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### Questionnaire for the ALAI Study Days 2015 in Bonn: Remuneration for the Use of Works: Exclusivity vs. Other Approaches. Report The Netherlands

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Questionnaire for the ALAI Study Days 2015 in Bonn

**Remuneration for the use of works**

**Exclusivity v. other approaches**

**REPORT THE NETHERLANDS**

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April 2015**

## **A. Questions in relation to scope and enforcement of exclusive rights under existing law**

*In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.*

1. **How are the following acts covered by the copyright law of your country (statute and case law):**
  - i. **Offering of hyperlinks to works**
  - ii. **Offering of deep links to works**
  - iii. **Framing/embedding of works**

European copyright law determines whether acts of linking and streaming constitute communication to the public (incl. making available) and/or reproduction and distribution. Since the European Court of Justice (ECJ) addressed this issue in the case of *Svensson*, offering a hyperlink to a work is understood to be harmonized in the EU member states. Supplying a clickable link to a freely available third party work on the internet is seen as an act of communication, article 3 Information Society Directive (ISD).<sup>1</sup> However, article 3 ISD exists of two cumulative criteria: an 'act of communication' of a work and the communication of that work to a 'public'.<sup>2</sup> In a case where the work is already freely available on the internet, there is no new public, and therefore no infringement of article 3 ISD.<sup>3</sup>

The Dutch Copyright Act (DCA) provides the author of a copyright protected work with two exclusive economic rights: the right of 'verveelvoudigen' (reproduce) and the right of 'openbaarmaken' (make public). The right of 'openbaarmaken', is a broad right which covers an array of acts such as public performance (public physically present), communication to the public

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<sup>1</sup> ECJ 3 February 2013, C-466/12 (*Svensson*), para. 19.

<sup>2</sup> *ibid*, para. 16.

<sup>3</sup> *ibid*, para. 25.

(e.g. broadcasting), making available on demand and the right of distribution of physical copies.<sup>4</sup> Dutch courts generally do not regard plain hyperlinking or deep linking to copyrighted content, as an act of 'openbaarmaken'.<sup>5</sup>

This was judged differently by the court in the case of *Buma v. Nederland FM*. *Nederland.fm* allowed users to activate radio streams through embedded links to the radio station server. In case of *Nederland FM*, this was done by clicking on the radio station logo on the *Nederland.fm* website. The user remained on the website while listening to the selected radio station and was able to switch to another station by clicking on that other station's logo. The defendant also offered radio streams via *OP.FM*. When clicking on a radio station logo on *OP.FM*, a pop up would appear showing information from the radio station's server. The user did however remain on the *OP.FM* website and could switch to another station from there. In 2012, the District Court of the Hague held that the bundling of framed links to radio streams on these websites, which were already freely online available to the public, did result in an act of communication to the public.<sup>6</sup> In 2014, the District Court of Roermond judged that providing on a website framed links to unauthorized live streams of sports games constituted 'openbaarmaking'.<sup>7</sup> In the latter case the court applies the ECJ *Svensson* judgment and opinions that there is the requisite 'new public'.

On 19 January 2015, the Advocate General (**A-G**) published his opinion on the case *Sanoma/GeenStijl* which is currently before the Supreme Court of the Netherlands. The case concerns hyperlinking to illegal content.<sup>8</sup> The A-G has advised the Supreme Court to file preliminary questions with the ECJ, asking: 'Is linking to an unauthorized source on the internet, in this case, a communication to the public (auteursrechtelijke openbaarmaking)'.<sup>9</sup>

Furthermore, there is no provision for secondary liability or indirect copyright infringement in the DCA. A plain (deep) hyperlink is not a communication to the public and does therefore not directly infringe copyright. It can in some special cases still be considered an 'unlawful act' under general

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<sup>4</sup> Visser, D.J.G., 'Openbaar maken: Communication to the public', in: Hugenholtz, P.B., Quaedvlieg, A.A., Visser, D.J.G. (Eds.) *A century of Dutch Copyright Law*, Amstelveen: DeLex, 2012, p.225.

<sup>5</sup> *Ibid*, p. 257.

<sup>6</sup> District Court of The Hague 19 December 2012, ECLI:NL:RBSGR:2011:BR1058, (*Buma/Nederland.fm*)

<sup>7</sup> District Court of Roermond 26 March 2014, C-04-110328 / HA ZA 11-4854 (*Premier League c.s. v MyP2P*) ECLI:NL:RBLIM:2014:2781.

<sup>8</sup> The popular Dutch website *GeenStijl* published a hyperlink on their homepage, directing the user to a zip-file at *Filefactory.com* which contained unreleased nude pictures of Dutch TV-personality Britt Dekker destined for publication in *Playboy*. *Sanoma*, the publisher of the Dutch edition of *Playboy Magazine* and exclusive licensee of the distribution of the pictures, sued *GeenStijl* for copyright infringement and (as secondary claim) tort. Conclusion A-G 19 January 2015, 14/01158 (*Sanoma/GeenStijl*).

