

## BOOK REVIEW

**Bernt Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds),  
*A Century of Dutch Copyright Law: Auteurswet 1912–2012*  
(deLex Publishers, 2012)**

An English language account of Dutch copyright law has long been needed. The need arises from the strikingly independent position of Dutch law among the European families of copyright protection, and in particular its independence from the two largest players in European development — Germany and France. The structures and concepts of Dutch copyright law can throw new ideas into the international discussion of how the protection of rights holders and users may be kept in equilibrium. Now, on the occasion of the one hundredth anniversary of the Dutch Copyright Act (*Auteurswet 1912*), readers of English have been given access both to an up-to-date translation of the legislation itself and to a detailed account of the history, special features and current issues of Dutch copyright law.

The book, edited by leading Dutch copyright scholars, consists of 16 chapters on the key aspects of Dutch copyright, each written by a specialist (or specialists) in that field. All aim to explain the history and characteristics of the chosen area to a person unfamiliar with either Dutch language or law. They consider the position and future of Dutch copyright, not only as a national law, but also within the European environment. Where the factual problems giving rise to litigation could be solved by legal mechanisms outside of or additional to copyright, those mechanisms are also mentioned for the sake of completeness. Judgments of the Dutch courts are given plenty of attention; this is something that a reader from a common law background tends to expect. Nevertheless, the fact that this is a civil law system means that they do not have the lawmaking function of upper level judgments in the common law countries. It also accounts for the initially startling lack of uniformity of judgments on apparently similar issues.

The first chapter, by Willem Grosheide, concerns the making of the *Auteurswet 1912*. Prior to its formulation, the Netherlands had adopted a *laissez faire* approach to the protection of foreign authors, much to the annoyance of those States whose authors' works could be translated with impunity in the Netherlands. The new Act was intended to address this and to allow the entry of the Netherlands as a State Party to the *Berne Convention*.<sup>1</sup> But, as Grosheide points out, not all aspects of the Convention were followed.

In the second chapter, Bernt Hugenholtz considers the most fundamental question of copyright law: its subject matter and, most particularly, the nature of a work. He discusses the level of individuality or creativity that is required of most copyright subject matter and the varying tests that the courts apply. He notes the lack of a requirement for fixation of a work, which need only be expressed in a

<sup>1</sup> *Berne Convention for the Protection of Literary and Artistic Works*, opened for signature 14 July 1971, 1161 UNTS 31 (entered into force 15 December 1972) (*'Berne Convention'*).

form that is ‘perceptible to the senses’, and a finding by the highest court in the Netherlands that perfume is capable of protection.<sup>2</sup> Like the other chapters, this one also considers Dutch law in the context of the European Union which is seen as having a potentially limiting and stabilising effect on the national law.

Hugenholtz also introduces that intriguing and anomalous creature of Dutch copyright, the protection that is given to non-original ‘writings’.<sup>3</sup> This type of subject matter is then discussed by Annemarie Beunen in greater detail in the third chapter. This chapter is interesting in that it makes comparisons with the protection of low originality subject matter in other European countries, pointing out that each of them has its own ways of effectively protecting investment in writings whose ‘authorship’ is dubious. Beunen concludes, however, that this Dutch form of protection is at present subject to challenge.

In the fourth chapter, Anselm Kamperman Sanders discusses the history of design protection in the Netherlands and its relationship with copyright law, in particular the overlap between the two areas. He notes that the Benelux Court of Justice has achieved some harmonisation of copyright among its Member States and asks whether the European Court of Justice will have the same effect in the broader European context.

Jacqueline Seignette then tackles copyright ownership, especially in relation to works made on commission and under employment contracts. Interestingly, the word ‘author’ is not used in the Dutch Act; instead, the concept is supplied by the word ‘maker’. A maker, however, may or may not be an author in the conventional sense of the word. An employer, for example, may be the ‘maker’ of a work. Seignette considers whether this is an acceptable derogation from the ‘creator doctrine’.<sup>4</sup> In particular, the derogation raises issues for the exercise of moral rights, which is normally the prerogative of the creator alone, or those deriving title from the creator.

In the sixth chapter, Mireille van Eechoud considers government works and the fact that some works are excluded from copyright protection ‘as core texts of the democratic state’,<sup>5</sup> while others may be freely reproduced after first publication.

Bart Lenselink then deals with an important area that had long remained relatively undeveloped in Dutch law: the regulation of copyright contracts, including transfers and licences. As he points out, this area was at the time of writing governed largely by general contract law rather than specialised provisions of the copyright legislation. This, however, was subject to change, a draft proposal on copyright contract law having already been issued in 2010.

2 Bernt Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds), *A Century of Dutch Copyright Law: Auteurswet 1912–2012* (deLex Publishers, 2012) 36, 51.

3 Ibid 39.

4 Ibid 124–7.

5 Ibid 141.

In chapter eight, Jaap Spoor goes to the heart of Dutch copyright doctrine and considers the exclusive rights of the maker and, more specifically, the rights of reproduction and adaptation. These two rights are embraced by the single right of *verveelvoudiging*. Spoor has retained the Dutch terminology here, rather than opting for an English translation such as the literal term ‘multiplication’, because of what he sees as the anomalous bracketing of reproduction (in material form) and adaptation (which he classifies as an immaterial process) in the legal concept of *verveelvoudiging*. He further notes what may seem strange to a common lawyer — that the exclusive right does not cover the importation of infringing material. This is dealt with by other areas of law, as discussed in the following chapter.

In a chapter which complements and completes the previous one, Dirk Visser then considers the other exclusive right of the maker, the very broad right of *openbaarmaking* or making available to the public. Again, he chooses to retain the Dutch terminology. This right, covered in art 12 of the Act, includes the making public, distribution, rental, performance and broadcasting of the work. These concepts and others are explored by Visser, who ultimately observes that the application of this law to the digital field is challenging and that general law is often resorted to as a fall-back position.

