# Geschriftenbescherming: The Dutch Protection for Non-original Writings

Beunen, A.C.; Hugenholtz, P.B.; Quaedvlieg, A.A.; Visser, D.J.G.

# 3

# *Geschriftenbescherming*: The Dutch Protection for Non-original Writings

*Annemarie Beunen**

## 1. Introduction

A peculiarity in the Dutch Copyright Act is its copyright protection for non-original writings, called the 'geschriftenbescherming' in Dutch. Its basis is in Article 10(1)(1) of the DCA, which lists 'books, brochures, newspapers, periodicals *and all other writings* [our italics]' among the subject matter eligible for copyright. For these writings, no originality test needs to be applied in order to assess whether they enjoy protection. Instead all writings, original or not, are *in se* protected in the Netherlands. Yet, the courts must still assess whether a writing is original or not, to determine whether regular copyright or the geschriftenbescherming applies since the scope of their protection differs.

## 2. Geschriftenbescherming: short description

The scope of the geschriftenbescherming has been developed in case law; its protection is limited compared to that of regular copyright. In short, it protects non-original writings against literal reprinting and forms of reproduction which show minor changes compared to the reproduced writing. Thus, the Dutch geschriftenbescherming resembles the 'catalogue rule' in the copyright acts of the Scandinavian countries, which protects non-original catalogues, tables and similar compilations against reproduction. The geschriftenbescherming also shares similarities with the copyright protection afforded by courts in several other countries for subject matter with a very low degree of originality, the so-called 'kleine Münze'.[1]

* A.C. Beunen is a copyright lawyer at the National Library of the Netherlands and an assistant professor at Leiden University at eLaw@Leiden, Centre for Law in the Information Society.

1 Compare P.B. Hugenholtz, *Auteursrecht op informatie. Auteursrechtelijke bescherming van feitelijke gegevens en gegevensverzamelingen in Nederland, de Verenigde Staten en West-Duitsland. Een rechtsvergelijkend*

The current wording of the geschriftenbescherming in the Dutch Copyright Act dates back to 1912, but its roots are much older. In many countries, as in the Netherlands, the coming into being of a copyright for authors was preceded by a form of protection for publishers against reprint of their publications (called 'copijrecht' in Dutch). It is widely accepted that the Dutch geschriftenbescherming is a remnant of this. The geschriftenbescherming is indeed also granted to reward the investments undertaken in the activities of collecting, arranging, fixing and publishing the writing.[2] Its rationale thus is to protect mere investments. Nevertheless, it is housed in the Copyright Act which for all works (except writings) requires a certain degree of originality for protection. While this has raised doctrinal objections from several scholars, this 'pseudo-copyright' has also found pragmatic or utilitarian supporters, among whom the Dutch legislator.

The need for protection for any sort of writing, especially those of high economic value, has become even stronger in our present-day society where everyone can make a literal digital copy without any cost or effort. New technology such as computer programs have therefore explicitly been afforded protection. Moreover, for writings in the form of databases, publishers and producers have successfully lobbied in Brussels for an exclusive right of their own: the *sui generis* or database right. Its protection is stronger than that of the geschriftenbescherming, but the latter was partly maintained for databases as a fall-back protection. The geschriftenbescherming also remains of considerable importance for writings that do not qualify as databases. However, its continued existence may well be threatened by recent judgments of the European Court of Justice, such as *Infopaq* and *Football Dataco*, which will be discussed below.

## 3 Geschriftenbescherming in the Dutch Copyright Act

### *3.1 Legislative history and relationship to the Berne Convention*

*Legislative history*

The Netherlands boasts a long and illustrious tradition of book printing. From around 1500, booksellers, printers and publishers could petition the governmental

*onderzoek*, Deventer: Kluwer 1989 (Ph.D. thesis University of Amsterdam), p. 53-59 and 119-133; M.J. Davison, *The legal protection of databases*, Cambridge: Cambridge University Press 2003, p. 103-159; A.C. Beunen, *Protection for databases. The European Database Directive and its effects in the Netherlands, France and the United Kingdom*, Nijmegen: Wolf Legal Publishers 2007 (Ph.D. thesis Leiden University), p. 80-84.