<sup>9</sup> *Ibid*.

tort law art. 6:162 of the Dutch Civil Code (e.g. when a person systematically links to large amounts of unauthorized material and profits from it).<sup>10</sup>

**v. Download of works**

**vi. Upload of works**

Uploading a copyright protected work is considered to be an act of ‘openbaarmaking’, which without permission of the copyright holder, is an act of copyright infringement.<sup>11</sup>

The downloading of a copyright protected work itself is an act of reproduction. In many cases downloads will not require permission as the private copying exception applies (thuiskopie-uitzondering; art. 16c DCA). The exception only applies to reproduction of (part of) a work that is made by a natural person without a direct or indirect commercial purpose and exclusively for his or her personal practice, use, or study<sup>12</sup> A levy is due by manufacturers and importers of blank media/equipment (see Question C.1 below). It was controversial whether the Dutch private copying exception applied only to works copied from an authorized source, or also covered copies of unlawful sources; this matter is relevant for the way in which levies are administered. A reference was made to the ECJ, which judged on that: ‘*National legislation which makes no distinction between private copies made from lawful sources and those made from counterfeited or pirated sources cannot be tolerated.*’<sup>13</sup> Therefore, downloading from an illegal source no longer falls under private copy exemption. The Dutch government as a result had to review its longtime position that downloading from an illegal source is not illegal. For details on remuneration, see below Question C.1.

**vii. Supply of a platform for ‘user-generated content’**

**viii. Other novel forms of use on the internet.**

There is no general exception for user-generated content (**UGC**) in Dutch law, nor has there been any case law on the topic of UGC in the Netherlands.<sup>14</sup> In 2012, the influential Dutch Copyright Commission advised that there seems to be a need for a flexible system that, on the one hand would create space for creative reuse by amateurs of copyright protected works, and on the

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<sup>10</sup> Visser, D.J.G., ‘Openbaar maken: Communication to the public’, in: Hugenholtz, P.B., Quaedvlieg, A.A., Visser, D.J.G. (Eds.) *A century of Dutch Copyright Law*, Amstelveen: Uitgeverij deLex, 2012, p.225.

<sup>11</sup> Court of Appeal The Hague 28 Jan 2014, JHG 2014/48 (*Brein/Ziggo XS4ALL*) para. 4.2.

<sup>12</sup> Article 16c (1), Dutch Copyright Act.

<sup>13</sup> European Court of Justice 10 April 2014, C-435/12 (*ACI Adam BV e.a/Stichting de ThuisKopie*), para. 37

<sup>14</sup> Commissie Auteursrecht, Advies: ‘*Een flexibele regeling voor user-generated content*’, 21 March 2012

other hand would not waive existing agreements on the remuneration of right holders.<sup>15</sup> The Copyright Commission is a formal advisory board of the Ministry of Justice, composed of law professors.

**2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?**

License agreements concluded between rightholders and service providers for acts done by (end) users are possible. However, this is difficult for rightholders to achieve because platforms like YouTube consider themselves as falling under the (hosting) exception of the E-commerce Directive. However, YouTube has a license agreement with the Dutch collective rights organization for musical works BUMA/STEMRA. The music provider pays a percentage of the income generated in the Netherlands. YouTube can indeed track how often a video is played but this information is not further broken down by location. The license agreement with Buma/Stemra currently only covers the Netherlands (that is: the exploitation of Dutch music copyrights).

**3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:**

- **for content providers**
- **for host providers**
- **for access providers**
- **for others?**

**b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?**

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<sup>15</sup> Ibid.

There is no specific rule for secondary liability or indirect copyright infringement in the DCA. The liability of intermediaries (i.e. providers of information society services) as regulated in articles 12 to 15 of the E-Commerce directive are implemented in article 6:196c of the Dutch Civil Code. An intermediary can be held liable for damages resulting from infringement by a third person if the test of article 6:162 Dutch Civil Code are met. An unlawful act is any 'violation of a right or an act or omission violating a statutory duty or an unwritten rule of law pertaining to proper social conduct.'<sup>16</sup> Typically, the latter category (violating a rule of proper social conduct) applies to situations where intermediaries by either facilitating infringement or withholding information on infringers commit an unlawful act. In order to be held liable on the grounds of article 6:162, there has to be a causal connection between the damage suffered by the plaintiff and the unlawful act of the defendant, and the defendant needs to be accountable for the act.<sup>17</sup>

In several cases, web services were held liable for facilitating copyright infringement by users of their services. In 2006, the Amsterdam Court of Appeals ruled that website *Zoekmp3.nl*, a popular search engine which hosted hyperlinks to MP3 files which predominantly contained infringing copies of works, acted unlawful.<sup>18</sup> In 2009, the District Court of Utrecht held BitTorrent site Mininova liable for facilitating infringement and benefiting, through advertising, from infringing uploads of its users.<sup>19</sup>

An ISP can be forced to disclose information or block content, even if the ISP itself does not commit a unlawful act. Article 8 (3) ISD and article 11 Enforcement Directive 2004/48/EC, on injunctions against intermediaries, are implemented in article 26d DCA and article 15e Neighboring Rights Act (WNR). Article 26d DCA states that courts may, at the request of the author, order intermediaries whose services are used by third parties to infringe copyright protected works, to cease services to said users.<sup>20</sup> In 2014, the Court of Appeal of The Hague rejected the request of anti-piracy organization Brein to force internet service providers (**ISP's**) Ziggo and XS4ALL to block access to The Pirate Bay.<sup>21</sup> The court ruled that the requested order to block The Pirate Bay (aimed at curbing filesharing of illicit copies) did not meet the requirement of proportionality. The blockade would be ineffective while harming the right of defendants to run their businesses (as recognized in the Charter of fundamental rights of the

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<sup>16</sup> Hartkamp, A.S, Hondius, E.H, *Towards a European Civil Code*, Nijmwegen: Kluwer Law International 2004, p.607.

