



TERRALEX®

CROSS-BORDER COPYRIGHT GUIDE 2018



Netherlands

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1. Legislation and regulation

1.1 What are the main sources of copyright law?

The main source of copyright legislation in the Netherlands is the Copyright Act (*Auteurswet*). The Copyright Act was enacted in 1912. Since then, many changes have been made. A body of case law is available to interpret the legislation.

Because the Netherlands is a member of the European Union, the Copyright Act must be read and interpreted in accordance with European Directives and Regulations, such as the Copyright Directive (Directive 2001/29/EC of 22 May 2001). Therefore, directives were implemented in the Copyright Act and courts interpret the Copyright Act in accordance with European case law.

Apart from the copyright legislation, other laws are relevant. The Neighbouring Rights Act (*Wet op de Naburige Rechten*) contains rules for protection of performing artists, producers of phonograms or films and broadcasting companies, and the Database Act (*Databankenwet*) provides protection for certain databases. These two Acts are relevant, but are technically not a part of copyright law. Therefore, they will be left out of this guide.

2. Subsistence of copyright

2.1 What type of works can be protected by copyright?

The categories of work that are protected by copyright are works of literature, science or art. These are very broad categories. Article 10 of the Copyright Act provides a non-exhaustive list of categories of works, including:

- books, brochures, newspapers, magazines and other documents
- theatrical productions and dramatic-musical works
- oral lectures
- choreographic works and pantomimes
- musical works, with or without words
- drawings, paintings, buildings, sculptures, lithographs, engravings and other reproductions
- geographical maps
- designs, sketches and visual arts, relating to architecture, geography, topography or other sciences
- photographic works
- films
- works of applied arts and drawings and industrial designs
- computer programs, including preparatory materials

2.2 What is required for works to qualify for copyright protection?

A work qualifies for copyright protection if it has an original character and carries the author's personal stamp. This means that the work may not be copied from another work and creative choices must have been made by the author. The European Court of Justice (ECJ) considered that a work must be the expression of the intellectual creation of its author. Both criteria have the same meaning in practice under Dutch law.

As a general rule, the Netherlands provides copyright protection if the author is a national of or the work was first published in the Netherlands or a state which is a signatory to the Berne Convention and/or the International Copyright Convention.

2.3 What rights does copyright grant to the rights holder?

The Copyright Act sets out the rights subsisting in copyright works which are the exclusive rights of the rights holder (before any licences are granted). They include two broad rights to:

- reproduce the work, which means to copy, revise, adapt and translate a work
- publish the work, which means to make the work or copies thereof available to the public

What these rights imply is further explained in 4.1. Authors also have the moral rights described in 2.4.

The Copyright Act contains a few limitations to the exclusive rights, which shall be discussed in 4.3.

2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

In the Netherlands, the following moral rights are provided by the Copyright Act:

- the right to object to publication of a copyright work without being named as author
- the right to object to publication of a copyright work under another name than the author, to object to amendment of the name of the work or in the indication of the author in the event that these are included on or in the work or have been published in connection with the work

- the right to object to any other amendment in the work, unless the amendment is such that the objection would be unreasonable
- the right to object to malformation, mutilation or other impairments of the work, which would result in defamation of the author or his/her reputation.
- these moral rights apply to all copyright works. For films, certain additional moral rights exist:
- the right to have the author's name mentioned in the film, including his/her capacity or contribution to the film
- the right to demand that the part of the film where the name of the author is mentioned is screened
- the right to object against mentioning the name of the author in the film, unless such objection is unreasonable.

Therefore, moral rights are rested in the actual author of the work, who can rely on his/her moral rights after assignment of the copyright in the work. Consequently, the acquirer of the copyright cannot exercise moral rights.

2.5 What is the duration of copyright in protected works?

The duration of protection for copyright works varies according to the type of work and the date of creation. In general, for works created on or after 29 December 1995, the duration of copyright protection is as follows:

Category of work
Works of literature, science or art (general)
Duration
Copyright expires 70 years from the end of the calendar year in which the actual author dies.
Where a work has joint/co-authors, copyright expires 70 years from the end of the calendar year in which the last known actual author dies.
Where the author's identity is unknown or the author is a legal entity, copyright expires 70 years from the end of the calendar year in which the work was first made available to the public.
Copyright expires when a work has not been made available to the public within 70 years, from the end of the calendar year in which the actual author dies.
Category of work
Films

3. Ownership

Duration

For films, the reference point is the end of the calendar year in which the last of the following persons die: the chief director, screenwriter, writer of the dialogue and the composer of film music. Copyright then lasts for 70 years after that date.

