

ALAI Congress 2017 in Copenhagen

Copyright, to be or not to be

Questionnaire

Answers by the Dutch ALAI Group (Stef van Gompel & Robert van Schaik – Institute for Information Law, University of Amsterdam)

The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

The present Dutch Copyright Act (DCA), which was introduced in 1912, is utterly silent on the justifications for protection. Neither the preamble of the law, nor the parliamentary documents explain the reasons for granting copyright. At the time of enactment of the law, the Explanatory Memorandum merely stated that, in light of the Netherlands' accession to the Berne Convention (Berlin Act, 1908), it was desirable to enact a new regulation of the law on copyright to secure the interests of Dutch authors. The 1881 Copyright Act (in place at that time) only protected against (1) the making public by means of print of writings, illustrations, maps, musical or dramatic works and oral lectures; and (2) the public performance of dramatic or dramatic musical works. Paintings and works of sculptural art were excluded from protection. The legislator found that this gap had to be filled, not only because works of art were protected under the Berne Convention, but also given 'the importance of these works for the world of art and for society in general'.¹

Interestingly, the parliamentary documents of the 1881 Copyright Act do contain some justifications for protection. The Dutch legislator strongly refuted that authors have pre-existing rights based on ideological or principled grounds, but it nevertheless felt that the state was bound to create by law a temporary and exclusive author's right, not only on utilitarian grounds but also as a matter of fairness and justice.² Thus, the legislator acknowledged that it was not just in the interest of the public to protect copyright, but that reasons of fairness and justice also instigated that author's rights be protected.

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

The Dutch Neighbouring Rights Act (DNRA), introduced in 1993, also contains no justifications for granting protection in its preamble. The preamble merely explains that this new law was enacted in response to the Netherlands' intention to accede to the Rome Convention (1961) and the Geneva Convention (1971). The

¹ Explanatory Memorandum, Parliamentary Paper 227.3 ('Nieuwe regeling van het auteursrecht'), *Handelingen der Staten-Generaal* 1911/12 II Bijlagen, p. 6-14 (at 6).

² Minister Modderman, Debate on the Copyright Bill in the House of Representatives, 1 and 2 June 1881, *Handelingen der Staten-Generaal* 1880/81 II, p. 1627-1629 (at 1629) and 1637-1651 (at 1644). See also Memorandum in reply, Parliamentary Paper 15.1, *Handelingen der Staten-Generaal* 1880/81 II Bijlagen, p. 1-6 (at 1).

parliamentary documents, on the other hand, mention justifications for protection that, with the exception of performers' rights, are predominantly economic in nature. The Explanatory Memorandum explains that the protection of phonogram producers and broadcasting organisations by means of neighbouring rights is based on purely economic objectives, aimed at safeguarding the investments they made in the production of phonograms and broadcasts. The protection of performers, on the other hand, is also based on social objectives, as the secondary use of their recorded performances directly jeopardised the employment of performers.³ During the debates, some parliamentarians also acknowledged that, because of their artistic and creative achievements, the protection of performers was more akin to that of authors.⁴

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

Despite the absence of clear justifications for copyright in Dutch parliamentary history, it is fair to assume that the key rationales for copyright protection in the Netherlands are based on an amalgam of principles of justice and societal utility,⁵ although it is not easy to trace the impact of these principles in individual provisions of the law. Yet the protection of specific authors' and performers' interests is safeguarded in the recognition of prerogatives deriving from moral rights (art. 25 DCA and art. 5 DNRA) and specific provisions of contract law that strengthen the position of authors and performers vis-à-vis exploiting parties (art. 25b-25h DCA and art. 2b DNRA). At the same time, the Netherlands cannot be clearly situated within either the author's right or the copyright traditions. As envisaged by art. 7 and 8 DCA, which set out a presumption of authorship of employers and legal persons, the DCA departs on two occasions from 'the principle that the creator is the author and first owner of the copyright in a work made by him'.⁶

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

There is not an overwhelming stock of legal literature in the Netherlands that delves into the justifications for copyright and related rights protection. The dissertation of Grosheide, which extensively discussed the rationales for copyright, is a notable exception. Yet, Grosheide aims to analyse the various rationales that can be put forward to justify copyright, without proposing alternative or supplementary justifications for copyright. In this respect, he offers an excellent overview of the main justifications for copyright expressed in legal literature in other countries, particularly in Europe and the US.⁷

Also from a history perspective, the justifications for copyright protection have been scantily discussed in the Netherlands.⁸ One of the few legal scholars that has proposed his own legal theory on copyright is De Savornin Lohman, who in the nineteenth century suggested that the rationales of copyright can be based on a combination of legal principles. He basically stated that fairness requires copyright to be protected,

³ *Kamerstukken II 1988/89*, 21244, no. 3, p. 4.