<sup>17</sup> Gielen, Ch. and others, *Kort Begrip*, Deventer: Kluwer 2014.

<sup>18</sup> Court of Appeal A'dam 15 June 2006, *LJN*: AX7579 (Zoekmp3).

<sup>19</sup> District Court Utrecht 26 Aug 2009, *IER* 2009, 60 (Mininova).

<sup>20</sup> Article 26d Dutch Copyright Act.

<sup>21</sup> Court of Appeal, The Hague 28 January 2014, *ECLI:NL:GHDHA:2014:88*, (*Ziggo & Xs4all/Brein*) *Mediaforum* 2014/5, 72, note Kingma.

EU). Blockades could easily be circumvented by the use of other torrent sites and proxies.<sup>22</sup> This decision predates the *UPC Telekabel/ Constantin Film* ruling of the ECJ.<sup>23</sup> This case is now before the Supreme Court. The Advocate General has advised the Supreme Court to refer the case to the ECJ.

#### **4. In these cases of infringement, who has standing to sue:**

- **the author**
- **the exclusive licensee**
- **the non-exclusive licensee**
- **the employer of the author**
- **the CMO that manages the exclusive right?**

The general rule is that only the author or his successor in title (by transfer, inheritance, etc.) has standing to sue when enforcing copyright in civil procedures. They might also instruct a third party to sue on their behalf or grant permission to do so. CBOs enforce copyright because the author has transferred copyright or has granted authority to enforce.<sup>24</sup>

Art. 27(1) DCA further states that ‘notwithstanding the assignment of his copyright wholly or in part, the author shall retain the right to bring an action for damages against persons who infringe the copyright’.

Art. 27a (2) DCA provides that the author may claim damages on behalf of a licensee. By law, a licensee has standing to sue only for damages and surrender of the profits, and only if he/she has the consent of the copyright owner (art. 27a DCA).

Article 3:305a and 3:305b DCC are the legal grounds for class actions by either foundations or associations under private law, or bodies incorporated under public law to sue to protect the interest of particular groups, such as intellectual property right holders. One such well-known organization is Stichting Brein, a joint enforcement initiative of a large number of intellectual property rights owners in the domain of copyright and related rights. They can only apply for court orders to cease and desist infringement (plus associated orders, e.g. for the disclosure of information on distribution chains), but not claim damages. Because under the Dutch copyright (art. 7 DCA), the employer is first owner of any copyright in works created by employees in the course of their duties (unless agreed otherwise), employers will generally have standing to sue.

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<sup>22</sup> Ibid.

<sup>23</sup> ECJ 27 March 2014, C-314/12 (*UPC Telekabel Wien / Constantin Film Verleih e.a.*).

<sup>24</sup> Gielen, Ch. and others, *Kort Begrip*, Deventer: Kluwer 2014, p.535.



Of note, the provision in the Dutch copyright act which grants a person portrayed in a work the right to resist publication (art. 19-21 DCA) provides that after the portrayed person's death, only immediate kin or registered partner can stand to sue.<sup>25</sup>

## **B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees**

*If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.*

**1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:**

- **as a general rule for all kinds of contracts;**
  - **as regards 'best-seller' situations (i.e., when parties did not presume that the work would become a best-seller);**
  - **in the case of oppressive contracts;**
  - **in other cases;**
- and if so, under what conditions?**

The legal relationships of authors and performing artists with publishers and other intermediaries are governed by the general principles of contract law of Book 3 and Book 6 of the Dutch Civil Code ('DCC'). Only a limited number of (contract) rules address the rights of authors/performers specifically. The topics that are regulated in the Civil Code Books 3 and 6 are the formation, validity and interpretation of contracts, as well as the different remedies available in case of non-performance/ breach of contract.

It is settled case law that for the interpretation of a contractual relationship, one should not only look at the wording of the agreement, but also the intention of the parties and what they could reasonably expect from each other (the so-called Haviltex-criterion after the landmark judgment by the Supreme Court).<sup>26</sup>

A legislative proposal for a new authors' contract law is currently with the Dutch parliament. The proposal has already been adopted by the (politically most important) House of

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<sup>25</sup> Ibid.

<sup>26</sup> HR 13 Maart 1981, NJ 1981, 635 (*Halviltex*).

Representatives, and is now before the Senate of the Dutch parliament awaiting adoption (or rejection, but this is unlikely to happen). The proposal's aim is to strengthen the contractual position of authors and performers. Their bargaining position is considered to be structurally weaker than that of the assignee of exploitation rights, e.g. publishers, record labels.<sup>27</sup> As regards remuneration, the new provisions will give authors and performers in return for the assignment or exclusive license the explicit right to:<sup>28</sup>

- Reasonable compensation for making a work accessible to the public.
- Additional remuneration under a best-sellers clause (see below).

Furthermore, the author or performer will have (inter alia) the right:

- To full or partial termination of a contract with an exploitation business, if the work is not exploited sufficiently (a non-uses rule).
- To have unreasonably onerous clauses declared void.
- Of recourse to an arbitration board that decides disputes between creators and exploitation businesses.

