



ICLG

The International Comparative Legal Guide to:

Copyright 2016

2nd Edition

A practical cross-border insight into copyright law

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Netherlands



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1 Copyright Subsistence

1.1 What are the requirements for copyright to subsist in a work?

The Dutch Copyright Act ('DCA') does not expressly require originality, but it is settled case-law that only original works are eligible for copyright protection. According to the Dutch Supreme Court (*Hoge Raad*), a work must have an individual character and bear the personal imprint of its creator. "Personal imprint" means that the form is a result of creative human activity and thus of creative choice. The current stand of the Dutch Supreme Court is that the Dutch originality criterion is in line with the originality standard as formulated by the ECJ.

In the Netherlands, copyright exists as soon as a work is produced. No formalities are necessary (and not even allowed) to obtain copyright protection. The author does not need to register the work or declare that copyright is reserved.

1.2 On the presumption that copyright can arise in literary, artistic and musical works, are there any other works in which copyright can subsist and are there any works which are excluded from copyright protection?

In all works with an individual character and bearing the personal imprint of its creator, copyright can subsist.

The DCA explicitly excludes laws, decrees and directives issued by the public sector, as well as judicial decisions from copyright protection (article 11 DCA). The reason for this is that they are core texts of the democratic state. For other works produced by the public sector, or in which copyright has been acquired, the default position is that they may be freely reproduced, adapted, distributed or otherwise communicated once they have first been published by or on behalf of the public authorities. The public sector may, however, reserve its rights (article 15b DCA).

Also in case-law and literature, it is generally accepted that the DCA does not grant protection to what is technically or functionally determined. Choices that are completely or largely dictated by the need to achieve a certain technical or functional effect are considered to result in 'objective' characteristics, which do not count towards the required level of originality. As a result, mere technical works may not be able to rely on copyright protection.

1.3 Is there a system for registration of copyright and if so what is the effect of registration?

Sometimes, people choose to register their creations. Registration does not provide any legal protection. However, it can prove that a creation already existed on a certain date. Such evidence may be useful in a conflict with a third party to prove that the creation was not derived from that third party's work.

There is no legal requirement for how a work should be registered for this purpose. One could register one's work at a notary public or at the Benelux Office for Intellectual Property ('BOIP'). The BOIP offers an online facility, named i-DEPOT, against a fee starting from EUR 35 for five years' storage. Before 2013, works could also be registered at the tax authorities.

1.4 What is the duration of copyright protection? Does this vary depending on the type of work?

Copyright continues to apply for 70 years after the death of the author. When the author dies, the copyright is transferred to his heirs. Unless the author timely discloses his identity, the copyright in a work of which the author has not been indicated or has not been indicated in such a way that his identity is beyond doubt, shall expire 70 years after the work was first lawfully communicated to the public. The same applies to works of which a public institution, association, foundation or company is deemed the author, unless the natural person who created the work is indicated as the author on or in copies of the work which have been communicated to the public. The 70-year term always starts on 1 January of the year following the described event and applies to all types of works (articles 37-39 DCA).

1.5 Is there any overlap between copyright and other intellectual property rights such as design rights and database rights?

Besides design right protection, under Dutch copyright law industrial designs, i.e. applied art, can also be copyright protected if such designs meet the originality test. Consequently, copyright and design right protection can apply simultaneously. Nowadays, the lapse of design rights does not affect a copyright. Before 1 December 2003, copyrights automatically lapsed at the moment the design rights lapsed, unless the proprietor made a declaration for the maintenance of his copyrights.

Also copyrights and database rights can coincide. The DCA explicitly stipulates that collections of different works shall be protected as separate works, without prejudice to the copyright in the original work (article 10(2) DCA). This provision is in line with the European Database Directive which stipulates that databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. Apart from that, the producer of a database can also, if applicable, rely upon a *sui generis* database right if the database consists of a collection of independent works, data or other materials arranged in a systematic or methodical way that are individually accessible by electronic or other means and for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment.

Furthermore, copyrights can overlap with trademark rights. A copyright protected work can also be a trademark and *vice versa*. This particularly applies to industrial designs, titles and slogans that may be registered as a shape mark, word mark, as well as (original) figurative marks respectively.

1.6 Are there any restrictions on the protection for copyright works which are made by an industrial process?

No, there are not.

2 Ownership

2.1 Who is the first owner of copyright in each of the works protected (other than where questions 2.2 or 2.3 apply)?

The author of a work is the person who has brought the intellectual creation into being. The author is almost always also the owner of the copyright.