2.6 For how long do moral rights subsist in copyright works?

Moral rights expire when the author dies, unless the author passes the rights to a named beneficiary in their last will or handwritten disposition (*codicil*). The moral rights then expire when the copyright expires (see 2.5).

3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the actual author. There are three main exceptions to this rule, if the work:

- was made following a design prepared by someone else and under that person's supervision, in which case that person is regarded as the first owner
- was made by a person in the course of their employment. In those circumstances, the employer is the first owner
- has been made public by a legal entity in their name, without mentioning the name of the original author who created the work, unless such publication was unlawful.

The author is defined as the person who creates the work. The Copyright Act provides guidance for films, where the creator is less clear. Everyone who made a creative contribution to the film is regarded as an author. However, the exploitation rights from the authors are deemed to have been transferred to the producer of the film. Therefore, the authors remain first owner, but the producer can exercise the exclusive rights. This special arrangement is a legal presumption, and parties can agree otherwise in writing. The producer is required to pay the authors a fair compensation.

3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person, or in the case of an assignment of a part of a work.

To qualify as joint authors, it is necessary that the contributions of each author are not distinct. If they are distinct then two works subsist, each with separate copyright.

Joint owners have their own individual rights with respect to the work that can be assigned independently of the other(s), but the consent of all joint authors is required for licensing or use of the copyright work.

3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

Copyright is an unregistered right in the Netherlands and comes into existence automatically upon creation of the work. There is no registration system.

4. Infringement

3.4 What steps should you take to validly transfer, assign or license copyright?

An assignment of copyright must be in writing, signed by the copyright owner.

An exclusive licence of copyright must also be in writing, signed by the copyright owner.

A non-exclusive licence of copyright can, in addition to being in writing, be agreed orally or implied (although this is not best practice, as the rights holder will not benefit from certain statutory rights as licensee, such as the right to sue third-party infringers).

3.5 Can moral rights be transferred, assigned or licensed?

Some moral rights can be waived but they cannot be transferred, assigned or licensed. The author cannot waive his/her right to object to impairment of the work.

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. The exclusive rights include two broad categories; reproduction and publication.

4.1 What acts constitute infringement of copyright within the scope of reproduction?

Infringement occurs where a person performs any of the following acts without the consent of the rights holder:

- copying the work
- making an adaptation of the work, including translation, transliteration, or transposition.

4.2 What acts constitute infringement of copyright within the scope of publication?

Infringement occurs where a person performs any of the following acts without the consent of the rights holder:

- providing copies of the work to the public
- renting or lending the work to the public
- performing, showing, exhibiting or playing a copyright work in public
- otherwise communicating the work to the public
- doing any of the acts listed above in relation to an adaptation of the work.

It is sufficient that (a copy of) the work was made available to the public, even if members of the public did not take notice of the work.

4.3 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of acts that can be performed as an exception to the exclusive copyright. The Information Society Directive (2001/29/EC) contains what has been termed a 'shopping list' of exceptions and limitations, all of which were implemented in the Copyright Act. These permitted acts are wide in variety but often relate to very specific scenarios. They include:

Act
Making temporary copies
Description
A copy that is transient or incidental which: <ul style="list-style-type: none">• is an integral and essential part of a technological process