⁴ *Kamerstukken II 1989/90*, 21244, no. 5, p. 5.

⁵ J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 10.

⁶ J.M.B. Seignette, *Challenges to the creator doctrine: authorship, copyright ownership and the exploitation of creative works in the Netherlands, Germany and the United States*, Deventer [etc.]: Kluwer Law and Taxation Publishers 1994.

⁷ F.W. Grosheide, *Auteursrecht op maat: beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context*, Deventer: Kluwer 1986, p. 127-143.

⁸ See H.L. de Beaufort, *Auteursrecht*, Zwolle: Tjeenk Willink, 1932, p. 15-16.

because ‘a labourer has a right to receive a reward for his labour’ and ‘no one may enrich himself at the cost of others’, thus using reasons of fairness, labour and unjust enrichment to justify copyright.⁹

Many legal scholars in the Netherlands in the nineteenth century, however, denied that copyright could be based on principled grounds. In 1877 the *Nederlandse Juristenvereniging* discussed the question ‘According to what principle is the State required to protect the rights of writers and artists to the product of their labour?’ This question was answered by a plain: ‘no such legal principle exists’. The majority of lawyers rejected the literary or intellectual property theory (40 to 9), the theory that, as labourers, authors should be entitled to receive a reward for their labour (42 to 7), and the theory of a tacit contract by which a purchaser of a copy of a work commits himself to abstain from reprinting the work of the author (48 to 1). If the lawmaker was bound by a legal principle for protecting copyright, it was thought to exist in the public interest. A proposal to this effect was adopted by a majority of 36 to 10 (with 3 abstentions).¹⁰

Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

Weda, Kocsis et al. (2014)¹¹ has measured the economic contribution of copyright-based industries in the Netherlands in value added, employment and foreign trade, compared to the total Dutch economy.

The results are reported for the year 2011. In that year:

- The gross value added of copyright- relevant industries in the Netherlands was measured to be € 35,9 billion or 6% of the Dutch GDP.
- The contribution of copyright-based industries to the Dutch economy in terms of employment was appr. 529,000 FTEs or 7.4% of total employment in the Netherlands.
- In terms of trade (imports and exports of tangible products, excluding services and non-tangible/digital goods), copyright-based industries in the Netherlands had a trade surplus of € 1.2 billion or 2.7% of the national trade surplus.

The report distinguishes between four categories of copyright-relevant industries, based on WIPO (2003),¹² and has found that in 2011:

- Core Copyright Industries account for 4.6% of the Dutch GDP, of which
 - Software and Databases: 2.3% of the GDP
 - Press & Literature: 1.0% of the GDP

⁹ A.F. de Savornin Lohman, ‘Grond en omvang van het regt van schrijver en uitvinder’, *Bijdragen tot de Kennis van het Staats-, Provinciaal- en Gemeente-Bestuur in Nederland*, vol. 16 (new series, third part), 1870, p. 1-124.

¹⁰ See *Handelingen NJV 1877*, I, p. 33 and II, p. 69-71 (‘Netherlands Lawyers’ Association’s debate on the principle behind author’s rights protection, Leeuwarden (1877), *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org).

¹¹ Weda, Kocsis et al. (2014). *Economic Contribution of Copyright-Relevant Industries in the Netherlands. A Study Based on the WIPO Guide*. Amsterdam: SEO Economic Research (SEO-report nr. 2014-08), available at: http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_of_cr_ind_nl_2014.pdf.

¹² WIPO (2003). *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*. Geneva: World Intellectual Property Organization (WIPO).