Besides the situations where questions 2.2 or 2.3 apply, the only deviations to this rule are if (i) a work has been made according to the draft and under the guidance and supervision of another person, who will then be the author (article 6 DCA), or (ii) a work is published for the first time by a legal entity – e.g. a private or public limited company – as deriving from it without specifying a natural person as the author, then the legal entity is deemed to be the author of the work (article 8 DCA).

In this respect, please note that, unless there is proof to the contrary, the person who is named as the author in or on the work or, where there is no such indication, the person who, when the work is communicated to the public, is named as the author by the party who communicates the work to the public, shall be deemed the author of the work (article 4 DCA).

2.2 Where a work is commissioned, how is ownership of the copyright determined between the author and the commissioner?

In principle, copyrights are owned by the author, i.e. creator, regardless of whether the work was commissioned. There is one exception to this rule: the Benelux Convention on Intellectual Property ('BCIP') stipulates that if the work created concerns the appearance of a product or a part of a product and has been created on commission, the commissioning party shall, unless specified otherwise, be regarded as the creator, provided that the commission was given with a view to commercial or industrial use of the product in which the design is incorporated (article 3.8 BCIP).

2.3 Where a work is created by an employee, how is ownership of the copyright determined between the employee and the employer?

If activities carried out in the context of employment involve producing certain works, then the employer is deemed to be the author (article 7 DCA). If the work created by the employee is, however, not related to his role, then the employee holds the copyright himself. Parties may derogate from this by contract (within reasonable margins). Consequently, to avoid discussion, more and more labour agreements contain IP clauses on works created by the employee.

The matter may, however, be different where it concerns scientific/scholarly research. The question of who then owns the copyrights has been the topic of discussion for decades, but the general view is that if the work is created during independent academic research, for which the researcher bears responsibility, the researcher is entitled to the copyrights.

2.4 Is there a concept of joint ownership and, if so, what rules apply to dealings with a jointly owned work?

Yes, joint creation results in joint ownership of copyrights in a work. Joint ownership can also result from e.g. transfer of a share, marriage or succession. Where the copyrights in a work belong jointly to two or more persons, it may be enforced by any one of them, unless otherwise agreed. The exploitation of shared copyrights, however, needs the consent of all owners. Consequently, in principle, publication, reproduction or licensing of a jointly owned work requires shared approval.

3 Exploitation

3.1 Are there any formalities which apply to the transfer/assignment of ownership?

Copyrights are assignable in whole or in part by any person powered to do so. A deed, i.e. a written and signed document, is required for assignment of copyrights (article 2 DCA). The assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the deed. The moral rights stay with the original author despite the assignment of the copyright. A consideration is not required.

3.2 Are there any formalities required for a copyright licence?

Under the current law, a licence can be granted in writing or even verbally, although the latter may result in lack of proof of the licence in case of a dispute. Due to the bill regarding copyright contracts (*Wetsvoorstel auteurscontractenrecht*), the DCA has been modified as from July 1, 2015. Article 2 of the current DCA requires a deed for granting an exclusive licence.

A sub-licence (unless contractually prohibited) can only be granted by the licensee by deed upon notification to the licensor.

3.3 Are there any laws which limit the licence terms parties may agree (other than as addressed in questions 3.4 to 3.6)?

A licence is an agreement. Therefore, the Dutch law principle

of freedom of contract applies, although this freedom is not unrestricted. E.g. good faith and fair dealing in relation to the legal effects of a contract, public order and *bonos mores* restrict this freedom. Restriction can also result from specific mandatory law. There are no specific laws regarding copyright licence agreements.

The current DCA that has been modified as per July 1, 2015 due to the bill regarding copyright contracts (*Wetsvoorstel auteurscontractenrecht*) contains rules as to copyright contracts between authors or performers on the one hand and producers or publishers exploiting their work on the other hand. As a consequence an author should (*inter alia*) receive reasonable compensation for exploitation of his work. It also stipulates that if the producer does not exploit the author's work within a reasonable period, the author has the right to dissolve the contract.

3.4 Which types of copyright work have collective licensing bodies (please name the relevant bodies)?

Most authors of music, film and photography work exercise their copyrights through a collective management organisation. Many collecting societies with regard to all kinds of works exist and their number increases over time. These collective management organisations are affiliated with the Association of Organisations for the Collective Management of Intellectual Property Rights (*Vereniging van Organisaties die Intellectueel eigendom Collectief Exploiteren*, "VOI©E").