There is currently no specific provision under Dutch law, which expressly gives authors or performing artists the right to request a revision of the terms of the contract in case the lump sum paid proves to be grossly disproportionate in relation to the proceeds generated from the exploitation of the work.<sup>29</sup> If the act on author contracts is passed, a new article 25d DCA will specifically provide for fair compensation in case of works that have become unexpected best-sellers.<sup>30</sup>

**2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?**

The law does not determine the percentage of income, nor does it specify the amount of remuneration. In most cases the transferee or licensee will be under the contractual obligation to remunerate the transferor/licensor by way of a lump sum, royalties or

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<sup>27</sup> Memorie van toelichting, *Kamerstukken II* 2011/12, 33 308, nr 3. p. 1.

<sup>28</sup> [http://www.eerstekamer.nl/wetsvoorstel/33308\\_wet\\_auteurscontractenrecht](http://www.eerstekamer.nl/wetsvoorstel/33308_wet_auteurscontractenrecht)

<sup>29</sup> In exceptional circumstances, an action based on the provision of the Dutch Civil Code on 'unforeseeable circumstances' (art. 6:258 DCC) might be open.

<sup>30</sup> Eerste Kamer (Senate), *Kamerstukken I* 2014/15, 33 308, A.

combination of both ways of remuneration. It is therefore generally left to the parties to make contractual arrangements for the remuneration of the transferor/licensor. Such an obligation can, however, be implied in the contract. The general rules for construction and /or interpretation of contracts (arts 3:33/35. 6:2 and 6:248 DCC) apply.

**3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.**

Whether the mechanisms of the new authors' contracts provisions will be effective can only be evaluated in the future.

**C. Questions in relation to statutory remuneration rights**

*The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.*

**1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?**

In the Netherlands, there are a number of statutory remuneration rights. There is a remuneration right for private copying, as is mentioned in article 5(2) (b) of the Copyright Directive.<sup>31</sup> The Dutch rules regarding electronic private copying are laid down in article 16c – 16ga of the Dutch Copyright Act and additional Orders in Council.<sup>32</sup>

Authors of copyright protected works are ensured fair compensation for the private copy exemption with private copy levies (thuis kopie heffingen), which are collected by 'Stichting de Thuis kopie', a not for profit foundation in which different right owner groups are represented (see below for remuneration).<sup>33</sup> In recent years, controversy over the type of blank media that are subject to a levy and the amount due has led to legal disputes. A separate foundation exists which is responsible for facilitating negotiations between right owners and media/equipment

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<sup>31</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, p. 10–19.

<sup>32</sup> Besluit van 28 oktober 2014, houdende wijziging van het Besluit van 23 oktober 2012 tot aanwijzing van de voorwerpen, bedoeld in artikel 16c van de Auteurswet, en tot vaststelling van nadere regels over de hoogte en de verschuldigheid van de vergoeding, bedoeld in artikel 16c van de Auteurswet, *Stb.* 2014, 410.

<sup>33</sup> <http://www.thuis kopie.nl/nl/about-thuis kopie>

manufacturers on levies. The Minister of Justice decides on a levy schedule by Order in Council. The Dutch state in 2012 was ordered to compensate damages to rightholders (CMO's) for refusing to apply the levy to new media such as smart phones, MP3 players, etc. A revised levy schedule has come into force in Jan. 2015, with substantially lower levies. Currently levies are due for a range of media, from blank DVDs to PCs, smartphones, e-readers and external hard drives.

Since the implementation of the Rental and Lending Rights Directive,<sup>34</sup> a remuneration right for public lending of copyright protected materials has been laid down in article 15c of the Dutch Copyright Act. This right only applies to tangible copies of the work and does not extend to software or to architecture and works of applied art. Lending is only allowed after the original copy has been distributed by the right owner or with his consent. Libraries in the educational and research sectors as well as the Royal library are exempt from the obligation to pay remuneration.

In the Netherlands, the right to an equitable remuneration for rental is not exercised through a collecting society (given art. 5.2. of the Directive does not make this mandatory).<sup>35</sup> In practice, no separate payment to authors takes place. As Visser explains, the equitable remuneration for rental is usually deemed to be included in the lump sum paid to the author when he assigns his rental right in respect of a work fixed on a phonogram or a film work to the producer.<sup>36</sup>

Article 15i of the Dutch Copyright Act contains a provision that allows the reproduction or making available of a work for disabled persons, for as far as this relates to their handicap, is necessary in relation to the handicap, and is not done for commercial gain. The use of this exception requires the payment of an equitable remuneration to the right owner.<sup>37</sup>

There is also an exception for educational purposes, to be found in art 16 of the Dutch Copyright Act. This exception allows reproduction or communication of parts of works or short works, subject to the payment of remuneration. This exception is only available for as far as the use is non-commercial and required for educational purposes.

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<sup>34</sup> Directive, Council. "92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property." URL: [http://europa.eu.int/ISPO/ecommerce/legal/documents/392L0100/392L0100\\_EN.doc](http://europa.eu.int/ISPO/ecommerce/legal/documents/392L0100/392L0100_EN.doc) and Council Directive 29 (2001).

<sup>35</sup> As per art. 5.2 '(...) *The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers*'. See also B Lenselink, 'Copyright Contract law' in B Hugenholtz, A Quaedvlieg, D Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012*; Amsterdam, deLex (2012), p.178-179.