- Advertising: 0.5% of the GDP
- Radio & Television, Visual & Graphic Arts, Motion Picture & Video, Music, Theatrical Productions & Operas, and Photography: 0.9% to the GDP
- Interdependent Copyright Industries account for 0.4% of the Dutch GDP
- Partial Copyright Industries account for 0.3% of the Dutch GDP
- Non-Dedicated Support Industries account for 0.6%.of the Dutch GDP

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

The report of Weda, Kocsis et al. (2014) adopts the methodology as given in WIPO (2003).¹³ In appendix B, an elaborate description is given of how this methodology was applied, including the methodological issues and data limitations that the researchers encountered and how they were resolved.

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

No empirical research exists on who benefits economically from copyright and neighbouring rights in the Netherlands. In 2011, an inventory was made of how authors and performers perceive the management of copyright and neighbouring rights, and the opportunities and threats of exercising or enforcing these rights in the online environment, but this study provides insights of neither the economic benefits from copyright and neighbouring rights accruing to authors and performers, nor how these benefits relate to the benefits from copyright and neighbouring rights accruing to publishers and producers. What this study does show, however, is that most authors and performers perceive their bargaining position towards publishers and producers to be weak and support measures to strengthen their position. This study is based on data that was collected through an online survey to which more than 4.500 creators responded.¹⁴

Further, in the context of authors' and performers' contract law, two EU-wide studies were conducted in 2015 and 2016 on the remuneration of authors and performers for the use of their works and the fixation of their performances,¹⁵ and on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works.¹⁶ While the Netherlands figured prominently in both reports, no conclusions were drawn on individual countries. So these reports provide no empirical evidence on who benefits economically from copyright and neighbouring rights in the Netherlands.

¹³ Id.

¹⁴ Weda, Akker et al (2011). *Wat er speelt*. Amsterdam: SEO Economisch Onderzoek (SEO-rapport nr. 2011-17), available at: http://www.seo.nl/uploads/media/2011-17_Wat_er_speelt.pdf.

¹⁵ Europe Economics, Guibault et al. (2015). *Remuneration of authors and performers for the use of their works and the fixations of their performances*. European Commission DG Communications Networks, Content & Technology, available at: <http://www.ivir.nl/publicaties/download/1593.pdf>.

¹⁶ Europe Economics, Guibault et al. (2016). *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*. European Commission DG Communications Networks, Content & Technology, available at: http://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf.

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

The Netherlands has a wide-spread culture of collective management, pertaining both to copyright and neighbouring rights. To give an illustration, pursuant to the Dutch Act on the supervision of collective management organisations for copyright and neighbouring rights,¹⁷ the Dutch Copyright Supervisory Board (CvTA) currently oversees the following collective management organisations (CMOs):¹⁸

- Vereniging Buma (Het Bureau voor Muziekauteursrecht):¹⁹ CMO collecting and distributing royalties for performing rights of musical authors, pursuant to art. 30a DCA and Royal Decree of 1932, *Stb.* 1932, 496 and Ministerial Decision of 1933, *Stcrt.* 1933, no. 60
- IPRO (International Publishers Right Organization):²⁰ CMO collecting and distributing remunerations for reprographic reproduction, digital copying and reuse of books and magazines by educational institutions, libraries and other users on behalf of publishers (international organisation)
- Stichting Leenrecht:²¹ CMO collecting the remuneration for the public lending of copyrighted works, pursuant to art. 15f DCA and art. 15a DNRA
- Stichting Lira (Literaire Rechten Auteurs):²² CMO administering rights and distributing remuneration for copyright-relevant uses of literary and literary-dramatic works for authors
- Stichting Norma (Naburige Rechtenorganisatie voor Musici en Acteurs):²³ CMO administering several neighbouring rights for performing artists
- Stichting Pictoright:²⁴ CMO administering rights for the reproduction and publication of works of pictorial and sculptural art
- Stichting PM (Platform Multimediaproductenten):²⁵ CMO distributing remunerations for private copying and rental to producers and publishers of interactive media
- Stichting PRO (Publicatie- en Reproductierechten Organisatie):²⁶ CMO collecting and distributing remunerations for (digital) reproduction and reuse of books and magazines by educational institutions, libraries and other users on behalf of publishers (national organisation)
- Stichting Reprorecht:²⁷ CMO collecting and distributing the remuneration for the reprographic reproduction of copyrighted works, pursuant to art. 16l DCA

¹⁷ Act of 6 March 2003 (*Stb.* 2003, 111), as amended by the Acts of 7 March 2013 (*Stb.* 2013, 97) and 14 November 2016 (*Stb.* 2016, 435).