2 Th.C.J.A. van Engelen, 'De geschriften-bescherming in de Auteurswet en de bescherming van daarmee op één lijn te stellen prestaties', *BIE* 1987, p. 250; Hugenholtz, *Auteursrecht op informatie*, p. 46. Also see the conclusion of Advocate General Langemeijer in Supreme Court of the Netherlands, 8 February 2002 (EP Controls v. Regulateurs), *AMI* 2002, p. 122.

authorities for a privilege (or licence) to exclusively print and sell a specific book, protecting them against reprinting.[3] Privileges were not only issued for newly written books but for all sorts of writings, such as trivial almanacs, official documents and old texts like the Bible. By means of a privilege, for example, the 17th century saw the tumultuous issue of the state-authorized Dutch translation of the Bible ('Statenbijbel').[4] These exclusive privileges were mostly granted to printers, publishers and booksellers, as the parties involved in the exploitation of information.[5] Occasionally, privileges were issued to authors instead (like in the case of the Dutch Bible translators), but as these concerned exclusive rights of printing and selling, the authors would often have to involve parties which could provide such services for them. This often required transfer of the privilege to a printer. These privileges differed from current copyright in that they exclusively protected activities of printers and publishers, not achievements of authors. They thus offered protection against unfair competition.[6] In practice, however, the privileges' force was limited; they only had territorial effect within the jurisdiction of the issuing governmental authority, and their enforcement, by criminal sanctions, was difficult.

Gradually, the object of protection of the Dutch privileges became more restricted. Originally, they could be requested for all sorts of writings, but from the beginning of the 18th century provincial decrees and subsequent national legislation imposed limitations, excluding bibles, psalm books, church books, school books, texts of classical Greek and Roman authors, and ordinary almanacs and similar texts. New additions to these writings such as annotations, comments, indices, or embellishments could still qualify for protection. Interestingly, these regulations alternately called the protection against reprinting 'copijrecht' (literal translation: right to copy) and 'right of ownership'.[7] The regulations abolished the traditional privileges, which were merely governmental favours, and replaced

3 This historical paragraph is largely based on Van Engelen, 'De geschriften-bescherming in de Auteurswet', p. 243-250, and Th.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, Zwolle: W.E.J. Tjeenk Willink 1994 (Ph.D. thesis Leiden University), p. 35-46.

4 C. Schriks, *Het Kopijrecht 16de tot 19de eeuw*, Zutphen: Walburg Pers/Kluwer 2004 (Ph.D. thesis Leiden University), p. 157-167; E.J. Dommering, 'Lessen uit de geschiedenis van het auteursrecht', *AMI* 2004, p. 161-162.

5 It was difficult to distinguish between booksellers, printers and publishers in those days because many were active in printing, publishing and selling concurrently.

6 See e.g. F.W. Grosheide, 'Transition from guild regulation to modern copyright law – a view from the Low Countries', in: L. Bentley, U. Suthersanen, P. Torremans (eds), *Global Copyright. Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*, Cheltenham/Northampton: Edward Elgar (proceedings ALAI Conference 2009), p. 85-86 and 100.

7 Schriks, *Het Kopijrecht 16de tot 19de eeuw*, p. 77 writes that the copijrecht was considered as a right of ownership, which included the right to copy. Also see p. 76-80 on the intricate distinction between privileges and the copijrecht.

them with the copijrecht, which was explicitly acknowledged in legislation.[8]