Only the following societies have an explicit legal basis and are exclusively entrusted with the collection, distribution and exercise of the:

- lending right for authors: **Stichting Leenrecht** (Lending Rights Foundation);
- private copying remuneration: **Stichting de Thuis kopie** (Home Copying Foundation), by collecting levies for rights holders from manufacturers and importers of blank sound and image carriers;
- remuneration for reprography: **Stichting Reprorecht** (Replication Rights Foundation);
- remuneration for the broadcasting and communication to the public of music works: **BUMA**; and
- remuneration of all Dutch artists and record producers under the Neighbouring Rights Act: **SENA**.

Besides these societies, there are many more privately organised collective societies in the Netherlands. To name a few:

- **Stemra**, which has joined forces with BUMA and manages the remuneration for the reproduction of music works; and
- **Pictoright**: manages the copyrights of (joined) graphic designers, photographers and other professional image creators.

In the context of distribution of cable remunerations, the following societies play an important role:

- **Sekam**: collects remunerations paid by cable exploiters for audio-visual work and distributes them amongst rights holders; and
- **Vevam**: collects and distributes remunerations, mainly paid by cable exploiters, for the use of audio-visual works for the benefit of film and television directors.

3.5 Where there are collective licensing bodies, how are they regulated?

Most societies have come into being out of the initiatives of professional groups. There are no general legal regulations as to copyright management/mediation organisations. Only the first

five societies mentioned in question 3.4 have a legally established monopoly and are being legally supervised.

All collecting societies only represent the authors who have joined and, in most cases, also have licensed or assigned their copyrights to them, in whole or in part.

3.6 On what grounds can licence terms offered by a collective licensing body be challenged?

There are no special legal grounds for challenge of terms offered by a licensing body. The financial terms of the legally supervised societies are, however, hardly negotiable, as they are directly or indirectly fixed by the Administration or by a society appointed by the Administration. Also, imposition of unreasonable terms by the societies that have a legal monopoly may – in exceptional cases – qualify as abuse of a dominant position.

Beside this, the societies have their own dispute settlement system. If a complaint has either not been settled or has not been properly settled, one can contact VOI©E (see question 3.4).

4 Owners' Rights

4.1 What acts involving a copyright work are capable of being restricted by the rights holder?

Copyrights give the rights holder the exclusive right to (i) publish the work, and (ii) duplicate the work (article 1 DCA). The term "publication" means bringing the work to the attention of the public in some way or another, e.g. publishing, lending out, providing or presenting in public. "Duplication" also has a broad meaning and includes acts like adapting or translating the work.

4.2 Are there any ancillary rights related to copyright, such as moral rights, and if so what do they protect, and can they be waived or assigned?

Yes, the DCA provides for moral rights (article 25 DCA). Pursuant to these rights, the author can oppose:

- a. communication to the public of his work without acknowledgment of his authorship, unless such opposition would be unreasonable;
- b. communication to the public of his work under a name other than his own, and any alteration in the name of the work or the indication of the author;
- c. any other alteration of his work, unless such opposition would be unreasonable; and
- d. any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such.

Moral rights cannot be transferred, but the author can waive them – except for the right under d.

4.3 Are there circumstances in which a copyright owner is unable to restrain subsequent dealings in works which have been put on the market with his consent?

Yes, a general exhaustion doctrine forms part of Dutch copyright law: if by means of transfer of ownership, an original or copy of a work has been put into circulation for the first time by or with the consent of the rights holder in one of the Member States of the European Union or in a state that is a party to the Agreement on the

European Economic Area, then putting that original or copy into circulation in any other way, except by rental and lending, does not infringe the copyright (article 12b DCA).

5 Copyright Enforcement

5.1 Are there any statutory enforcement agencies and, if so, are they used by rights holders as an alternative to civil actions?

On the basis of the European Anti-Piracy Regulation, customs authorities can prevent, *ex officio* or by request, counterfeit or otherwise infringing products from being imported into or exported from the EU market. Rights holders often involve customs for this purpose. Action by customs, if challenged by the alleged infringer, has to be followed up by civil proceedings.

Although not statutory, the organisations BREIN and REACT are an alternative for many rights holders. On behalf of their members, these organisations actively combat counterfeit through their own efforts and in close cooperation with the Public Prosecution.

5.2 Other than the copyright owner, can anyone else bring a claim for infringement of the copyright in a work?

Another party, including an exclusive licensee, can only bring a claim for infringement if so powered by the rights holder.

5.3 Can an action be brought against 'secondary' infringers as well as primary infringers and, if so, on what basis can someone be liable for secondary infringement?

