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Q246

Exceptions and limitations to copyright protection for libraries, archives and education and research institutions

Responsible Reporters: by Sarah MATHESON, Reporter General John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General Yusuke INUI, Ari LAAKKONEN and Ralph NACK Assistants to the Reporter General

National/Regional Group	Netherlands
Authors name(s)	Stef VAN GOMPEL, Vicky BREEMEN, Roderick CHALMERS HOYNCK VAN PAPENDRECHT, Robin VAN KLEEFF, Herwin ROERDINK, Martin SENFTLEBEN and Nadine WIERSMA
Contributors name(s)	
e-Mail contact	vangompel@ivir.nl
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I. Current law and practice

1) Does your law provide for exceptions or limitations to copyright protection for libraries and archives?
yes
If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) reproduction and/or distribution for the purpose of preservation or replacement;

yes

Please comment:

The Dutch **Copyright Act** (*Auteurswet*) contains specific exceptions for libraries and archives, some of which also apply to museums and educational institutions (on the latter, see Questions 5-8 below). These exceptions were introduced with the implementation of the Rental and Lending Rights Directive (92/100/EEG, now: 2006/115/EG), the Copyright Directive (2001/29/EC) and recently the Orphan Works Directive (2012/28/EU). The **Neighbouring Rights Act** (*Wet op de naburige rechten*) contains similar provisions.

The exception for preservation copies can be found in **art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**. The articles are implementations of art. 5(2)(c) Directive 2001/29/EC. It

should be noted that the exception only regards *reproduction* for specific preservation purposes. In other words, distribution or subsequent access are not covered and thus require permission from rightholders, unless another exception applies. Reproduction is allowed if the sole purpose is restoration of an exemplar; retention of a reproduction for the institution in case of imminent disrepair; or keeping the work consultable when consultation techniques threaten to get outdated.

b) reproduction and/or distribution for the purpose of interlibrary lending;

yes

Please comment:

The law does not contain a specific exception for the benefit of interlibrary lending practices, but **art. 16h Copyright Act** determines that newspaper articles, small parts of books and complete books that are not commercially available anymore may be reproduced via traditional reprographic means. **Art. 3 of the Decree on reprographic reproduction (*Besluit reprografisch verveelvoudigen*)** further determines that making reproductions in the sense of art. 16h Copyright Act by or by order of libraries does not constitute copyright infringement if it meets one of the purposes specifically listed, such as the replacement of a work which third parties have requested to borrow from the library. See also the answer to Question 1c.

c) reproduction and/or distribution for the purpose of providing copies (either in a physical or a digital form) to users of libraries or archives; or

yes

Please comment:

While the law does not contain a specific exception for this purpose, **art. 16b Copyright Act** provides an exception for private copying via 'traditional' reproduction forms, such as photocopying. This article permits individuals to make a small number of copies of a work for the sole purpose of *their own* use or study and to order such copies to be made for their personal use or study purposes. On this basis, libraries are allowed to make a limited number of copies for individuals who have *requested* this for their personal use or study purposes. This exception does not require remuneration.

d) any other activities, and if so, what activities?

yes

Please comment:

Other activities include:

- Providing on-site access to works (or recordings) via dedicated terminals and closed networks in libraries and archives, as well as in museums and educational institutions (see Questions 5-8). Accordingly, digital consultation is allowed but only via the *intranet* (and not the internet). See **art. 15h Copyright Act** and **art. 10 sub c Neighbouring Rights Act** (implementing art. 5(3)(n) Directive 2001/29/EC).
- Lending. Based on **art. 15c Copyright Act** in combination with art. 12 Copyright Act, libraries are allowed to lend books without prior permission of the right holder, as these articles turns the right holder's exclusive right into a remuneration right (see also **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**). This means that lending does not constitute an infringement as long as an equitable remuneration is paid. The Dutch Supreme Court has ruled that renewal of borrowed materials does not invoke a new payment obligation since renewal falls under the definition of 'limited in time' in the legal definition of lending (see HR 23 November 2012, no. 11/04472, ECLI:NL:HR:2012:BX7484).

- Reproduction and making available of orphan works (**art. 16o-17 Copyright Act / art. 10 sub I Neighbouring Rights Act**). The exception only applies when the right holder has not been identified or found after a 'diligent search'. The institutions must report on the results of the search and the reached conclusion on the orphan status, the envisaged use of the work, etc. Orphan works must be registered in a European orphan works database.

2) Do any of these exceptions or limitations apply to libraries, archives or other organizations (e.g. museums) generally, or only to certain organizations (e.g. public and/or commercial libraries and archives)? If so, which organizations?

The exceptions and limitations apply to the following organizations:

The preservation exception (**art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**) and on-site-access exception (**art. 15h Copyright Act** and **art. 10 sub c Neighbouring Rights Act**) target 'publicly accessible libraries, educational institutions and museums or archives' with the exception of archives that have a direct or indirect economic or commercial benefit. It is not entirely clear whether the not-for-profit condition only applies to archives. If so, this would mean that corporate libraries, commercial educational institutions could also benefit from these exceptions (see Ch. Gielen & D.J.G. Visser (eds.), *Tekst & Commentaar: Intellectuele eigendom*, Deventer: Kluwer 2013, p. 56). The condition to be publicly accessible in turn does not apply to archives, thus making these exceptions applicable also to not-for-profit archives that are *not* publicly accessible. Further, the Explanatory Memorandum to the Dutch implementation law of the Copyright Directive confirms that 'publicly accessible' should not be understood as only meaning accessible to the *general* public, but also to a specifically targeted audience such as in case of school libraries and academic institutions (see the Parliamentary Report of the House of Representatives (*Tweede Kamer*) 2001/2002, 28482, no. 3, p. 49).