<ul style="list-style-type: none"> • has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary or has the sole purpose of legitimate use; and • has no independent economic significance (eg internet service providers who use caching).
Act
Personal copies for private use
Description
<p>The making of a copy made for the individual's personal and private non-commercial use. The exception to the rights holder's exclusive right is further restricted to a limited part of magazines, newspapers, books and musical works, unless there are no commercially available copies, or it concerns short articles or other pieces in newspapers and magazines.</p> <p>Levies are in place for several devices whose function is to store personal copies.</p> <p>This exception of private copying was quashed for not complying with the relevant EU Directive as the Government had not properly considered whether the exception offered adequate compensation to rights holders. Therefore, the Netherlands has adapted the scheme for levies.</p>
Act
Research, education and private study
Description
<p>Reproducing or publication of the work is permitted where a person is researching for a non-commercial reason or using it for supplementary notes to non-commercial education. In addition, a fair compensation must be paid to the copyright holder. It must contain acknowledgement of the copyright work where it is referenced (ie identify it by title and author).</p> <p>Copying is always allowed for private study.</p>
Act
Reporting current events
Description
<p>A short recording, showing or presentation of a work in public in a photographic, film, radio or television report is permitted insofar as this is justified for giving a proper account of the current event that is the subject of the report. Adopting a news report from one medium by a separate medium is also allowed, when the copyright is not explicitly reserved.</p>

<p>When it is possible, the source, including the author's name, must be clearly indicated. The reporting must be done in a medium related to reporting news.</p>
Act
Quotation
Description
<p>Including where the use is for criticism and review, quotations are a permitted act provided they relate to a work that has already been lawfully made available to the public. One may also quote an image if it supports the accompanying text. The quotation must be in accordance with standards which are generally considered reasonable. For example, a quotation is not allowed when it is used for decoration only.</p> <p>An acknowledgement of the copyright work used is required where a quotation is used.</p>
Act
Parody
Description
<p>Naturally parodies, to some extent, require copying or mixing of another's work. People are allowed to use limited amounts of another's material without the owner's permission.</p> <p>The parody must evoke the existing work whilst being noticeably different from it. A form of humour must be present, but this does not have to relate to the adapted work or its maker. An acknowledgement of a copyright work used is not required.</p> <p>It should be noted that parodied work does not excuse defamatory remarks or negate the moral right to object to derogatory treatment of a work.</p>
Act
Music during worship
Description
<p>Singing in a congregation with instrumental accompaniment during a service of worship is permitted without the rights holders' consent.</p>
Act
Images of works of architecture and sculpture

Description
It is permitted to make images of buildings and sculptures situated in public places and as they are situated there. It is therefore not permitted to make changes to the buildings or sculptures or to make a three-dimensional copy of the architectural works unless permitted elsewhere (eg for an individual's personal non-commercial use or parody)

action but only where the licence is in writing and signed by the copyright owner and expressly grants the non-exclusive licensee the right of action.

4.4 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) determined whether linking to or framing links to copyright material without consent is a 'communication to the public' and therefore infringes the rights holder's 'communication to the public' exclusive right.

The CJEU emphasised that to be a communication to the public, a link would have to be a communication to a 'new' public, ie a public not in the contemplation of the rights holder when the rights holder published the work. As a result, when a person uploads material to the internet, the public communicated to is the internet at large. Therefore, linking to a work freely available on the internet does not communicate that work to a 'new' public.

However, where a work is not freely available on the internet, such as where the work sits behind a paywall, the copyright owner cannot be said to have communicated with the internet as a whole, and so linking to that work in a way that circumvents the paywall would constitute a communication to the public and infringe the rights of the rights holder.

The situation is different where the hyperlinked-to work infringes copyright. This is discussed further at 7.1 below.

4.5 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action depends on the type of licence involved.

An exclusive licence authorises the licensee to exercise rights which would otherwise be exercisable exclusively by the copyright owner. One such right is the right to bring an infringement action.

A non-exclusive licensee may also bring an infringement

5. Remedies

5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- interim injunctions (including search orders, freezing orders and pre-action, non-party disclosure)
- delivery up of infringing articles
- seizure of infringing articles
- forfeiture of infringing articles
- an injunction against the infringer
- to elect between either an enquiry as to damages or an account of profits arising from the infringement.

5.2 Are there any specific remedies for online copyright infringement?

Where it appears that a website is displaying infringing material, rights holders can seek an injunction from the court ordering the internet service provider (ISP) to block the website. The ISP should be put on notice of the person using their services to infringe copyright before the order is sought.

