctrine* (Kluwer Deventer 1994); P.B. Hugenholtz, *Sleeping with the enemy* (Kluwer Deventer 1989).

41. See for another view F.W. Grosheide, *De commercialisering van het auteursrecht*, *Informatie-recht/AMI* 1996/3, p.43; idem, *Copyright Law from a User's perspective* referred to in footnote 10.

the formulation of an open standard for copyright and related rights which may be appealed to in a specific case, as a defense against a claim based on an infringement of copyright and/or related rights, and in which all the interests involved can be balanced against each other. Article 5 paragraph 4 of the proposal for the EC directive (the free steps test) could serve as a model for this. It should be clear that these are exceptional or analogue cases. It is a matter for the person who appeals to this standard to show why an appeal to this standard should be honored. The test on the basis of general standards is not alien to the Dutch legal system, given the options outlined above of appealing to the standards of competition law or private general law. However these standards do not provide pointers to the judiciary in all possible cases involving a copyright dispute. Although the Supreme Court considered there was scope for breaking with the system of a restrictive list of limitations, the formulation of the conditions under which this is possible has not been approved by everyone.

One member of the Copyright Commission thinks that the completely open system which applies in the USA should not be followed. The highest judge in the USA has ruled that this system should be applied on a case-dependent basis, which according to this member would lead to unacceptable legal uncertainty which also conflicts with the BC, a convention which until now has been observed by the Netherlands, with the precisely defined limitations in the Aw (Copyright Act). However, other members of the Copyright Commission consider in this respect that article 9 BC also leads to application on a case-dependent basis. Moreover, the fair use approach in the USA and the fair dealing approach in the UK do not affect these states' membership of the BC.

The position taken by the Copyright Commission seems to be supported by a recent report by the Netherlands Bureau for Economic Policy Analysis (CPB), in answer to a call on behalf of publishers for additional copyright legislation and enforcement. However, the title of this report is already significant: *Copyright Protection: not more but different*. And as far as the content is concerned, in this article it suffices to quote only some sentences from the preface.

However, the claim for increased protection is not as valid as it appears. First, in many markets for information goods competition between originals and copies is virtually non-existent or publishers can internalize part of the surplus created by copies. Second, in markets that experience network effects, both publishers and consumers might benefit from copying. Finally, publishers can use the decrease in costs to engage in (digital) business strategies such as giving away free samples, versioning and selling complementary products. The case for increased protection is further undermined by the fact that information goods industries often use market solutions, such as contractual agreements and technological devices, to protect their content. The challenge for policy-makers is to design a modern, flexible copyright regime that balances the interests of publishers and consumers. An extension of protection does not seem to achieve this goal.

2.2 *Specific issues*

2.2.1 General

On-line publishing has become an issue of major concern both with regard to upstream licensing (i.e. the relationship between authors and exploiters), as well as downstream licensing (i.e. the relationship between authors and/or exploiters), and end-users (consumers)). It may be said that with regard to upstream licensing nationally and internationally a great deal of emphasis is placed upon model contracts and collective bargaining as instruments for the promotion of the interests of individual authors.⁴² With regard to downstream licensing it is particularly the multimedia industry that has successfully taken action in order to discipline the users of copyright protected information.⁴³ The most striking example is that of the US UCITA (although not many US States have adopted this model law in their national jurisdiction).⁴⁴ A widely-debated question in this respect is whether, and if so, in how far statutory exceptions and limitations to the copyright prerogatives can be contracted away. Legal doctrine seems to be divided on this point.⁴⁵

On-line publishing has also influenced the status of freelance journalists. The available computer technology has made it possible to digitize both old and new works either for archival purposes or for offering informational services in addition to the existing paper-made format. Since the indicated modes for exploiting those works could not have been envisaged at the time when they were written, the question had to be answered whether the journalists were entitled to supplementary remuneration. It appears that the leading answer to this question has been provided by the US Supreme Court in the *Tassini*-case: journalists may indeed request for additional remuneration.⁴⁶

2.2.2 The Netherlands

On-line publishing, both upstream licensing and downstream licensing, is left almost entirely to the parties involved. Contractual freedom is what counts here. In the case of upstream licensing in some branches such as that of *belletrie* the situation is dealt with on the basis of model or standard contracts.⁴⁷ With regard to downstream licensing different views are held in the literature as there is no available case law.⁴⁸

As far as the position of journalists is concerned, mention should be made of the *Heg c.s. v. De Volkskrant* case.⁴⁹ In this case which preceded the *Tassini* case already

42. See e.g. ALAI Nordic Study Days 2000 (Stockholm Sweden 2000).

43. Compapre Pamela Samuelson, Kurt Opsall, *The Tensions between Intellectual Property & Contracts in the Information Age: An American Perspective*, in *Molengrafica* 1998, referred to in footnote 19, pp. 163-198.