The lending rights regime covers 'publicly accessible institutions'. See **art. 15c Copyright Act** and the legal definition of 'lending' in art. 12(3) Copyright Act and art. 1 sub k Neighbouring Rights Act. Some institutions are exempted from payment under the lending regime, namely educational and research institutions, including their libraries, and the Royal Library (*Koninklijke Bibliotheek*). See **art. 15c(4) Copyright Act** and **art. 2(4), art. 6(4), art. 7a(4) and art. 8(4) Neighbouring Rights Act**.

The orphan works exception (**art. 16o-17 Copyright Act** and **art. 10 sub I Neighbouring Rights Act**) covers 'publicly accessible libraries, educational institutions and museums, as well as institutions for cinematographic or audiovisual heritage that do not attempt to achieve direct or indirect economic or commercial benefit'.

3) Are there any conditions as to the type or scope of any permitted activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether certain forms of reproduction (e.g. digital reproduction) are excluded)? If so, please explain the conditions.

Yes. The following conditions apply:

The preservation exception (**art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**) does not mention the number of copies or any other conditions regarding the permitted activities, other than that the reproduction must relate to one of the listed preservation purposes and that the author's moral rights (art. 25 Copyright Act) must be respected. The lack of direction on the number of copies and the moment on which they may be made is identified as a point where clarification is needed. As the exception is formulated in a technology neutral way, preservation by digital means is arguably covered. The Explanatory Memorandum to the Dutch implementation law of the Copyright Directive also indicates that institutions such as libraries are expected to use the possibilities of new technologies. At the same time, it recognizes that new technologies may lead to various problems in preservation practices, as storage and processing techniques may get outdated quickly.

The on-site-access exception only refers to the making available of works (**art. 15h Copyright Act**) and recordings or reproductions thereof (**art. 10 sub c Neighbouring Rights Act**), without indicating the number of copies that may be made available on the terminals. The exception applies 'unless otherwise agreed', meaning that it can be set aside contractually (see Question 14) or subjected to conditions such as payment. Only *on-site* activities are covered. The Explanatory Memorandum to the Dutch implementation law of the Copyright Directive further clarifies that the making available on dedicated terminals and closed networks does not allow printing or downloading.

The lending rights regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**) covers the making available for use for a limited period of time. The scope of the lending right in the digital domain is not clear. Currently, a Dutch test case regarding e-lending is pending (Court of The Hague, 3 September 2014, ECLI:NL:RBDHA:2014:10962). In this case, the Dutch court is asking the Court of Justice of the European Union interpretation questions with regard to the lending concept (does this cover e-lending based on a *one copy one user* model?) and the specific requirements for applicability of the lending rights regime. In 2012, a study commissioned by the Dutch Ministry of Education, Culture and Science explored the economic and legal possibilities of e-lending (see R. van der Noll, J.M. Breemen, V.E. Breemen, P.B. Hugenholtz, M. Brom & J.P. Poort, *Online uitlenen van e-books door bibliotheken*, Amsterdam: SEO/IViR 2012).

The orphan works exception (**art. 16o-17 Copyright Act** and **art. 10 sub l Neighbouring Rights Act**) is specifically aimed at facilitating the digital unlocking of orphan works, in other words, digitization and making available online. The reproduction and making available of the works in question should serve the public task of the institution, notably preservation and restoration of works and providing access to works of their collections for cultural and educational purposes. The exception applies as long as a work, after a diligent search for the right holders, is qualified as an orphan work. This qualification as an orphan work can be terminated at any time upon request of the right holder. The institution shall then pay a fair compensation to the right holder for the use of the work in accordance with art. 16o and art. 16q Copyright Act. See also Question 11.

- 4) Are there any conditions as to the type of copyrighted work that may be used (e.g. lawfully created copies, copies existing in the library's or archive's collection, published works)? If so, please explain the conditions.

Yes. The following conditions apply:

The preservation exception (**art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**) only applies to exemplars of works that are part of the permanent collection of the institution itself.

The on-site-access exception (**art. 15h Copyright Act** and **art. 10 sub c Neighbouring Rights Act**) only permits the making available of works that form part of the collection of the institution in question. The exception is not limited to lawfully obtained works, which raised some controversy at the time of implementing the exception (see Dutch Copyright Association (*Vereniging voor Auteursrecht*), 'Reactie op het Wetsvoorstel 28482 tot uitvoering van de Richtlijn Auteursrechten en naburige rechten in de informatiemaatschappij (2001/29/EG)', 10 October 2002, p. 13).

The lending right regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**) applies to lending whole or part of exemplars or copies of a work that have been brought into circulation by or with the consent of the right holder. The regime does not apply to computer programs, unless this program serves to make available other works on an information carrier. So far, the common understanding seems to be that the lending right regime applies to physical copies only.