<sup>36</sup> D Visser, 'Openbaar maken: communication to the public', in P.B. Hugenholtz, A Quaedvlieg, D Visser (eds), *A Century of Dutch Copyright Law. Auteurswet 1912-2012*; Amsterdam, deLex (2012) p. 251

<sup>37</sup> Art. 15i (2) DCA.

Under Dutch law, there is also an exception for the copying of printed works in articles 16h – 16m of the Dutch Copyright Act. It applies to the copying of short excerpts or short articles by legal entities and organisations. Equitable remuneration is due. Reprography of sheet music is not allowed.<sup>38</sup>

The Dutch Act on Neighbouring Rights provides for an equitable remuneration for the public performance of phonograms that have been commercially published. The remuneration is collectively managed and to be distributed equally between phonogram producers and performers.

Article 45d DCA sets out a presumption of transfer of the film author's principal exploitation rights to the producer of the audiovisual work in return for which the producer has to pay an equitable remuneration to the author. Producer is the natural or legal person responsible for the making of the work with a view to its exploitation.<sup>39</sup> Parties can agree differently. The presumed assignment does not include the adaptation rights (of a book into film; excluding subtitling and synchronization), merchandising rights or the use of a cinematographic work that is not ready to be shown to the public. When authors are employed for the making of a film work, initial ownership of all rights rests with the employer.<sup>40</sup> Authors of the film music and the writers of the texts to the film music are not subject to this presumption of transfer.

The legislative proposal for authors copyright contracts includes an amendment to art. 45d DCA according to which the director, screen writer and lead actor(s), in addition to the general right to an equitable remuneration that already exists under the present law have an unwaivable right to a *proportionate* equitable remuneration for each communication to the public other than making available. This latter right to remuneration will be collectively managed. The remuneration is due by the party that performs the communication to the public. The 'proportionate' criterion relates to the income generated with the communication by that party.

## **2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?**

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<sup>38</sup> Art. 16i DCA, based on art 5(2)(a) Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167 of 22.6.2001, p. 10.

<sup>39</sup> Here, the presumption of transfer of the right to communicate the works to the public would therefore include the rental and lending rights of the audiovisual work, as per art 12.1.3. DCA.

<sup>40</sup> C. van der Net, F. Borgesius, country report ('The Netherlands') in *Creativity Comes at a Price. The Role of collecting societies*, IRIS Special, European Audiovisual Observatory: Strasbourg 2009.

The Dutch Copyright Act contains a provision, laid down in article 17a, that allows the implementation of a compulsory license by Order in Council<sup>41</sup> for cable transmission and terrestrial broadcasting<sup>42</sup>. Satellite transmission is excluded, as this would conflict with the Satellite and Cable Directive.<sup>43</sup> The provision is further limited to broadcasts from the Netherlands or from a country outside of the European Union. It is limited to copyright, for neighbouring rights no such provision exists. No decree has ever been made.<sup>44</sup>

### 3.

#### **i. For which statutory remuneration rights does your law provide for obligatory collective management?**

There is no statutory remuneration right for which the law does not appoint an organisation that is to carry out the collective management, except for the remuneration for the use of works for educational purposes or necessary for disabled people in relation to their handicap. For musical works only BUMA/STEMRA are authorized to collectively manage exploitation rights for certain exploitations, but on the basis of the Copyright Act government could in principle designate other organizations to do the same.

For reprography, mostly remuneration is collected through the dedicated CMO, Stichting Reporecht, which was set up by and operates for publishers and authors. Originally Reporecht only collected for print copies, but increasingly it also collects for digital copies. Copyright owners are free to not exercise their right to equitable remuneration individually.

The home copying levy is collected by “Stichting de Thuis kopie”, the Home Copying Foundation. This organisation distributes the levies to other collective management organisations, although the Home Copying Foundation is also allowed to pay the levies directly to the right holders.<sup>45</sup> This organisation is legally appointed by by Order in Council to collect and distribute the levies.

The remuneration for lending is collected by “Stichting Leenrecht”, this foundation is appointed by Order in Council to do this.

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<sup>41</sup> Order in council is a type of implementing regulation, which must have its basis in an Act of parliament. In Dutch: Algemene maatregel van bestuur.

<sup>42</sup> Art 17a Dutch Copyright Act.

<sup>43</sup> Directive, Council. "93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission." *Official Journal L 248* (1993): 06-10.

<sup>44</sup> Spoor/Verkade/Visser. *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*. Kluwer 2005, p. 285.

<sup>45</sup> [http://www.thuis kopie.nl/nl/thuis kopie\\_2/verdeling-rechthebbenden](http://www.thuis kopie.nl/nl/thuis kopie_2/verdeling-rechthebbenden).

**ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?**

The remuneration for the use of works for educational purposes or necessary for disabled people in relation to their handicap, the law does not provide for obligatory collective management.