44. Guibault, referred to in footnote 19.

45. See references in footnote 12.

46. 25 June 2001 New York Times and co. v. Tassini and co. AMI 2001/6, pp. 143-148.

47. Hendrik van Hees, Michel Frequin, *Auteursrechtgids* (Sdu The Hague 1999).

48. Grosheide, referred to in footnote 19; Guibault, referred to in footnote 19.

49. 24 December 1997, *Mediaforum* 1997/11-12, B. 159-161 (*Heg and co. v. De Volkskrant*).

mentioned, the outcome was the same: the respective modes of exploitation not being foreseeable at the time of offering the works for publication, the journalists were entitled to additional remuneration.

3 The financial flows

3.1 The remuneration of authors and the technical means collecting the royalties

3.1.1 General

Technical means for collecting the royalties consist of Copyright Management Information (CMI) as its central component. CMI is the generic term used to indicate all information, either in analogue or in digital form, that identifies a copyrighted work, those who have a particular interest in the work (e.g. the author or exploiter), as well as any other information that enables or facilitates the management of the rights to the work. As is illustrated by the International Standard Book Number (ISBN) which was already established in 1967, CMI is not a new phenomenon brought into existence as a result of computer technology. However, it is quite clear that CMI is of particular importance for the role it can play with regard to electronic commerce in information products and the management (or administration) of the copyright and related rights thereto. This importance is underlined by the fact that recently international as well as national legal instruments such as the WCT, the CHD and the DMCA offer special protection against the removal or alteration of CMI appropriately applied by any rightholder.⁵⁰

It follows that in the context of this paper particularly relevant are those copyright management systems which operate in an electronic environment, the so-called Electronic Copyright Management Systems (ECMS). Recently, a variety of such systems and a number of standards have been proposed and developed.⁵¹ Understandably, the different kinds of information that have to be identified by a CMI in a ECMS (e.g. text, image, music) require different kinds of legal approaches. This is equally true for characteristics of information such as the capability of changing status (e.g. from copyright protected into public domain information), or for the question of so-called granulation (to what degree of precision does information have to be identified for e-commerce in content to become effective?) In relation to all this effective CMI's and CMS's are seen by those who consider statutory exceptions to copyright and related rights as mere market failure correctives, as adequate technical expedients in order to withdraw from them.

Although certain elements of CMI may already be protected by existing domestic law against removal or alteration, the different national solutions applied in this respect in similar cases under different national law have been unsatisfactory.

3.1.2 The Netherlands

See also District Court of Amsterdam 9 August 2000, AMI 2001/3, pp. 66-68.

50. See Annemique M.E. de Kroon, Protection of Copyright Management Information, in Hugenholtz referred to in footnote 8, p.p. 229-265.

51. Ibidem.

For the actual state of affairs in the Netherlands reference should again be made to the 1998 Report by the Copyright Commission where the commission comes to terms with what it calls *legal collective rights management*.⁵²

2.6 *Legal collective rights management*

2.6.1. *Problems involved*

In some places, the law prescribes collective rights management as the answer to developments which prejudice the interests of rightholders who cannot exercise control or conclude contracts on an individual basis.

At the moment there are five organisations which collect remuneration exclusively for rightholders for the use of protected material: Stichting Reprerecht (collection and distribution of remuneration for reprographic copying), Stichting Leenrecht (collection and distribution of remuneration for the lending of protected material by public libraries and a number of other establishments with public access), Stichting De Thuis kopie (collection and distribution of the levy on blank image and sound carriers), the organisation SENA mentioned before and the Buma association (which is the only organisation in the Netherlands with a licence from the Ministry of Justice to mediate in exercising copyright on music when music is broadcast or performed in public). The four foundations negotiate with users, excluding individual rightholders. For Buma, the situation is the same de facto.

The question is, whether the legacy enshrined task of these organisations extends to new media. The European Commission stated in its Communication that although the wish has been expressed to form central rights management and collective licences of rights by means of one-stop-shops or clearing houses, there are also new technologies which in the future will create more options for exercising rights individually.

2.6.2. *Point of view*

2.6.2.1 *General*

Legal collective management is regarded as a practical but at the same time next-best or ultimate remedy solution. Individual rightholders are no longer involved in the exploitation. The establishment of the level of the remuneration and the basis for the distribution of this are of a general nature. If there were full interaction of market forces, there would be no need for legal collective management.