The orphan works exception (**art. 16o-17 Copyright Act** and **art. 10 sub l Neighbouring Rights Act**) is aimed at specific types of works that must be part of the collection of the institution. **Art. 16o**

Copyright Act refers to works listed in art. 10(1) under 1, 5 and 10 Copyright Act. These include books, pamphlets, newspapers, periodicals and other writings (under 1), musical works, with or without words (under 5) and cinematographic works (under 10). **Art. 10 sub I Neighbouring Rights Act** adds recordings of performances, phonograms and the first recording of a film to this list. Other categories of works, such as stand-alone photographs, are not included in the regime.

5) Does your law provide for exceptions or limitations to copyright protection for education and research institutions?

yes

If so, please provide details of such exceptions or limitations, including in relation to the following activities::

a) performance and/or display for educational purposes;

yes

Please comment:

The Dutch Copyright Act contains specific exceptions and limitations to copyright protection for educational and research institutions. The Neighbouring Rights Act contains similar provisions.

Art. 12(1) Copyright Act defines the publication right and gives examples of what constitutes a publication. Amongst others, this includes the recitation, playing, performance or presentation in public of the whole or part of a work or a reproduction thereof. **Art. 12(5) Copyright Act** and **art. 2(8) Neighbouring Rights Act**, however, state that 'recitation, playing, performance or presentation in public' does not include those that take place exclusively for the purposes of education provided on behalf of the public authorities or a non-profit-making legal person, in so far as such a recitation, performance or presentation forms part of the school work plan or curriculum where applicable, or those that exclusively serve a scientific purpose.

Art. 15h Copyright Act also allows educational institutions to provide on-site access to works via dedicated terminals and closed networks to individual members of the public for research purposes and for the purpose of private use by said members of the public.

Art. 16 Copyright Act and **art. 11 Neighbouring Rights Act** provide that right holders cannot oppose to the reproduction or making public of parts of a work for the sole purpose of illustration for teaching, provided that the statutory conditions are met (see Questions 6 and 7). **Art. 16(2) Copyright Act** provides that, for the same purpose and subject to the same conditions, use of the whole work is allowed if it concerns a short work or a work mentioned in art. 10(1) under 6, 9 or 11 Copyright Act (see Question 7). According to **art. 16(4) Copyright Act** these exceptions also apply where the use is in a language other than the original. This allows for the translation and making public of translations of a work for the purpose of illustration for teaching.

b) reproduction and/or distribution for educational purposes (e.g. preparation of course packs, compilations or anthologies, exams);

yes

Please comment:

This situation is covered by the general exception for teaching purposes (**art. 16 Copyright Act** and **art. 11 Neighbouring Rights Act**). See Question 5a.

The copyright collecting society *Stichting PRO* collects and distributes the payments made for the reproduction and communication of parts of works in readers, compilations and other courseware as permitted under **art. 16 Copyright Act**. Since this exception is subject to the payment of a fair

compensation for the use of the copyright protected works in courseware, Stichting PRO collects such compensation on behalf of the right holders whose repertoire is used by the educational institutes and subsequently distributes it to the relevant right holders.

c) making translations;

yes

Please comment:

The general exception for teaching purposes (**art. 16 Copyright Act and art. 11 Neighbouring Rights Act**) allows for the translation and making public of translations of a work. See Question 5a.

d) making available in digital networks for educational purposes (e.g. uploading course packs onto on-line platforms, compilations or anthologies, providing distance education);

no

Please comment:

No explicit exception or limitation is included in Dutch legislation. The making available in digital networks for educational purposes may perhaps be partly covered by the general exception for teaching purposes (**art. 16 Copyright Act and art. 11 Neighbouring Rights Act**). Art. 15h Copyright Act does not apply in this situation, because this exception only allows *on-site* access through dedicated terminals and closed networks and not online access through internet.

e) reproduction and/or distribution for research purposes; or

no

Please comment:

Such exception or limitation is not included in Dutch legislation.

f) any other activities, and if so, what activities?

yes

if so, what activities?:

The following exceptions as described in Question 4 also apply to educational institutions:

- Public lending (**art. 15c Copyright Act and para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**).
- Reproduction for preservation purposes (**art. 16n Copyright Act and art. 10 sub f Neighbouring Rights Act**).
- Reproduction and making available of orphan works (**art. 16o-17 Copyright Act and art. 10 sub I Neighbouring Rights Act**).

See for further conditions Questions 6-8.

6) Do any of these exceptions or limitations apply to educational and research institutions generally (e.g. non-profit institutions), or only to certain institutions? If so, which institutions?

The exceptions and limitations apply to the following organizations:

Art. 12(5) Copyright Act and **art. 2(8) Neighbouring Rights Act** apply in situations where education is provided on behalf of the public authorities or a non-profit-making legal person, in so far as the use (i.e. the recitation, performance or presentation of works) forms part of the school work plan or curriculum where applicable. With respect to the recitation, performance or presentation that exclusively serve a scientific purpose, no further reference is made to any institutions.

The general exception for teaching purposes (**art. 16 Copyright Act** and **art. 11 Neighbouring Rights Act**) also does not refer to particular institutions, but permits use for the sole purpose of illustration for teaching, thus limiting the exception to institutions with a clear educational program.