The Dutch Society of Publishers, “Nederlandse Uitgeversbond” has made an agreement with the organisation for public libraries, “Stichting Sectorinstituut Openbare Bibliotheken.”<sup>46</sup> This agreement contains conditions and tariffs. The payment will be made to the publishers themselves. As similar agreement has been made with the Dutch Universities.<sup>47</sup> However, the remuneration will be paid to “Stichting PRO”, collective management organization.<sup>48</sup>

**iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?**

In relation to electronic private copying the manufacturers or importers of the data carriers will have to pay the levy to “Stichting Thuis kopie”, the Home Copying Foundation, based on art. 16c(2) of the Dutch Copyright Act. Professional users that have paid the levy, can request a refund. Parties that supply blank media to Dutch consumers from abroad in certain circumstances are also regarded as ‘importers’ within the meaning of the private copying provision.

In the case of lending, the organisation that lends the copies of the works out will have to pay a set fee to the collective management organisation, appointed by Order in Council, called “Stichting Leenrecht”.<sup>49</sup>

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<sup>46</sup> <http://www.eziz.nuv.nl/downloadcentrum/regelingen-modellen-en-checklists/regelingen-bibliotheken/regeling-toegankelijke-lectuur-leesgehandicapten.158422.lynkx> and <http://www.nuv.nl/artikelen/achtergrondinformatie/toegankelijke-lectuur-voor-leesgehandicapten.16382.lynkx>

<sup>47</sup> <http://www.nuv.nl/Uploads/2014/6/Readerregeling.pdf> and <http://www.ipro.nu/index.php?sa=24&si=331>

<sup>48</sup> <http://www.stichting-pro.nl/nl/Over-Stichting-PRO>

<sup>49</sup> <http://www.leenrecht.nl/en>

With regard to the use of works for educational purposes, the organisation that uses the works, eg. the educational institution, will have to pay the right holder.<sup>50</sup>

For the use of works for handicapped persons, the payment has to be made by the organisation who makes the works available to the right holder.<sup>51</sup>

Remuneration for reprography is to be paid by the organisations making the copies<sup>52</sup>.

The person who relies on the exception of art. 7 of the Dutch Neighbouring Rights Act for the use of phonograms, is obliged to pay the equitable remuneration.

**iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?**

The remuneration for the private copying exception is determined by Order in Council. This Decree is based on the advice of an organisation called “Stichting Onderhandelingen Thuis kopie” (SONT), a non-profit organization that facilitates negotiations over remuneration between representatives of right holders and the parties that will have to pay the levy.<sup>53</sup> The foundation commissions research on the amount of private copying that takes place, which informs its advice to the Ministry.<sup>54</sup>

The fees for lending are set in a similar way. The “Stichting Onderhandelingen Leenvergoeding”, Foundation for the Negotiation regarding Lending fees”, advises on the tariffs, which will be the basis of the Order in Council that actually sets the tariffs.

There are no rules that fix the remuneration with regard to the exception for handicapped persons or the exception for the use for educational purposes. This means, that the parties will have to agree themselves on what a fair price would be.

With regard to the public performance of phonograms published for commercial purposes, payments must be made to “Stichting ter Exploitatie van Naburige Rechten” (SENA).<sup>55</sup> The

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<sup>50</sup> Art. 16 DCA.

<sup>51</sup> Art. 15i(2) DCA.

<sup>52</sup> Art. 16h and art. 16i DCA.

<sup>53</sup> K. J. Koelman, ‘Regulation of Collecting Societies’, in: P.H. Hugenholtz, a.o., A century of Dutch Copyright Law, deLex, 2012, p. 486.

<sup>54</sup> <http://www.thuiskopie.nl/nl/opgave/tarieven>

<sup>55</sup> Art. 15 Dutch Neighbouring Rights Act.



remuneration should be distributed to phonogram producers and performers on a 50-50 basis. If parties do not agree on the amount that should be paid, the Court of The Hague is exclusively competent to hear disputes over remuneration.<sup>56</sup>

In case of most statutory remuneration rights (private copying, public lending, reprography) the share of authors and performers is defined by the distribution schedule as set by the board of the CMO that is appointed to collect and distribute the remuneration. Users may go to the District Court of the Hague claiming that the remuneration is not equitable.

**v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?**

By law there is a Supervisory Board that oversees all collective management organisations.<sup>57</sup> Until recently this Supervisory Board had no control over the tariffs set by collective management organisations; the prices were to be set by the market or set by Order in Council.<sup>58</sup> Since the adoption of an amendment on 7 March 2013, collective management organisations are obliged to ask permission if they want to increase the tariffs unilaterally.<sup>59</sup> The Supervisory Board will allow the change to the tariffs, unless the new tariffs are excessive.

Secondly, this law allows right holders or the persons who have to pay a remuneration below 100.000,-- euro to file a complaint with an arbitration board. This board will rule on the issue at hand. Its decision is only binding if parties do not go to court afterwards.<sup>60</sup> In reviewing the complaint, the dispute resolution body will take into account the requirement of non discrimination, the market value of the use and the nature and extent of use (article 3, 25 Act on Supervision on Collective Management of Copyright and Neighbouring Rights).<sup>61</sup>

**vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?**

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<sup>56</sup> Art. 15(3) Dutch Neighbouring Rights Act.

<sup>57</sup> Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten, Stb. 2013/179.

<sup>58</sup> K. J. Koelman, 'Regulation of Collecting Societies', in: P.H. Hugenholtz et al. (eds.), *A century of Dutch Copyright Law*, deLex, 2012, p. 494.

<sup>59</sup> Art. 3(1)(c) Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten.

<sup>60</sup> Art. 23 Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten.