¹⁸ Source: <http://www.cvta.nl/over-het-cvta/welke-organisaties/> (last visited: March 2, 2017).

¹⁹ Website: www.bumastemra.nl

²⁰ Website: www.ipro.nu

²¹ Website: www.leenrecht.nl

²² Website: www.lira.nl

²³ Website: www.stichtingnorma.nl

²⁴ Website: www.pictoright.nl

²⁵ Website: www.multimediaproductenten.nl

²⁶ Website: www.stichting-pro.nl

²⁷ Website: www.reprorecht.nl

- Stichting SEKAM (Stichting tot Exploitatie van Kabeltelevisierechten op Audiovisueel Materiaal):²⁸ CMO distributing remunerations for cable retransmission to film and television producers
- Stichting SEKAM Video:²⁹ CMO distributing remunerations for private copying and rental to film and television producers
- Stichting Sena (Stichting ter Exploitatie van Naburige rechten):³⁰ CMO for secondary exploitation of neighbouring rights in sound recordings on behalf of music performers and phonogram producers, pursuant to art. 15 DNRA
- Stichting STAP (Stichting Thuiskopievergoeding Audio Producenten):³¹ CMO distributing remunerations for private copying and rental to phonogram producers
- StOPnl (Stichting Onafhankelijke Producenten Nederland):³² CMO administering remunerations for the broadcasting of audiovisual works on behalf of film and television producers
- Stichting Stemra (Stichting Exploitatie Mechanische Reproductierechten der Auteurs):³³ CMO administering mechanical reproduction rights of musical authors
- Stichting Thuiskopie:³⁴ CMO collecting the private copying remuneration for works and sound and audiovisual recordings, pursuant to art. 16d DCA
- Vereniging VEVAM (Vereniging voor regisseurs van filmwerken):³⁵ CMO distributing remunerations for cable retransmission, private copying and rental to film and television directors
- Stichting VIDEMA:³⁶ CMO administering the right to display or make available television broadcasts on behalf of copyright owners (producers, broadcasting organisations, music publishers, etc.)

In the Netherlands, the interests of CMOs are represented by VOI©E, the branch association of CMOs for copyright and neighbouring rights.³⁷

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

Yes. Since 2003, the Netherlands has in place the Act on the supervision of collective management organisations for copyright and neighbouring rights. This Act provides a general framework to control CMOs, including extensive obligations for CMOs relating to their governance, structure, finance, statutes and (distribution) regulations, membership conditions for rightholders and codes of conduct in relation to rightholders and users. In accordance with the Act, the Dutch Copyright Supervisory Board (CvTA) has the task of supervising the CMOs operating in the Netherlands. The Act has been substantively revised in 2013, and once again in 2016 with the implementation in the Netherlands of Directive 2014/26/EU.³⁸ It facilitates

²⁸ Website: www.sekam.org

²⁹ Website: www.sekamvideo.org

³⁰ Website: www.sena.nl

³¹ Website: www.stichtingstap.nl

³² Website: www.stop-nl.nl

³³ Website: www.bumastemra.nl

³⁴ Website: www.thuiskopie.nl

³⁵ Website: www.vevam.org

³⁶ Website: www.videma.nl

³⁷ Website: www.voice-info.nl

³⁸ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance, *OJ L 84/72*.

the collective management of copyright and neighbouring rights, because the fact that CMOs are under a strict regime of control may indirectly also legitimize their existence and operation.

Apart from the collective management models described in the next question, the DCA on three occasions contains provisions on collective rights management. First, in accordance with art. 3(2) Satellite and Cable Directive (Directive 93/83/EEC),³⁹ art. 26a DCA sets out a system of obligatory collective management for cable retransmission rights. Second, art. 30a DCA provides that only CMOs which have permission of the Dutch Minister of Justice may conduct business with respect to musical performing rights. The only CMO that so far has been granted such permission is Vereniging Buma.⁴⁰ Third, pursuant to art. 45d(2) DCA and art. 4(2) DNRA, the principal director, screenplay writer and leading performers of a film who have assigned their rights to the film producer, have an unwaivable right to proportionate fair compensation from anyone who broadcasts the film or communicates it to the public in any other manner, with the exclusion of on demand services such as VoD and cinema screening. This right can only be exercised collectively by a CMO that adequately represents the interests of the beneficiaries of this right (art. 45d(3) DCA).