The lending right regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**) covers 'publicly accessible institutions', but exempts some institutions from payment, including educational and research institutions and their libraries. See Question 2.

The preservation exception (**art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**), the on-site-access exception (**art. 15h Copyright Act**) and the orphan works exception (**art. 16o-17 Copyright Act** and **art. 10 sub l Neighbouring Rights Act**) apply amongst others to 'publicly accessible [...] educational institutions [...]'. See Question 2 for further clarification.

7) Are there any conditions as to the type or scope of the activities and the persons who may engage in such activities (e.g. number of copies that may be created, whether only a portion of a work may be used, whether both a teacher's and student's performance is covered, or only one or the other)? If so, please explain the conditions.

Yes. The following conditions apply:

Art. 12(5) Copyright Act allows the recitation, performance or presentation of a work exclusively for scientific purposes or for educational purposes in so far as those acts are part of the school work plan or curriculum of the educational institution.

The general exception for teaching purposes (**art. 16 Copyright Act** and **art. 11 Neighbouring Rights Act**) applies to the reproduction or making public of *parts* of any type of work for the sole purpose of illustration for teaching. Pursuant to **art. 16(2) Copyright Act**, use of the whole work is allowed if it concerns a short work or a work listed in art. 10(1) under 6, 9 or 11 Copyright Act. This includes drawings, paintings, works of architecture and sculpture, lithographs and engravings (under 6), photographic works (under 9) and works of applied art and industrial designs (under 11). Where the use is for a compilation, **art. 16(3) Copyright Act** provides that the use of works by the same author must be limited to only short (passages of) works. Where it concerns a compilation of works listed in art. 10(1) under 6, 9 or 11 Copyright Act, only a few of said works may be used and only if the reproductions differ appreciably from the original work, in size or as a result of the manner in which they are made.

Art. 4 of the Decree on reprographic reproduction further provides that educational institution may only make as many reproductions as required for the number of students that need the reproduction (either to take part in the specific course or to do the examination). **Art. 16(1) Copyright Act** further subjects the use of works under this exception to the following conditions:

- i. the work from which the part has been taken must have been lawfully made public;
- ii. the use must be in accordance with what social custom regards as reasonably acceptable;
- iii. the moral rights of the author must be respected (art. 25 Copyright Act);
- iv. as far as reasonably possible, the source and the author's name must be clearly indicated; and
- v. fair compensation must be paid to the right holder.

The conditions of the preservation exception (**art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**), the on-site-access exception (**art. 15h Copyright Act**), the orphan works exception (**art. 16o-17 Copyright Act** and **art. 10 sub l Neighbouring Rights Act**) and the lending

right regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act Neighbouring Rights Act**) are explained under Question 3.

8) Are there any conditions as to the type of copyrighted work that may be used (e.g. only lawfully created copies, only certain kinds of copyrighted works)? If so, please explain the conditions.

Yes. The following conditions apply:

Art. 12(5) Copyright Act applies to any kind of copyrighted work.

As explained under Question 7, the general exception for teaching purposes (**art. 16 Copyright Act and art. 11 Neighbouring Rights Act**) applies to any kind of work, but a distinction is made between works of which only part of the work may be reproduced and works that may be fully reproduced under the exception. Art. 16 further only allows reproductions of works lawfully made available by the right holder. See Question 7 for further details.

The preservation exception (**art. 16n Copyright Act** and **art. 10 sub f Neighbouring Rights Act**), the on-site-access exception (**art. 15h Copyright Act**) and the orphan works exception (**art. 16o-17 Copyright Act** and **art. 10 sub I Neighbouring Rights Act**) apply only to works that are part of the collection of the institution to which these exceptions apply. Further conditions, also in relation to the lending right regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**) are explained under Question 4.

For the questions below, please provide an answer for each exception or limitation mentioned above.

9) Is there any statutory provision that specifically provides for such exception or limitation? Is it alternatively or additionally recognized in case law? If neither, does your jurisdiction have a more general or broad exception or limitation that is interpreted as covering such specific exception or limitation?

The Dutch Copyright Act has a closed system of exceptions and limitations, meaning that there are only statutory provisions that provide for limitations or exceptions in copyright. See our answers to Questions 1 and 5. Copyright exceptions are generally to be read narrowly, within the operation of their objectives. Under circumstances, further exceptions based on for instance the Convention for the Protection of Human Rights and Fundamental Freedoms can be construed by the courts, but in the Netherlands this is not a very common practice. Unlike the US copyright system, Dutch copyright law does not provide for a general open formulated exemption, such as fair use. It should be noted, however, that the Dutch lawmaker has a keen interest in introducing more flexibility in the system of exceptions and limitations (and perhaps even in adopting an open-ended exemption), but to date no conclusions have been reached on this issue.

10) Does your law adopt the Three-Step Test (or equivalent wording) in relation to such exception or limitation?

No. The three-step test has not been implemented in Dutch legislation. In practice, however, Dutch courts have applied the three-step test in a few cases to interpret the precisely defined exceptions as formulated in the Dutch Copyright Act in a narrower (stricter) or broader (more flexible) sense.