In the Act of 1817 concerning the rights of printing and publishing in the Netherlands,[9] the authors themselves became the subject of the protection against reprint of their published works (which again required publishers, or authors acting as publishers).[10] The objects of protection were called 'literary and artistic works'. This Act also explicitly excluded the abovementioned categories of writings from protection. Scarce jurisprudence included a case on a royal decree in which the state reserved for itself an exclusive right to print sailor almanacs and lottery lists among other things. After the state suffered reprinting, it filed suit against its competitor who contested that the reprinted writings were literary works. Yet, the court in first instance broadly interpreted the term literary works as all that is printed by means of letters, which was sanctioned by the appeal court. However, the Dutch Supreme Court held firstly that outside the scope of the 1817 Act no copijrecht was available, and secondly that this Act was meant to favour literary and artistic creators as natural persons, so that the state could not claim copijrecht. The preceding lower judgments were also strongly criticized by lawyers, who stated that the court of first instance's interpretation would mean protection for printers instead of authors. They also argued that only creations of the intellect qualified for the copijrecht.[11]

Drafting the Dutch Copyright Act of 1881, the legislator followed proposals of the Dutch booksellers' association and of the Royal Academy of Sciences. According to Van Engelen, neither intended to change the existing legal situation with protection being unavailable for non-original writings. In its proposal, the booksellers' association deleted the list of specific exceptions from the 1817 Act, arguing that it was superfluous since, for example, almanacs as a rule had no author. The legislator explicitly followed this proposal and left out the exceptions in the 1881 Act. It also replaced the term 'literary works' with 'writings' because it argued that the former term had become less customary. This replacement of terms became a source of confusion in case law according to Van Engelen.[12] In 1892, the Dutch Supreme Court afforded protection to a Leiden feast program,

8 The Act of the Batavian Republic of 1803 granted this right to the 'opsteller', the party drawing up the text, which in the opinion of M. Reinsma, *Auteurswet 1881. Parlementaire Geschiedenis wet van 1881 - ontwerp 1884*, Zutphen: Walburg Pers 2006, p. 13 was the printer or publisher, whereas this was the author according to Schriks, *Het Kopijrecht 16de tot 19de eeuw*, p. 321 and Grosheide, 'Transition from guild regulation to modern copyright law', p. 97-98.

9 Act of 25 January 1817, *Staatsblad* 1817, nr. 5

10 Schriks, *Het Kopijrecht 16de tot 19de eeuw*, p. 421

11 See Van Engelen, 'De geschriften-bescherming in de Auteurswet', p. 245.

12 Van Engelen, 'De geschriften-bescherming in de Auteurswet', p. 245-248; Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 37-41.

in spite of the defendant's argument that it did not express any literary thoughts. Instead, the Supreme Court held that the term 'writings' in the Copyright Act did not distinguish between different sorts of texts, so that any writing was entitled to copyright. On the same grounds, it afforded copyright to preaching engagement lists in 1895, while also rejecting the defence that no author could be indicated for them. Several scholars at the time criticized the Supreme Court's literal, broad interpretation of the term 'writings' and argued that only intellectual creations should be entitled to copyright in view of the Act's drafting history.

In the subsequent (and current) Copyright Act of 1912, the legislator explicitly provided protection for non-original writings, thus willfully following the Dutch Supreme Court's case law. According to Van Engelen, the legislator did so for economic reasons as it wished to keep protecting the financial investments involved in the production of non-original writings. Van Engelen objects to the often-heard statement that the traditional printers' privileges and/or the copijrecht can be considered forerunners of the current geschriftenbescherming for non-original writings. What may indeed be apparent from this extensive legislative history in our view is that both the privileges and the copijrecht were not fixed concepts but underwent fundamental changes in the Netherlands, as to both their subject and object of protection, at times including and at others excluding non-original writings.[13] A strong similarity between the privileges and copijrecht on the one hand and the current geschriftenbescherming on the other hand is in fact that they protect mere investments, instead of originality, against unfair competition.

*Relationship to the Berne Convention*

After the Netherlands had joined the Berne Convention in 1912, the 1881 Copyright Act needed revision. Whereas the Berne Convention in Article 2 lists 'books, pamphlets *and other writings*' among the works of literature, science and art eligible for its copyright protection, the Dutch legislator deliberately extended this by listing 'and *all* other writings' in Article 10(1)(1) of the DCA. In the Explanatory Memorandum of the 1912 Act, the legislator observed: 'the treaty [BC] limits its protection, however broad this may be, to productions of literature, science and art, so that it is at least questionable whether printed matter to which one cannot with the best will in the world ascribe any literary or scientific value, such as preaching engagement lists, feast programs, theatre programs and the like, will

13 Also compare E.D. Hirsch Ballin, *Uitgeversrecht-in-wording. Over structuurveranderingen in het recht van een risico-drager*, Zwolle: W.E.J. Tjeenk Willink 1947, p. 12-16.

fall under the definition of the treaty."[14] The legislator continued that preceding case law had nevertheless shown a need for copyright for such non-original writings. For that reason it explicitly included the geschriftenbescherming in the 1912 Act while defying much scholarly criticism.