<sup>61</sup> H.F.R. van Heemstra, 'Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten', AMI 2013/4, p. 121-129.

It is difficult to predict. Proceedings may be lengthy.

**vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?**

CMOs can file a complaint to an arbitration board in which case the board will review whether the fee invoiced is equitable. If the user does not go to court within three months from the board's decision, the fee is presumed to be agreed between the CMO and the user (article 23(2) Act on Supervision of Collective Management of Copyright and Neighbouring Rights).

#### **D. Mechanisms to ensure adequate remuneration for creators and performers**

*The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.*

**1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?**

The law itself does not provide rules that determine the way in which the collected remuneration fees have to be distributed among various right owners. However, the organisations that are appointed by Order in Council to collect certain types of fees, have to obtain approval from the Minister of Justice on the rules they apply to divide the fees.<sup>62</sup>

The law does require a certain percentage of the collected fees to be paid to the right holders. In general only 15% of the collected money can be used for organisational cost of the collective management organisation.<sup>63</sup>

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Spoor/Verkade/Visser. *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*. Kluwer, 2005, p. 274 and 280.

<sup>63</sup> Besluit van 25 juni 2013, houdende uitvoering van de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten, *Stb.* 2013, 260.

With regard to the use of phonograms, the law states that half of the collected fees should be distributed to the artists, and half should be distributed to the producers.<sup>64</sup>

**2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?**

See above.

**3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?**

Each collective management organisation has a set of rules on which the distribution is based (distribution schedule). The collective management organisations that are appointed by law by Order in Council typically distribute the remuneration not to individual right owners but to organisations that represent specific groups of right holders. These organisations in turn will redistribute the monies to the right holders they represent.

The organisation that collects the levies for the private copying exception, “Stichting de ThuisKopie” distributes the money for audio-visual works according to the following key (applies to levies due up to January 1, 2014).<sup>65</sup>

Creators of the work:	33,75%
Producers:	33,75%
Performing artists:	25,50%
Broadcasting organisations:	7,0%

The levies for audio are distributed according to the following key.<sup>66</sup>

Creators of the work	40%
Performing artists	30%
Producers	30%

Under the new decree, the home copy levy is due for more devices and involves more rights. New distribution rules therefore have to be made.

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<sup>64</sup> Art. 15(4) Dutch Neighbouring Rights Act.

<sup>65</sup> [http://www.thuisKopie.nl/nl/thuisKopie\\_2/verdeling-rechthebbenden](http://www.thuisKopie.nl/nl/thuisKopie_2/verdeling-rechthebbenden)

<sup>66</sup> Idem.

**4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?**

In the case of the reprography, Reprorecht has a fee distribution schedule that is approved by the Minister of Justice. Fees are paid to publishers on the basis of estimated copying, on condition that they redistribute at least 50 of revenues to their authors.<sup>67</sup>

**5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?**

Collective management organisations are under supervision of the College van Toezicht Auteursrecht en naburige rechten. Distribution regulations require prior authorization by the College. Collective management organisations are obliged to distribute the collected fees within three years after the year of collection.<sup>68</sup> The collective management organisations are not allowed to spend more than a fixed percentage of the collected fees on overhead costs. This percentage is set at 15%; if a CMO has larger overheads it needs to motivate why this is so (“apply or explain” rule).<sup>69</sup>

**E. Questions on new business models and their legal assessment**

**1. Which new business models do you know in your country in respect of the supply of works via the internet?**

Given the speed with which new information services are launched and disappear, we have no comprehensive overview of new internet based business models for copyright works. In the Netherlands as elsewhere, cloud based services increasingly overtake traditional distribution of copyright works, e.g. subscription based SaaS (software as a service) models are rolled out among many professional user groups and consumers. In the field of academic publishing open access models are on the rise, a development stimulated by public sector funders of research. In legal

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<sup>67</sup> Spoor/Verkade/Visser. *Auteursrecht: auteursrecht, naburige rechten en databankenrecht*. Kluwer, 2005, p 280 and article 5.3 of the internal rules of “Stichting Reprorecht”, to be found via [https://www.reprorecht.nl/uploads/Publicaties%20&%20Documenten%20Regeling%20RB/Reglement\\_Uitkeringen\\_0401110\\_def.pdf](https://www.reprorecht.nl/uploads/Publicaties%20&%20Documenten%20Regeling%20RB/Reglement_Uitkeringen_0401110_def.pdf)

<sup>68</sup> Article 2(2)(g) Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten.

<sup>69</sup> Besluit van 25 juni 2013, houdende uitvoering van de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten, *Stb.* 2013, 260.

publishing various content integrating service providers have emerged in the past decade. Below are some examples of recently introduced services aimed at consumers/end-users.

A new business model for the supply for non-fiction in the Netherlands is called Blendle.<sup>70</sup>

Blendle is a social platform that offers its users the possibility of buying short or long-read articles from many well-established newspapers and popular Dutch magazines, but increasingly also from foreign publications like the New York Times and the Washington Post. Readers benefit because they can purchase per view articles from a broad pool of publications, rather than having to purchase a subscription to individual papers or magazines. Newspaper subscription rates in the Netherlands have been in decline for years, so for publishers it is an additional revenue stream. Journalists however have so far not been able to effectuate participation in the revenue stream.