11) Is use under the exception or limitation permitted automatically (without any further action), or must certain criteria be fulfilled/procedure(s) followed (e.g. seeking a compulsory licence)? If it is the latter,

please explain the criteria/procedure(s).

Use under the exceptions and limitations described above is permitted automatically, insofar as the requirements of the exception have been met. However, there is one exception to this automatic permission, namely in the case of orphan works. Before the orphan works exception applies, it must first be established that a work is an orphan work. To this end, a so-called Due Diligence Search for the right holders must be conducted (**art. 16o-16p Copyright Act** and **art. 10 sub I Neighbouring Rights Act**).

12) Is remuneration payable for use under such exception or limitation? If so, how is the amount of remuneration determined or calculated? Who is liable for making such payment, and to whom must such payment be made?

Yes. Remuneration is required for the lending right regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**) and the general exception for teaching purposes (**art. 16 Copyright Act** and **art. 11 Neighbouring Rights Act**). The other exceptions include no remuneration requirements.

Lending right regime (**art. 15c Copyright Act** and **para. 3 to 6 of art. 2, art. 6, art. 7a and art. 8 Neighbouring Rights Act**): as specified under Question 2, publicly accessible institutions (libraries and archives included) may lend copyright protected works based on the lending right exception of **art. 15c Copyright Act**, provided that the person doing or arranging the lending pays an equitable remuneration. As indicated, excluded from this payment obligation are educational and research institutes and the libraries attached to them, as well as the Royal Library. The level of remuneration is determined by a foundation designated by the Minister of Justice in agreement with the Minister of Education, Culture and Science. Payment of the remuneration has to be made to *Stichting Leenrecht*, a legal person designated by the Minister of Justice in agreement with the Minister of Education, Culture and Science in the Netherlands.

General exception for teaching purposes (**art. 16 Copyright Act** and **art. 11 Neighbouring Rights Act**): reproduction or publication of parts of a literary, scientific or artistic work exclusively for use as illustrations for educational purposes so far as justified by their intended and non-commercial purpose is only allowed when a fair compensation is made to the right holder on the basis of **art. 16(1)(5) Copyright Act** and **art. 11 Neighbouring Rights Act**. The term educational purposes needs to be interpreted broadly. Art. 16(1) Copyright Act does not apply to commercially purposed education. The person reproducing parts of the copyrighted work is obliged to pay the required fee to the foundation charged with the remuneration of the work that is reproduced in part. *Stichting PRO* administers the fair compensation payable under the exception on behalf of publishers.

13) Is there any special treatment for orphan works for use within such exception or limitation? If so please explain.

No. There is no special treatment for orphan works *within* the exceptions or limitations described in this report. However, as explained, there is a special stand-alone exception for orphan works in **art. 16o-16q and 17 Copyright Act** and **art. 10 sub I Neighbouring Rights Act** (see earlier answers).

14) Does the law of your jurisdiction allow the exception or limitation to be overridden by contract?

In the Netherlands, there is no uniform rule on the contractual overridability of copyright exceptions and limitations. Some are explicitly declared mandatory by the lawmaker and therefore cannot be

overridden by contract. Yet, none of the copyright exceptions and limitations relating to libraries, archives and educational and research institutions fall into this category. Other copyright exceptions and limitations apply 'unless otherwise agreed' and therefore can be overridden by contract. That is the case, e.g., with the exception permitting the communication of works on dedicated terminals on the premises of libraries, archives, etc. (**art. 15h Copyright Act; art. 10 sub c Neighbouring Rights Act**). In the majority of cases, the Dutch lawmaker has left it for the courts to determine whether the copyright exception or limitation can be departed from in contractual arrangements. Accordingly, it will depend on the circumstances of the case whether or not courts will allow a copyright exception or limitation to be contractually side-stepped. The parliamentary records of the implementation of EC Directive 2001/29/EC show that the lawmaker has deliberately left this issue as much as possible for judicial resolution, so as to retain legal flexibility to accommodate future developments (see Parliamentary Report of the Senate (*Eerste Kamer*), 2003/2004, 28 482, C, p. 1-2).

15) Other than what is provided in the law of your jurisdiction, are there any efforts by private organizations (such as a private licensing organizations) to address use by libraries, archives and educational and research institutions?

yes

If so, please explain those efforts.:

Such efforts exist. In recent years, a relatively large number of collective licensing agreements have been concluded in the Netherlands between collective rights management organizations (e.g. Lira, for literary works, and Pictoright, for pictorial works) and libraries and archives (e.g. the Royal Library, the National Archive, the Institute for Sound & Vision and various other regional or local archives) permitting the latter institutions to digitise works contained in their collections and to make them available online. These agreements greatly facilitate the rights clearance operation for mass-digitization projects that are currently undertaken by libraries and archives.

In the field of educational uses, *Stichting PRO*, which on behalf of publishers administers the 'fair compensation' payable under the general exception for teaching purposes (**art. 16 Copyright Act and art. 11 Neighbouring Rights Act**), has also set up a licensing scheme with standardized licensing fees for universities and educational institutions to make reproduction for educational purposes that go beyond art. 16 Copyright Act and thus require prior authorization from the right holders.