An interesting question is whether the geschriftenbescherming is consistent with the Berne Convention. The Convention prescribes the minimum level of copyright protection which the signatory states must guarantee to each other's authors in international situations. The Berne Convention mentions 'literary and artistic works' as being the subject matter eligible for its copyright protection, but it does not say what level of originality these works must meet in order to be protected. Yet, Ricketson/Ginsburg refer to Article 2(5) BC in stating that an 'intellectual creation' is implicit in the conception of a literary or artistic work.[15] Article 2(5) requires collections of literary and artistic works, in order to be protected as such, to constitute 'intellectual creations' by reason of the selection and arrangement of their contents. The Berne Convention's term 'literary works' thus presupposes a certain level of originality, which excludes writings which are not original from its list of works eligible for its prescribed minimum level of copyright protection, as was also remarked by the Dutch legislator in 1912. Nevertheless, a signatory state may provide more extensive copyright protection, for example for non-original subject matter as well.[16] Article 2(8) BC may serve as an example; it explicitly states that the protection of the Berne Convention does not apply to 'news of the day or to miscellaneous facts having the character of mere items of press information'. Still, the Convention leaves (some) room here for individual signatory states to offer a form of national protection.[17] The overall conclusion may thus be that the Dutch geschriftenbescherming arguably is permitted under the Berne Convention.

Another question is whether the Berne Convention applies to non-original writings. This arguably is not the case[18] because non-original writings do not

14 Our translation. L. de Vries, *Parlementaire Geschiedenis van de Auteurswet 1912 zoals sedertdien gewijzigd*, Den Haag: SDU 1989-1997, Part 1, p. 10.5.

15 S. Ricketson, J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford: Oxford University Press 2006, Vol. I, para. 8.03, p. 402.

16 Compare Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, Vol. I, para. 6.110, p. 331 and para 8.104, p. 499.

17 Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, Vol. I, para. 8.104, p. 499; F.W. Grosheide, *Auteursrecht op maat. Beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context*, Deventer: Kluwer 1986 (Ph.D. thesis Utrecht University), p. 233; Hugenholtz, *Auteursrecht op informatie*, p. 83.

18 Comparably, Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, Vol. I, para. 8.56, p. 452 remark that the Berne Convention's national treatment principle does not apply to the German protection for non-original photographs. V. Bensinger, *Sui-generis Schutz für Datenbanken. Die EG-Datenbankrichtlinie vor dem Hintergrund des nordischen Rechts*, München: Beck 1999 (doctoral

meet the Convention's qualification of 'works of literature, science and art' in Article 2.[19] Ricketson/Ginsburg observe: 'Member states incur no obligation to grant national treatment if the domestically protected work is not an "intellectual creation" in the sense of article 2. Similarly, no minimum rights attach to works falling outside the scope of "literary and artistic works" within the meaning of the Convention.'[20] Despite this, foreigners can still invoke the geschriftenbescherming in the Netherlands on the basis of Article 47 of the DCA. This article pertains to situations where international treaties do not apply but its content is largely in line with the Berne Convention's principle of national treatment. It declares the DCA applicable to all works of literature, science and art[21] which were first published in the Netherlands and to all works, whether published or unpublished, by Dutch authors or foreign authors whose place of residence is in the Netherlands. Moreover, being a member of the European Union, the Netherlands must accord EU citizens and residents the same level of protection it offers to its nationals by virtue of the principle of non-discrimination in the EEC Treaty.[22] This was confirmed by the European Court of Justice in its *Phil Collins* judgment of 1993.[23]

A contrary view could possibly be that the Berne Convention does apply because the Dutch legislator has explicitly qualified non-original writings in the DCA as belonging to the 'works of literature, science and art' eligible for copyright, and has thus brought them within the realm of the Convention. It would then follow from the Berne Convention's principle of national treatment that foreigners could claim protection in the Netherlands for subject matter not protected in their home countries.[24]

---

dissertation University of Münster), p. 37 writes that the catalogue rule in the Scandinavian copyright acts protecting non-original catalogues does not fall under the scope of any international treaty.