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

In the Netherlands, the exceptions and limitations (E&Ls) are contained in Chapter 6 of the DCA and art. 7, 10 and 11 DNRA. All E&Ls are subject to specific requirements, which for some includes the payment of a (fair) compensation or a (equitable) remuneration. The way it is administered varies. The DCA and DNRA prescribe different models for different categories of rights:

- **Remuneration rights administered by CMOs.** In two instances, the law turns the rightholder's exclusive right into a remuneration right, subject to administration by a CMO. This concerns the remuneration right for the public lending of copyrighted works (art. 15c in conjunction with art. 12 DCA and para. 3 to 6 of art. 2, 6, 7a and 8 DNRA), which is administered by *Stichting Leenrecht* (art. 15f DCA and art. 15a DNRA); and the right to an equitable remuneration for the secondary exploitation of neighbouring rights in sound recordings (art. 7 DNRA), which is administered by *SENA* (art. 15 DNRA). The law provides that the level of the remuneration for public lending must be determined by an organisation in which rightholders and the persons liable for payment are represented (art. 15d DCA and art. 15b DNRA). This organisation is *Stichting Onderhandeligen Leenvergoedingen (StOL)*.
- **Statutory licensing by CMOs.** In two instances, the law provides for E&Ls to the rightholder's exclusive rights, subject to the payment of (fair) compensation. That is the case for private copying of copyrighted works and sound and audiovisual recordings (art. 16c DCA and art. 10 sub e DNRA) and for the reprographic reproduction of copyrighted works (art. 16l DCA). In respect of the private copying exception, the fair compensation is determined by an organisation in which rightholders and the persons liable for payment are represented (art. 16e DCA). This organisation is *Stichting Onderhandeligen Thuiskopievergoeding (SONT)*. The CMO collecting the fair compensation for private copying is *Stichting Thuiskopie* (art. 16d DCA). In respect of the exception for reprography,

³⁹ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L 248/15*.

⁴⁰ Royal Decree of 1932, *Stb.* 1932, 496 and Ministerial Decision of 1933, *Stcrt.* 1933, no. 60

the fair compensation is determined by Order in Council⁴¹ (art. 16i DCA) and administered by *Stichting Reprerecht* (art. 16l DCA).

- **No provision for collective licensing.** In other instances where the law provides for E&Ls subject to payment of a fair compensation, it is not specified how this compensation is to be administered. This is the case for the fair compensation for the use of works for the benefit of persons with a disability (art. 15i DCA and art. 10 sub i DNRA), for educational uses (art. 16 DCA and art. 11 DNRA) and for the use of orphan works of which a rightholder has reappeared (art. 16q DCA and art. 10 sub l DNRA). In some cases, rightholders have voluntarily set up a CMO that exercises these rights to a fair compensation. *Stichting PRO* and *IPRO*, for example, administer the fair compensation payable under the educational use exception on behalf of publishers.

In 2015, the Dutch government announced the intention to prepare legislation to introduce an Extended Collective Licensing (ECL) provision in the DCA to facilitate mass-digitisation projects,⁴² following a study of the costs and benefits of ECL that supports the introduction of such provision.⁴³ For now, these plans seem to have been adjourned waiting for developments in Europe, where in the framework of the proposal for a Directive on copyright in the Digital Single Market, provisions are proposed for the use of out-of-commerce works which (implicitly) also follow the ECL-model.⁴⁴

⁴¹ Besluit van 27 november 2002, houdende vaststelling van de vergoeding voor reprografisch verveelvoudigen en vaststelling van de vrijstelling van de opgaveplicht, *Stb.* 2002, 574.

⁴² *Kamerstukken II* 2015/16, 29838, nr. 83.

⁴³ P.B. Hugenholtz, S.J. van Gompel, L. Guibault & R. Obradović, *Extended collective licensing: panacee voor massadigitalisering?* Onderzoek in opdracht van het Ministerie van OCW, Amsterdam, 1 september 2014.

⁴⁴ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14 September 2016, COM(2016) 593 def, art. 7 and following.