Acts which facilitate or promote copyright infringement and in itself do not qualify as an infringement, may nevertheless be considered tortious on the basis of general tort law. A party who commits such tortious act must in principle repair the damage that another party has suffered as a result thereof (article 6: 162 Dutch Civil Code).

The primary as well as well the secondary infringer can be sued simultaneously as long as their acting is connected.

5.4 Are there any general or specific exceptions which can be relied upon as a defence to a claim of infringement?

The DCA has a closed system of exceptions, set out in paragraph 6 DCA:

- reproduction by the press (15 DCA);
- exception for quotation (15a DCA);
- library exception (15h DCA);
- disability exception (article 15i DCA);
- publications for educational purposes (16 DCA);
- short recordings and showings for topical documentaries (16a DCA);
- (restricted) reproduction intended for personal exercise, study or use by the natural person (16b DCA);
- private copy exception (16c DCA);
- reproductions of printed material for internal use (16h and 16j DCA);
- restoration or preservation exception (16n DCA);
- recordings of own programmes by broadcasting organisations (17b DCA);

- congregational singing (17c DCA);
- reproductions of depictions of works, made to be put on permanent display, in public places (18 DCA);
- *de minimis* use exception (18a DCA);
- parody exception (18b DCA);
- use by judicial authorities in the interests of public security as well as the detection of criminal activity (22 (1) DCA);
- use to safeguard the proper progression of administrative, parliamentary or judicial proceedings or media coverage thereof (article 22 (2) DCA);
- public exhibition or public sale of art (23 DCA); and
- right to continuously make similar paintings (24 DCA).

Besides these exceptions, paragraph 6 DCA provides for the Government to order that a work may be broadcasted without consent of the rights holder (17a DCA). This right has, however, never been exercised.

5.5 Are interim or permanent injunctions available?

Yes, both are available.

In case of urgency, an interim injunction can be requested in *inter partes* summary proceedings. An *ex parte* injunction can be requested if the need for an injunction is so urgent that irreparable damage will be suffered by the applicant if the injunction is not ordered. In accordance with article 50(6) of TRIPS, interim injunction proceedings have to be timely followed up by proceedings on the merits (1019(i) Dutch Code of Civil Procedure).

In proceedings on the merits, in case of infringement of IPRs or real threat thereof, Dutch courts are in principle obliged to issue a permanent injunction.

5.6 On what basis are damages or an account of profits calculated?

The assessment of damages is based on grounds of civil liability. The duty to compensate actual damages is found in the Dutch law on tort. It is up to the claimant to prove its damages. There is no legally prescribed format as to this proof, although often the effect of the infringing activity on the rights holder's profitability is taken into consideration (i.e. loss of profits or licence fees). In many cases, lost profits are calculated by multiplying the amount of products that the rights holder has sold fewer than he would have otherwise due to the infringement, multiplied by the missed profit (that the rights holder would have made) per product. Apart from the infringement, the duty to compensate damages requires that the infringement can be attributed to the infringer.

As it is often difficult to prove actual damages, it is noted that damages can also be assessed by the amount of profits made with the infringing activity. An award to surrender *net* profits is a different way of assessing damages, also based on civil liability. Case law shows that direct costs (i.e. taxes and other costs directly and exclusively related to the infringing products) and an attributable part of the fixed costs may be deducted from the gross profits.

Compensation for actual damages and compensation in the form of surrender of profits made by the infringing party can both be claimed (article 27a DCA), but cannot be awarded as an accumulation. The rights holder may choose the higher of the two amounts. Surrender of the profits made by the infringing party can accumulate with compensation for possible other damages, such as extrajudicial costs, etc.

5.7 What are the typical costs of infringement proceedings and how long do they take?

The Dutch Bar does not allow remuneration according to the no cure-no pay principle. As actual time is charged, costs may differ greatly and depend on the complexity of the case. Nevertheless, in the context of legal costs compensation, the courts use so-called Indicative Rates in IP matters, except for patent cases, in the first instance. These rates give a good impression of typical costs:

- simple summary proceedings: EUR 6,000;
- other summary proceedings: EUR 15,000;
- simple proceedings on the merits without reply and rejoinder: maximum EUR 8,000;
- other proceedings on the merits without reply and rejoinder: maximum EUR 20,000;
- simple proceedings on the merits with reply, rejoinder and/or counsel's plea: maximum EUR 10,000; and
- other proceedings on the merits with reply, rejoinder and/or counsel's plea: maximum EUR 25,000.

Although courts can deviate from these rates, they do not easily award higher compensation claims without good reasons (unless for instance the parties both claim higher costs).