19 Members of parliament expressed this opinion during the 1992 debate on the Dutch bill implementing the European Computer Programs Directive. This non-applicability of the Berne Convention in their view meant that foreign non-original writings are not granted the geschriftenbescherming in the Netherlands, and they asked the Minister of Justice whether this is not prohibited by the principle of non-discrimination in the EEC Treaty (Voorlopig Verslag, *Kamerstukken II* 1991/92, 22 531, nr. 4, p. 17). The Minister answered that their claim that foreign non-original writings can never enjoy the geschriftenbescherming went too far and stated that Article 47 of the DCA applied (Memorie van Antwoord, *Kamerstukken II* 1992/93, 22 531, nr. 5, p. 21).

20 Ricketson/Ginsburg, *International Copyright and Neighbouring Rights*, Vol. I, para 8.01, p. 400.

21 They include non-original writings according to Article 10(1).

22 P. Goldstein, P.B. Hugenholtz, *International Copyright. Principles, Law, Practice*, Oxford: Oxford University Press 2010 (2nd ed.), p. 65.

23 European Court of Justice, 20 October 1993, case C-92/92 and C-326/92 (Phil Collins), *ECR* 1993, p. I-5145.

24 The geschriftenbescherming, however, provides less protection than regular copyright (see section 3.3) which could even raise the question whether foreigners are instead entitled to invoke the Berne Convention's higher minimum level of protection for their non-original writings in the Netherlands.

### 3.2 *The Act of 1912 and subsequent amendments*

*Article 10(1)(1)*
In the DCA of 1912, the geschriftenbescherming was laid down in Article 10(1)(1) and up until now it has remained unchanged therein. This article reads:

> 1. For the purposes of this Act, literary, scientific or artistic works are:
> 1° books, brochures, newspapers, periodicals *and all other writings* [our italics];

Subsequently, 11 more subparagraphs list other work categories eligible for copyright, ending with the wording 'and generally any creation in the literary, scientific or artistic domain, regardless of the manner or form in which it has been expressed.'

By conferring copyright on *all* writings in the 1912 Act, thus including non-original ones, the legislator chose to endorse the line followed by the Dutch courts. The legislator gave the following reasoning for supporting the geschriftenbescherming for non-original writings: 'Given that the Act of 1881 acknowledges, according to the prevailing opinion, copyright in such writings, it would not do on the occasion of the large remodeling and extension of our copyright law to introduce a limitation on this point, especially given that copyright in the productions of the sort meant here has proven in practice to be by no means without significance. From the wording of the first paragraph, it clearly follows that all that must be qualified as belonging to the category of "books, brochures, newspapers, periodicals and all other writings", even though it does not possess the slightest literary or scientific value, has become by legislative stipulation a work of literature, science or art in the sense of this bill.'[25] This choice met with severe dogmatic criticism from prominent copyright scholars[26] and members of parliament. They argued that, based on the Berne Convention, non-original printed matter such as preaching engagement lists or theatre programs ought not to be protected by the Copyright Act. Instead, such protection would be better suited within the ambit of protection against unfair competition.

*Computer programs*
Due to the ongoing technological advances, the legislator had to consider whether new ICT products having a written form could also qualify for the

25 Our translation. See De Vries, *Parlementaire Geschiedenis van de Auteurswet 1912*, Part 1, p. 10.5.
26 For 1912 and 1913, Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 43-44 mentions (with exact sources): H.L. de Beaufort, F.W.J.G. Snijder van Wissenkerke, L.G. van Praag and P. Scholten.

geschriftenbescherming. As a result, Article 10 currently lists two work categories which it explicitly excludes from this protection, namely computer programs and databases which represent a substantial investment.