In the domain of industrial design, start-up 3Dhubs offers a platform where owners of 3D printers can contract with users who want to have a certain design printed (which might be any product from decorative to replacement parts). Buyer and seller need to ensure they have the necessary authorization of intellectual property rights owners.

In the audiovisual field, Netflix has been offering services in the Netherlands since 2013. It reportedly has almost a million subscribers to its streaming service (films, TV-series).<sup>71</sup> Collective rights society Buma/Stemra has license-agreements with multiple Video-on-Demand Services, including HBO, Netflix and Microsoft VOD.

Nevertheless, also due to legal issues, it appears to be difficult for rightowners to get licenses in place and earn money on the internet. Where the use has grown, the income has not<sup>72</sup>.

**2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found**

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<sup>70</sup> <https://blendle.com/signup/kiosk>

<sup>71</sup> <http://www.volkskrant.nl/media/nederland-op-vijfde-plek-met-bijna-miljoen-netflix-abonnees~a3851031/>

<sup>72</sup> <http://www.authorsocieties.eu/mediaroom/185/32/Creators-urge-Europe-to-ensure-a-fair-and-sustainable-digital-economy-and-welcome-the-initiative-of-MEPs-Christian-Ehler-and-Pervenche-Beres-to-discuss-this-issue-as-a-priority-in-the-CCI-Intergroup>

[http://www.europarl.europa.eu/document/activities/cont/201411/20141118ATT93574/20141118ATT93574\\_EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201411/20141118ATT93574/20141118ATT93574_EN.pdf)

A recent dispute involved the supply of e-books via the internet.

The Tom Kabinet website operates as a market place for people to sell and buy 'used' e-books. In January 2015, the Court of Appeal Amsterdam ruled in a dispute between the Dutch Association of Publishers and Tom Kabinet. The court considered it plausible that website Tom Kabinet facilitated the sale of not only legally published e-books, but also of unlawful copies. It partly awarded the Dutch Association's claim to order to prohibit the website of Tom Kabinet.<sup>73</sup> If Tom Kabinet succeeds in taking sufficient and effective measures to exclude illegal content, Tom Kabinet can petition the preliminary relief judge to remove the injunction.<sup>74</sup> In its judgment, The Court applied the ECJ UsedSoft decision from 2012.

In another case, the District Court of the Hague has asked questions to the ECJ, *i.a.* on whether e-lending (lending of ebooks by public libraries) is covered by the public lending right in the Rental Directive and also whether the copyright is exhausted after the first sale of an ebook.<sup>75</sup>

**3. In your country, are there offers that are based on flat rates, 'pay-per-click' or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.**

In the Netherlands many different models are offered. Flat rate models (streaming models like e.g. Netflix) seem to become more popular. No data are readily available on the relative popularity of different models.

**4. Within these business models, how do authors and performers get paid?**

Blendle receives 30 percent of each article that is 'bought'; the remaining money is said to go to the publishers/right owners.<sup>76</sup> There has been debate about the payment of the freelance journalists who, unlike the publishers, do not receive additional remuneration for the fact that their articles are published online through Blendle. The federation of journalists promotes standard terms that ensure any (additional) digital exploitation method is explicitly agreed and compensated. However, freelance journalists generally have to abide by the terms and conditions set by newspapers/media. Many freelance authors have authorized CMO 'LIRA' (and

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<sup>73</sup> Court of Appeal Amsterdam 20 January 2015, ECLI:NL:GHAMS:2015:66 (*Tom Kabinet*)

<sup>74</sup> *Ibid.* par. 3.7.3

<sup>75</sup> District Court The Hague 1 April 2015, ECLI:NL:RBDHA:2015:5195 (*VOB v. Leenrecht*).

<sup>76</sup> <http://www.nrc.nl/nieuws/2014/04/28/blendle-is-er-vijf-vragen-over-de-concurrent-partner-van-kranten-en-tijdschriften/>

Pictoright, for photography) to collect remuneration for reproductions of their work. The CMOs attempt to secure payment but so far have no real negotiations have taken place.<sup>77</sup> Blendle argues that they have secured rights and/or indemnification from the publishers.

For musical works, BUMA/STEMRA has so far been responsible for negotiating and setting the remuneration standards with online music providers and has contracts in place with all the major players, such as Spotify, YouTube or iTunes. Given their areas of collection, BUMA focuses on actual communication to the public (e.g. Spotify, Play) whereas STEMRA licenses reproductions (i.e. downloads, like iTunes). As mentioned above it is difficult to secure fair remuneration online. A number of parties active in the music market argue they do not require a license under the Copyright Act and/or the E-Commerce Directive.

As to the actual tariffs, BUMA/STEMRA bases its tariffs for streaming on the same criteria as for other acts of communication to the public. That is, the licensee pays a percentage over its revenue (in the case of streaming music tracks 10%,<sup>78</sup> with minimum rates of 0.0033 euro per started stream and Euro 0.42-0.85 per month per subscribed end-user). For small music service providers fixed rates apply. BUMA redistributes the income to its members or sister societies abroad. Amounts are based on the frequency of streaming.

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<sup>77</sup> See <https://www.villamedia.nl/ opinie/ bericht/ blendle- moet- freelancers- nu- gaan- betalen/>

<sup>78</sup> The percentage depends on how much of the content of the service consists of music, e.g. for streaming music tracks it is higher than for streaming content with incidental music.