II. Policy considerations and proposals for improvements of the current law

16) Should there be any exceptions or limitations to copyright protection for libraries and archives?

yes

If yes, in relation to what activities?:

The Dutch group is of the opinion that there should be exceptions or limitations of copyright and related rights protection for libraries and archives. Such exceptions or limitations should be available for lending works to the visitors/members of the libraries, for providing the visitors/members with on-site access to works and for the preservation of works.

Providing access to large collections of works at relatively low cost is an important core activity of libraries and ensures equal access to information. This fundamental activity can be significantly facilitated in the presence of an exception or limitation for lending, since it frees libraries from having to reach agreements with many authors/publishers.

Since lending can and will often lead to a significant use of copyrighted works, the Dutch group is of the opinion that the exception or limitation for lending should comprise a compensation scheme.

The preservation of works is an important activity for safeguarding access to works for future generations. However, in the course of preserving a work, it is likely that copyright restricted acts have to be performed for a proper preservation. At the same time, the preservation of works generally does not provide any or at least a significant source of income to libraries and archives. It is for this reason that the Dutch group is of the opinion that the presence of an exception or limitation is appropriate and that no compensation should be required.

17) Should there be any exceptions or limitations to copyright protection for education and research institutions?

yes

If yes, in relation to what activities? :

The Dutch group is of the opinion that educational institutions should be able to rely on an exception or limitation that enables them to provide hardcopy and/or digital course materials without having to reach agreement with all relevant stakeholders (i.e. authors/publishers).

The provision of course materials will often lead to a significant use of (often significant parts of) copyrighted works. Moreover, many of such copyrighted works have been created specifically for education purposes. Therefore, the Dutch group is of the opinion that this exception or limitation should comprise a compensation scheme.

18) Is the Three-Step Test a useful test for determining any exceptions or limitations to copyright protection?

yes

Why?:

The Dutch group is of the opinion that, in principle, the three-step test *can* serve as an adequate framework for determining the permissibility of copyright exceptions and limitations. With its open-ended criteria – certain special cases, normal exploitation, legitimate interests, unreasonable prejudice –, the three-step test is capable to offer sufficient room for the reconciliation of all interests involved. However, the appropriateness of the test as an overarching assessment tool depends on the right interpretation of the individual test criteria.

An overly restrictive application of the individual criteria, inevitably, transforms the three-step test into a straitjacket thwarting the activities of cultural heritage, research and educational institutions. If, for instance, the existence of a certain special case is denied with regard to each exception and limitation that is not targeting a very specific group of users, the three-step test will erode many use privileges in the sector. If each and every possibility of using copyrighted material is seen as a part of a work's 'normal exploitation', the test will leave very little room for new exceptions and limitations supporting the work of libraries, archives, museums, educational and research institutions. If each and every unauthorized use is seen as causing an unreasonable prejudice to legitimate interests of copyright holders, all exceptions and limitations in the sector will have to be accompanied by the payment of equitable remuneration. Unfortunately, the approach taken by the Court of Justice of the European Union points in the direction of such a restrictive interpretation. In *Infopaq/DDF*, the Court placed the three-step test in the context of the traditional dogma of a strict interpretation of copyright exceptions and limitations (CJEU, 16 July 2009, case C-5/08, *Infopaq International/Danske Dagblades Forening*, para. 56-58). According to the Dutch group, this position is inappropriate and incorrect in the light of the fundamental rights and policy rationales underlying the introduction of exceptions and limitations for libraries, archives, museums, educational and research institutions. In other words, an overly restrictive interpretation discredits the three-step test as an additional assessment tool and casts doubt upon the appropriateness of use of the test in general.

However, the test can also be interpreted differently. In particular, it can be employed as a refined proportionality test that offers the opportunity to weigh carefully the different rights and interests involved (cf. M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004). The criterion of 'certain special case' can be used to identify the objectives underlying an exception or limitation. The question, then, is not confined to a quantitative assessment of how many users benefit from an exception or limitation. By contrast, the question is whether the exception or limitation serves an important policy objective that justifies its scope and reach. The normal exploitation test can be approached from a normative perspective. Instead of focusing exclusively on the impact on actual and potential future markets, the normal exploitation inquiry can also clarify whether it is 'normal' from a policy perspective that the copyright holder exploits the work in the area of cultural heritage, educational and research uses. The final test of an unreasonable prejudice can serve as a tool to determine whether an exception or limitation causes so much harm that it requires the introduction of a compensation mechanism. Such an approach to the three-step test finds support in international treaties. For instance, the Agreed Statement concerning the three-step test in art. 10 of the WIPO Copyright Treaty reads as follows:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.

Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

Along these lines, recommendations for the appropriate application of the three-step test as a balancing tool have already been developed in academic circles (cf. C. Geiger, J. Griffiths & R.M. Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law', *IIC* 39 (2008), p. 707). If this alternative approach is followed – an approach employing the three-step test as a refined proportionality test for new exceptions and limitations –, the test can become an adequate instrument for the development of use privileges for libraries, archives, museums, educational and research institutions.

19) Should the exception or limitation be capable of being overridden by contract? Why? Why not?