Summary proceedings take roughly 4 to 10 weeks from serving the writ until judgment, although in very urgent cases (e.g. to prevent broadcasting of a programme) an interlocutory decision can be obtained in a matter of days. Proceedings on the merits (in first instance) normally take from 6 to 18 months.

5.8 Is there a right of appeal from a first instance judgment and if so what are the grounds on which an appeal may be brought?

Yes, if one of the parties disagrees with the court's ruling, the case can be referred to the court of appeal. Depending on the objections made, the court of appeal can fully reassess the case, from a factual as well as legal point of view.

5.9 What is the period in which an action must be commenced?

Although there is no legal term, case-law shows that courts normally accept urgency if summary proceedings are initiated within six months after the infringing act occurred. In situations of an ongoing infringement of IP rights, urgency is always deemed to exist. With regard to proceedings on the merits, courts rarely refuse claims because of mere lapse of time.

The appeal term is normally three months from the judgment, but in summary proceedings it is four weeks.

6 Criminal Offences

6.1 Are there any criminal offences relating to copyright infringement?

Yes, articles 31 to 35(d) DCA qualifies various acts as serious criminal offences (*misdrifven*) or minor or lesser criminal offences (*overtredingen*), varying from intentional infringement to incorrect statement to an (exclusively entrusted) collecting agency.

6.2 What is the threshold for criminal liability and what are the potential sanctions?

In brief, it must be proven that the offender deliberately and knowingly committed the crime in question. In that respect, sentences differ from a maximum fine of EUR 8,100, to a maximum of four years' imprisonment or a fine of EUR 81,000 in case of piracy. These amounts apply to 2014 and are increased annually.

7 Current Developments

7.1 Have there been, or are there anticipated, any significant legislative changes or case law developments?

Yes, the bill regarding copyright contracts (*Wetsvoorstel auteurscontractenrecht*) has matured into law as per July 1, 2015 (see also questions 3.2 and 3.3). The objective is to improve the contractual position of authors and performers in relation to producers and publishers who exploit their work. Pursuant to this bill, the position of authors will be more aligned with those of neighbouring countries.

7.2 Are there any particularly noteworthy issues around the application and enforcement of copyright in relation to digital content (for example, when a work is deemed to be made available to the public online, hyperlinking, etc.)?

As a result of the judgment of the ECJ in case C-435/12, dated 10 April 2014 (*ACI Adam BV and Others v. Stichting de ThuisKopie*), the Dutch Ministry of Security and Justice has banned the downloading of pirated content, finally making this illegal for people in the Netherlands. Before, people in the Netherlands had been allowed to download copyrighted material from illegal sources pursuant to the so-called private copy exception (see question 5.4).

Further, in April 2015 the Dutch Supreme Court (*Hoge Raad*) has asked prejudicial questions to the ECJ in the case *GeenStijl v. Sanoma re* hyperlinking to a website that is under the control of a third party and under which circumstances this can be seen as communication to the public within the meaning of article 3 under 1 of the Copyright Directive.



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Even before he started working as an attorney (*advocaat*) in 1999, Olav Schmutzer was focused on intellectual property law. More than 15 years down the road, he has become a legal specialist in copyrights, designs, trademarks and trade names. From 2008 to 2011 he worked as an in-house counsel, and was general counsel for an international apparel company.

Based on this wide experience, working for both law firms and commercial companies, Olav's forte is assessing his client's strategic interests whilst providing thorough and comprehensible legal advice.

Olav has extensive experience with domestic and international IP disputes, including disputes regarding so-called slavish imitations, and litigating such matters. He is often engaged in commercial (international) collaborations, especially in the fashion industry. Clients vary from SMEs to large multinationals.

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Being the co-author of the Dutch serial IP-guide for entrepreneurs and companies 'IE in Bedrijf' ('IP in business'), a respected publisher in newspapers, IP-magazines and blogs, and working for many (well-known) designers, authors, artists, advertising agencies and (multinational) companies, Marjolein Driessen has positioned herself as a true specialist in intellectual property and advertising law. Her creative and innovative clients are active in the fashion, furniture, sports, film and travel industries.

She is an experienced litigator in court procedures, oppositions and procedures at the Dutch Advertising Code Committee. She provides her clients with practical and valuable advice before conflicts may arise, and is a sparring partner in starting up and maintaining trademark/design portfolios.

Before joining Legaltree in 2011 as partner, Marjolein worked for ten years as a trademark attorney and as an attorney (*advocaat*) with a main focus on copyright, trademarks, designs and advertising law.



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