In chapter 10, Madeleine de Cock Buning addresses secondary uses of copyright material (derivative acts of exploitation which require a separate permission by the right holder), including cable retransmission. She considers how the European notion of a ‘new and different audience’ has influenced the Dutch notion of ‘separate markets’, both of these concepts having been used to distinguish between primary and secondary uses.<sup>6</sup> She asks whether the concepts of secondary use and of ‘new’ audiences will retain their relevance in the context of new technologies.<sup>7</sup>

Feer Verkade then discusses the ‘first sale’ or exhaustion doctrine, which had not originally existed in the Dutch legislation but was developed by jurisprudence. He points out that transformation of the copyright work can prevent exhaustion and keep the copyright active.

Chapter 12, written by Jan Kabel and Antoon Quaedvlieg, contains a substantial and very welcome treatment of moral rights under Dutch law. Curiously, the moral rights provision is classified among the limitations on copyright in art 25 of the Act, unlike its classification elsewhere in Europe or indeed in the common law world. One important issue addressed in the chapter is whether Dutch jurisprudence recognises a general moral right which is capable of expansion or whether only a closed catalogue of rights is present. Another important issue is the status of the ‘prejudice to honour or reputation’ criterion in the integrity right. The authors consider that the test must be ‘of an objectified and normative nature. The author should not be obliged to prove actual damage to his reputation: it suffices if the work is, without due cause, mutilated or impaired’.<sup>8</sup> Some readers may be surprised that, if the parody defence operates in relation to the economic

6 Ibid 262, 288–9.

7 Ibid 286–9.

8 Ibid 342–3.

rights (see below), there will, as a result, be no infringement of the moral right in the work. Others may be interested that a moral right may, with exceptions, be waived for financial remuneration. Many more issues are discussed in this chapter, for example the role of reasonableness, and whether destruction can amount to mutilation. The somewhat unpredictable outcomes of litigation are well demonstrated.

In chapter 13, Martin Senftleben addresses the extremely topical issue of how the law deals, and should deal, with quotations, parody, and fair and transformative use — in other words, with the exceptions to infringement. He expresses these mechanisms as giving the law flexibility and providing copyright users with breathing space, but objects in principle to the closed nature of the catalogue of exceptions that many would see as mandated by the *Berne Convention* and the *TRIPs Agreement*.<sup>9</sup> Senftleben provides an interesting discussion of the relationship between the quotation exception and the three-step test, and notes the unusually broad ambit of the exception under Dutch law. He observes that parodies can be saved by two different mechanisms in the Act. Much attention is given in this chapter to the future possibility of a broad ‘fair use’ doctrine in the Netherlands, something which Senftleben considers highly desirable.

The following chapter by Dirk Visser deals with the very practical subject of the regulation of and payment for private copying. At present, the Netherlands imposes a lump sum payment for users of photocopying machines and a per carrier levy on blank CDs and DVDs, but Visser sees the European Union as likely to have greater influence on regulation in the future.

In the penultimate chapter, Lucie Guibault considers the press exception contained in art 15 of the *Auteurswet 1912*. This is an exception which saves from infringement the use of published news items by other newspapers or broadcasting organisations. Certain limits are imposed on this exception, which Guibault discusses.

Finally, in chapter 16, Kamiel Koelman discusses the regulation of collecting societies in the Netherlands. He narrates the history of the Bureau for Musical Copyright (BUMA) and its creation STEMRA, which deals with mechanical rights. These organisations exist side by side with a multitude of other collecting and distribution societies, making for a complex scenery of remuneration mechanisms in the Netherlands. As with most other areas of Dutch copyright, membership of the European Union may force changes in this field.

In the Annex to this book is one of its most important contributions to the wider understanding of Dutch copyright law. This is the unofficial English translation of the latest version of the *Auteurswet 1912* by Mireille van Eechoud. In a useful preface to her translation, van Eechoud explains some of the more important choices she has made in rendering the Dutch text into English. Among them is the choice to remain scrupulously faithful to the Dutch text and therefore to

<sup>9</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex IC (‘*Agreement on Trade-Related Aspects of Intellectual Property Rights*’).

translate the 'author' concept with the English word 'maker', a choice wholly to be endorsed.

There is finally one criticism, and one suggestion, to be made. These chapters are, to the best of my knowledge, all written by authors whose native language is not English. By and large the quality of the English prose is extraordinarily high, but it is not entirely uniform across the book. Given that many readers will be unfamiliar with the legal concepts under discussion, it is important that the prose should leave no room for misunderstanding. As for the suggestion, it is that an up to date reproduction of the Act in Dutch should accompany the English translation. There will surely be many readers who have some basic understanding of Dutch, but who nonetheless prefer to read in the lingua franca of English and who would appreciate having the Dutch wording of the Act to refer to alongside (or prior to) the English discussion of it. This is particularly the case where the book's authors themselves choose to use the Dutch terminology in their commentary, as in chapters 8 and 9.

In summary, this book will be an important addition to the libraries of practitioners and scholars around the world. It will assist those contemplating litigation in the Netherlands to understand what 'national treatment' there entails. Equally importantly, it will open up a range of new ideas to those interested in law reform in their own countries. It is also to be expected that the book will contribute, as its editors desire, to the harmonisation of copyright law in the European Union. On a different level, it will be invaluable to the comparative lawyer who wishes to refer to Dutch legal principles in scholarly writing, but who has until now been unable to cite an English language authority. In short, the book functions on a variety of levels and gives a rare, indeed unparalleled, insight into the copyright law of this most open-minded European nation.

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