Yes. The Dutch group is of the opinion that the objectives behind copyright exceptions and limitations for libraries, archives, educational and research institutions are not of such an imperative nature that lawmakers should prevent their contractual overridability at all times. We prefer leaving the contractual overridability of copyright exceptions and limitations for judicial resolution, as the Dutch lawmaker has done in most cases (see Question 14). The main advantage of this model is that courts are well positioned to establish in individual cases how a contract that derogates from a copyright exception or limitation should be balanced against the objectives pursued by it. For lawmakers it would be impossible to make a general ex ante assessment of such kind.

20) Should remuneration be payable for any of the activities described in 16) and 17) above? Why? Why not?

As already indicated above, the answer to the question of remuneration differs from use privilege to use privilege. The Dutch group has assessed compensation obligations above in the context of Questions 16 and 17. Seeking to also provide more general guidelines, it can be added that criteria to be considered in this context may include the following parameters:

- whether the use privilege is for the benefit of a very specific form of use (for instance, preservation

- copies) or specific group of beneficiaries (for instance, disabled persons);
- whether the use is carried out with a direct profit motive or generates direct income for cultural heritage, educational or research institutions;
- whether the use is likely to substitute commercial exploitation channels used by the copyright holder and, therefore, competes directly with regular modes of exploitation;
- whether the use prevents the copyright holder from establishing new information products or services based on protected works.

21) How can your current law as it applies to exceptions and limitations to copyright protection for libraries, archives and educational and research institutions be improved?

In general, the law could provide more clarity on the application of existing copyright exceptions and limitations to certain digital uses by libraries, archives and educational and research institutions. This in particular concerns the e-lending of books, the online provision of digital course materials and - to the extent that licensing models fail to adequately address the issue - text and data mining. Further, it would be desirable if the law more precisely distinguished the copyright exceptions and limitations for educational uses for which a fair compensation is (or is not) due. Currently, the law provides for a general exception for certain (analogue) classroom uses for which no compensation is payable (**art. 12(5) Copyright Act**) and an exception for the reproduction and communication of parts of works for the sole purpose of illustration for teaching which is subject to payment of a fair compensation (**art. 16 Copyright Act; art. 11 Neighbouring Rights Act**). In the present digital context, it is not always clear how these two exceptions are to be demarcated. For example, the use of works in PowerPoint presentations during lectures arguably falls under the former exception of classroom uses and thus is not subject to any payment, while the use of exactly the same PowerPoint presentations in 'digital classrooms' seems to be covered by the latter exception, which is subject to the payment of a fair compensation. The law could cure this by better demarcating the two exceptions or by stipulating that for certain educational uses, it would be fair if the compensation is zero.

In addition, while not being exceptions and limitations *sensu stricto*, the lawmaker could consider adopting an extended collective licensing (ECL) regime for the digitization and making available of works by libraries and archives. Such regime would support the current licensing practice between collective rights management organizations and libraries and archives in the Netherlands (see Question 15). Because, in practice, collective rights management organizations hardly ever have a full mandate to issue licenses that would allow libraries and archives to digitize and make available works in particular parts of their collections (e.g. literary works, magazines or newspapers published before 1940), there remains considerable legal uncertainty for libraries and archives that engage in digitization efforts. Under an ECL system, the law creates the possibility to extend the mandates of sufficiently representative collective rights management organizations to issue voluntary collective licences covering all right owners in a given field, including non-members of those organizations. To protect the interests of right owners, they should be given the opportunity to 'opt out' of the ECL system. The result is that collective rights management organizations can grant libraries and archives voluntary licenses that cover the works of all right owners, except those who have explicitly opted out. On 10 September 2013, collective rights management organizations and libraries and archives in the Netherlands sent a joint letter petitioning the Dutch lawmaker to adopt an ECL system for the digitization and making available of cultural heritage works. The lawmaker is currently investigating the introduction of such system (cf. P.B. Hugenholtz, S.J. van Gompel, L. Guibault & R. Obradović, *Extended collective licensing: panacee voor massadigitalisering?* Study commissioned by the Dutch Ministry of Education, Culture and Science, Amsterdam, 1 September 2014).

III. Proposals for harmonisation

22) Is harmonisation in this area desirable?

yes

Please comment:

But only to the extent that exceptions and limitations for libraries, archives and educational and research institutions have international implications. This may be the case, e.g., for particular online uses in which these entities engage. A level playing field of exceptions and limitations could further be beneficial for right holders that operate internationally and contract with libraries, archives and educational and research institutions in different countries. However, any harmonisation in this area should not restrict countries in adopting specific exceptions and limitations for libraries, archives and educational and research institutions that are required to safeguard access to information to weaker parties in society that would otherwise have no (or limited) access to such information.

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

23) If your answer to question 16) or 17) is no, should this be explicitly set out in any international treaty/convention?

not yet set

24) If yes to question 16):

a) to what libraries, archives and other organizations should these exceptions or limitations apply;

Libraries and archives should be able to rely on an exception or limitation for the following activities: the lending of works, the provision of on-site access to works and the preservation of works. These exceptions or limitations of copyright protection are justified on the basis of public interests (lending and on-site access on the basis of equal access to information; and preservation on the basis of safeguarding access for future generations). In view of this public-interest justification, these exceptions or limitations should only apply to public libraries and archives. If these activities will lead to a significant use of copyrighted works, which is in our view would only apply to the lending of works, a compensation scheme should be in place.