2.6.2.2 *Electronic-reproduction*

The "reprography right" (in fact: the photocopy) was the subject of a previous advice document of the Copyright Commission. At the time, the conclusion was reached that there are good reasons for not applying the regulation to electronic reproduction. Rightholders and users wish to arrive at a practice where comprehensive agreements are reached about both reprographic and electronic reproduction. Some of the problems involved in electronic reproduction differ from those involved in reprographic reproduction. The Copyright Commission therefore thinks that there is no scope for the application of legally compulsory collective management of electronic reproduction via new media. It seems very likely

52. Copyright Commission, Report 1998, referred to in footnote 13, pp. 18-20.

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that the application of electronic reproduction was not considered when the reprography right rules were drawn up. Article 5 paragraph 2a of the proposal for the EC directive states that it shall be a matter for the member states to take their own decisions on this point.

2.6.2.3 Lending

The current regulation applies to digital carriers such as CD-ROM and CD-I, but not to computer software (article 15c ff. Aw; article 15a ff. Wnr). The lending payment is in accordance with EC directive 92/100, while the proposal for the EC directive does not in any way prevent member states from applying the regulation to new media as well. In practice, however, it seems that so far it has been difficult to reach a consensus on payments and other conditions for lending such carriers.

Nevertheless, the Copyright Commission would prefer the extension of the existing regulation. It is too early to revise the regulation. We advise the government to follow closely the developments in this area.

2.6.2.4 Levy on blank image and sound carriers

If we take the law to the letter, digital carriers such as CD-ROM and CD-I could be included in the existing levying regulation for blank sound and image carriers (articles 16ff. Aw in conjunction with article 10 Wnr). However, the application of this regulation to new media would cause problems. It would be extremely difficult, if not impossible, to check which works or performances are recorded on digital carriers, especially because such carriers are used mostly for the storage of non-protected material. These carriers may, nonetheless, contain a number of works or performances of a different nature. Nothing concrete can be said about the copying frequency of protected material. Therefore there are no reliable pointers for correction and repartition, as is still the case to some extent at the moment for copying at home on videotapes and music cassettes. The Copyright Commission advises against the application of the existing levy regime used for digital carriers. The proposal for the EC directive provides scope for member states to decide their own policy for the time being.

2.6.2.5 Use of music

The licence, on the basis of which Buma has the exclusive authority to mediate as regards copyright on music is, when taken literally, confined to broadcasts by broadcasting companies and performances in public (article 30a Aw). It is unlikely that, at the time, the exclusive authority for Buma was also intended or foreseen for other areas of disclosure. This means that there is a possibility of competition for the other forms of exploitation, and that other collective management organisations may negotiate with users of music on behalf of rightholders. The Copyright Commission thinks - also considering the cabinet's view following the report of the MDW working group on supervision and cooperation for collecting copyright remuneration - that it would not be desirable to have a situation where Buma and SENA derive different powers from the law. There is no objection as such to Buma operating outside the scope of the exclusive licence; Buma is already experimenting in this field. But the Copyright Commission does not think there is any reason for extending the exclusive licence.

2.6.2.6 Freedom of choice

With regard to new media, it may in principle (with the exception of the lending right) be left to the rightholders to decide whether or not they want their interests to be looked after collectively. There are

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no grounds for the introduction of new forms of legally compulsory collective management. The development of clearing houses and one-stop-shops should – in accordance with the point of view of the European Commission - be left to the market for the time being (see also 5.2.2). The government should strive to remove any obstacles to standardisation, but this has nothing to do with copyright. Existing collective organisations may present themselves as intermediaries with regard to rights involved in new media. They offer users the advantage of one single desk for certain rights. However, new organisations may also enter into this market.

Things have been somewhat amended since the commission issued its report. Legislation following the commission's suggestions in many parts has been placed before parliament with regard to reprographic reproduction, and this is now entering its final stage of deliberations.⁵³ According to the Ministry of Justice this draft is in harmony with the CHD and does not need to be adapted in that respect. The same is true for the issue of collective management generally dealt with in another piece of draft legislation aimed in particular at rationalizing and making uniform the different systems of collective management so that they become a producer and user friendly, i.e. easy to handle.⁵⁴

53. EK 2000/2001, 27617, nr. 249a. See R.W. Holzhauser, *Het nieuwe reproductie recht*, AMI 2002/1, p.p 1-5.

54. TK 2000/2001, 27775, nrs. 1-5. See H. Cohen Jehoram, *Veranderingen in het wetsvoorstel Toezicht collectieve beheersorganisaties*, AMI 2001/5, p.p. 108-110.