5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

There are a number of criminal acts under the Copyright Act in relation to copyright. The main offences relate to intentionally selling or making available for sale copies of a copyright work but there are also offences for communicating the infringing copy to the public or spreading an adapted work. The sanction for committing a criminal offence in relation to copyright is likely to be a fine and/or a prison sentence.

Each offence requires a level of intention, knowledge or belief on the part of the culprit.

Criminal act
Intentional infringement of exclusive rights
Relevant intention, knowledge or belief
The intent (<i>opzet</i>) to infringe a person's copyright
Maximum penalty
Six months' imprisonment or a fine of €20,500 (natural persons) or €82,000 (companies)

Criminal act
Publicly offering, possessing for illegal purposes, importing, exporting or forwarding in transit, or keeping for profit an infringing copy of a work
Relevant intention, knowledge or belief
The intent (<i>opzet</i>) to do one of the above-mentioned acts
Maximum penalty
Six months' imprisonment or a fine of €20,500 (natural persons) or €82,000 (companies)
Criminal act
Publicly offering, possessing for illegal purposes, importing, exporting or forwarding in transit, or keeping for profit an infringing copy of a work
Relevant intention, knowledge or belief
The knowledge, or having reason to believe, that the copy is infringing a person's copyright
Maximum penalty
Six months' imprisonment or a fine of €8,200 (natural persons) or €20,500 (companies)
Criminal act
Publicly offering, possessing for illegal purposes, importing, exporting or forwarding in transit, or keeping for profit any resources to unlawfully remove or evade technical security measures on software programs
Relevant intention, knowledge or belief
The intent (<i>opzet</i>) to do one of the above-mentioned acts
Maximum penalty
Six months' imprisonment or a fine of €20,500 (natural persons) or €82,000 (companies)
Criminal act
Infringement of the moral right to bring malformation, mutilation or other impairments to the work, which would result in defamation of the author or his/her character
Relevant intention, knowledge or belief
The intent (<i>opzet</i>) to infringe a person's moral right
Maximum penalty
Six months' imprisonment or a fine of €20,500 or €82,000 (for legal entities)

6. Enforcement

5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is five years to bring a claim for breach of copyright. Time begins to run from the date the copyright owner has knowledge of the damage and the person responsible for the damage.

5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In the Netherlands, the general rule is that the unsuccessful party pays the costs of the successful party. However, the courts have put together a list of indicative costs for 'standard' IP infringement proceedings. Unless the unsuccessful party does not oppose a specific costs order requested by the successful party or the successful party can convincingly explain why the court should deviate from the indicative list, courts tend to use the indicative amounts in their costs orders. Note that these indicative amounts may not apply in more complex intellectual property disputes.

6.1 What courts can you bring a copyright infringement action in and what monetary thresholds, if any, apply?

In principle, the court of first instance is the district of the defendant's residence or, at the claimant's choice, the district where the infringement occurred. When a fast decision is desired, the claim will be brought before the court in preliminary relief proceedings (*voorzieningenrechter*).

When no fast decision is required, full proceedings on the merits can be brought before the district court. Appeal to the Appellate Court or, in latest stage, the Supreme Court is available.

6.2 Are there any other ways in which you can enforce copyright?

Seizure

A copyright holder may request seizure by the Dutch Customs authorities of infringing copies being imported into the Netherlands.

Criminal proceedings

The public prosecutor can bring criminal proceedings, on the grounds described in 5.3 above and pursue them through the criminal courts. In practice, unless it concerns large-scale counterfeit involving criminal money and/or other criminal activities, copyright infringement is not often prosecuted.

6.3 What agency bodies are responsible for promoting and/or enforcing copyright?

There are no specific agencies responsible for promoting and/or enforcing copyright in the Netherlands. However, the agencies mentioned below at 6.4 have a certain responsibility for standing up for several authors.

6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

To use copyright material without infringing the rights of another, you usually need to gain permission of the rights holder.

However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually to those seeking them, copyright holders participate in collection schemes by signing up as members of collecting societies. Once members, they

either transfer rights to the collecting society, which administers the rights for them, or appoint the society as their agent.