The Dutch group is of the opinion that within these exceptions and limitations, digital uses should as much as possible be treated on the same footing as non-digital uses, provided that such treatment is compliant with the three-step test and that equivalent safeguards apply to such digital and non-digital uses. To give an example, if the lending right regime applies to physical copies it should also be made applicable to digital copies, provided that only one digital copy can be lend out to one user (this is the so-called *one copy one user* model) and that adequate safeguards are in place to prevent a user from reproducing the digital copy. Technological measures can help to facilitate this.

b) to what activities should these exceptions or limitations apply;

See Question 24a.

c) under what conditions should the activities be undertaken or the copyrighted work used?

See Question 24a.

25) If yes to question 17):

a) to what educational and research institutions should these exceptions or limitations apply;

Educational and research institutions should be able to rely on an exception or limitation for the provision of hardcopy and/or digital course materials. This exception or limitation should apply regardless of the type of education or research institute. Since this specific activity may lead to significant use of (part of) copyrighted works, a compensation scheme should apply.

Here too, the Dutch group notes that in its opinion any exceptions or limitations should apply to both digital and analogue activities of educational and research institutions, provided that the same safeguards apply as discussed above under Question 24.

b) to what activities should these exceptions or limitations apply;

See Question 25a.

c) under what conditions should the activities be undertaken or the copyrighted work be used?

See Question 25a.

For the questions below, please provide an answer for each exception or limitation mentioned above (as applicable).

26) Should use under the exception or limitation be permitted automatically (without any further action), or should certain criteria or procedure(s) be required? If so, what criteria/procedure(s)?

The Dutch group is of the opinion that the above exceptions or limitations should be permitted automatically without any further action. Regarding the exception for orphan works, however, the Dutch group contends that such an exception cannot reasonably be permitted automatically as it somehow needs to be determined when a work qualifies as an orphan work. This exception could therefore be subject to a diligent search as set out in Question 1d. Nevertheless, the Dutch group emphasizes that licensing schemes, such as the extended collective licensing scheme discussed in Question 21, could address the orphan works problem without requiring libraries, archives and educational institutions to engage in the arduous task of searching for rightholders for each and every work in their collections.

27) How should any remuneration for use that falls under such exception or limitation be determined or calculated? Who should be liable for making such payment, and to whom should such payment be made?

The Dutch Group is of the opinion that any remuneration for use that falls under such exception or limitation be based on a 'fair compensation'. It refers to the case law of the European Court of Justice regarding the private copy exception of art. 5(2)(b) of Directive 2001/29/EC, which sets out some core principles for how the remuneration under this provision must be established. These principles may be applied by analogy to the exceptions discussed here.

In case C-467/08 (*Padawan*) the ECJ has ruled that the limits of the concept of 'fair compensation' should be determined in a consistent and harmonized manner and to be interpreted uniformly in all Member States, irrespective of the power conferred on them to determine the form, detailed arrangements for financing and collection, and the level of that fair compensation. It follows from recitals 35 and 38 of the preamble to Directive 2001/29/EC that the purpose of fair compensation is to compensate authors 'adequately' for the use made of their works under a copyright exception. In order to determine the level of that compensation, account must be taken of the 'possible harm' suffered by

the author as a result of the act of reproduction concerned. The fair compensation must therefore include a system 'to compensate for the prejudice to rightholders', which may be different depending on what the exception or limitation permits. A fair compensation for lending is arguably set at a different level than a fair compensation for educational uses related for example to long distance learning.

The Dutch Group is of the opinion that in principle the persons invoking the exception or limitation are the persons liable for making the fair compensation. This is in line with joined cases C-457/11 to C-460/11 (*VG Wort*, para. 74-75), in which the ECJ has held that, in principle, it is for the person or institution causing the harm to recompense the rightholder for the harm suffered.

28) What special treatment, if any, should there be for use of orphan works within such exception or limitation?

The Dutch Group is of the opinion that orphan works, provided that their status is confirmed by a diligent search, can be treated on the same footing as public domain works for the purpose of calculating any remuneration due under such exception or limitation. This means that, similar as public domain works, orphan works should initially be excluded from remuneration. However, if the rightholder of an orphan work comes forward, he should be entitled to claim remuneration for the use of his work.

29) In what circumstances should the exception or limitation be capable of being overridden by contract?

The question of whether exceptions and limitations relating to libraries, archives and educational and research institutions should be capable of being overridden by contract depends to a large extent on the underlying values attached to them. A strong argument can be made that it should not be possible to contractually set aside any exception or limitation based on universally recognized fundamental rights and freedoms which constitutes an imperative rule of copyright law. Yet, apart from such cases, parties should be free to derogate from existing exceptions or limitations through contract (cf. L.M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague [etc.]: Kluwer Law International, 2002).

30) How should any efforts by private organisations to address use by libraries, archives and educational and research institutions, be reconciled with any exception or limitation provided by law?

The Dutch Group is of the opinion that efforts by private organisations, such as the ones discussed above under Question 21 can easily coexist with the exceptions or limitations provided by law.

Summary

not responded

Please comment on any additional issues concerning exceptions and limitations to copyright protection for libraries, archives and educational and research institutions you consider relevant to this Working Question.

not responded