The key collecting societies in each sector are as follows:

Agency
Lira
Who it represents
Writers
Agency
SENA
Who it represents
Artists and record producers (rights under the Neighbouring Rights Act)
Agency
Reprorecht
Who it represents
Authors of books, magazines, newspapers and other publications for copies of such works made by companies and governmental agencies
Agency
VEVAM
Who it represents
Directors
Agency
Leenrecht
Who it represents
Libraries
Agency
Pictoright
Who it represents
Illustrators, graphic artists and designers, photographers, architects
Agency
SEKAM
Who it represents
Producers of film and television works broadcast outside the Netherlands

Agency
ThuisKopie
Who it represents
It collects the private copy levies
Agency
Buma/Stemra
Who it represents
Composers, lyrics writers and music publishers
Agency
BREIN
Who it represents
Joint anti-piracy programme of authors, artists, publishers, producers and distributors of music, film, games, interactive software and books

6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are payable by manufacturers or importers of certain categories of hardware.

Copyright levies are not payable in the Netherlands where an exception applies.

7. Copyright reform

7.1 What do you consider to be the top two recent copyright developments?

GS Media BV v Sanoma Media Netherlands BV (Case C-160/15)

Previously, in *Svensson* (Case C-466/12), the CJEU held that hyperlinking to works that are freely available on another website was not an act of ‘communication to the public’ and therefore did not constitute a copyright infringement. The proviso was that the hyperlink did not circumvent public access restrictions (eg a login page or paywall) and make the works freely available where previously they were not. In *GS Media BV v Sanoma Media Netherlands BV*, the CJEU considered whether hyperlinking to copyright-infringing content (ie content posted online without the consent of the rights holder) constituted a ‘communication to the public’ (Article 3 (1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society).

The CJEU focused on the knowledge of the person hyperlinking to the infringing content. It decided that if the person “knew or ought reasonably to have known” that the hyperlinked-to content infringed copyright, then hyperlinking to that content was itself a ‘communication to the public’ and therefore an infringement of copyright.

The CJEU found that:

- where a person hyperlinks to infringing content for financial gain, it is presumed that the person knows the linked-to content is infringing, as that person is expected to have carried out the necessary checks to ensure the work hyperlinked to is not infringing (although it should be possible to rebut that presumption)
- where a person is notified of the fact that the hyperlinked-to content is infringing, hyperlinking to that content will constitute an infringement (this is good news for rights holders – notifying a person who has hyperlinked to their content could convert the hyperlink from non-infringing to infringing)
- where a person hyperlinks to copyright content in a way that circumvents the public access restrictions put in place by the site where the protected work is hosted, that will also constitute an infringement (as per the judgment in *Svensson*).

Digital Single Market Strategy for Europe

On 14 September 2016, the Commission published its proposed EU copyright reform package. A proposed directive on copyright in the Digital Single Market and a regulation are designed to ensure:

- better choice and access to content online and across borders
- improved copyright rules on education, research, cultural heritage and the inclusion of disabled people
- a fairer and more sustainable marketplace for creators, the creative industries and the press.

The proposals are designed to help copyright industries flourish in the Digital Single Market and to help European authors reach new audiences, while making European works widely accessible to European citizens. The aim is to ensure “a good balance between copyright and other public policy objectives such as education, research, innovation and the needs of persons with disabilities”.

In addition, the Marrakesh Treaty for people with print disabilities will be implemented via Directive (EU) 2017/1564 of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and Regulation (EU) 2017/1563 of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled. Both the directive and the regulation entered into force on 12 October 2017.

7.2 What do you consider will be the top upcoming copyright development?

The directive on copyright in the Digital Single Market is still being debated and the European Parliament proposed a number of amendments. Considering these, it is likely that the directive will be published in 2018, introducing at least three new exceptions which will require amendment of the Dutch Copyright Act (as well as the Database Act), as follows:

- the right for research organisations, such as universities, to perform text and data mining in relation to works or other subject matter to which they have lawful access for the purposes of scientific research
- the use of works for the sole purpose of illustration for non-commercial teaching, if such use takes place either on the educational establishment’s premises or via a secure closed network, and is accompanied by an indication of the source
- allowing cultural heritage institutions, such as public libraries and museums, to make copies of works which are permanently in their collections in order to preserve cultural heritage.

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