Computer programs have been afforded copyright by the Dutch courts from the beginning of the 1980s. For this, there were supporters and opponents in the doctrine.[27] Opponents dogmatically argued that computer programs did not fit into the domain of works of literature, science or art because they were technical in character. Some opponents also questioned that computer programs would satisfy the originality threshold and suggested the geschriftenbescherming as an alternative candidate for the protection of computer programs,[28] or a *sui generis* protection analogue to the geschriftenbescherming.[29] Yet, Dutch and foreign case law had proven the supporters of copyright for computer programs right.[30]

After several countries (United States, Germany, France, United Kingdom) had adapted their copyright acts by introducing computer programs as copyrightable matter, the Dutch legislator drafted a similar proposal in 1987, as part of a broader bill on piracy. During the legislative process, the government proposed an amendment which abolished the geschriftenbescherming for computer programs, so that only original computer programs would qualify for copyright.[31] However, this met with such fierce resistance that all provisions on computer programs were eventually dropped from the bill. In the doctrine, the amendment caused a heated debate on whether the abolition or instead a re-appraisal of the geschriftenbescherming was desirable for computer programs.[32] For reasons of legal certainty, opponents to the abolition of the geschriftenbescherming stressed that computer programs needed to be able

27 An overview of their arguments is provided in P.B. Hugenholtz, J.H. Spoor, *Auteursrecht op software*, Amsterdam: Otto Cramwinckel 1987, p. 30-34 and E.P.M. Thole, *Software, een 'novum' in het vermogensrecht*, Deventer: Kluwer 1991 (Ph.D. thesis Utrecht University), p. 27-31.

28 Grosheide, *Auteursrecht op maat*, p. 263-264 and F.W. Grosheide in: *Gegevensbescherming*, Handelingen Nederlandse Juristen-Vereniging 1988, Part 2, p. 75.

29 A.A. Quaedvlieg, *Auteursrecht op techniek. De auteursrechtelijke bescherming van het technisch aspect van industriële vormgeving en computerprogrammatuur*, Zwolle: W.E.J. Tjeenk Willink 1987 (Ph.D. thesis Catholic University of Nijmegen), p. 112-115; A.A. Quaedvlieg, 'Originaliteit van computerprogramma's als wettelijke voorwaarde?', *IER* 1988, p. 43. Bensinger, *Sui-generis Schutz für Datenbanken*, p. 11 footnote 40 remarks that in the Scandinavian countries it was also considered to shape the protection for computer programs in an analogue way to the catalogue rule, as this did not require originality and would thus meet a need for protection of non-original computer programs.

30 Hugenholtz/Spoor, *Auteursrecht op software*, p. 30-38; S. Gerbrandy, *Kort Commentaar op de Auteurswet 1912*, Arnhem: Gouda Quint 1988, p. 112-114 (provided that originality remains a requirement and otherwise pleading for *sui generis* protection); D.W.F. Verkade, 'Preadvies Gegevensbescherming en privaatrecht', in: *Gegevensbescherming*, Handelingen Nederlandse Juristen-Vereniging 1988, Part 1, p. 49-50.

31 Nota van Wijziging 24 November 1987, 19 921, nr. 7.

32 See Hugenholtz, *Auteursrecht op informatie*, p. 50-51 and Thole, *Software,* p. 35-39.

to fall back on the geschriftenbescherming in case they were judged to lack originality.[33] This was all the more urgent in their view because the Supreme Court[34] had just severely curtailed the possibility to fight piracy via the tenet of unfair competition under the general tort provision of the Dutch Civil Code.[35] Supporters of the geschriftenbescherming's abolition were dogmatic in not just rejecting it for computer programs but denying the geschriftenbescherming its place in the Copyright Act altogether.[36]

The legislator meanwhile ordered further study and waited for the European Commission's Computer Programs Directive, adopted in 1991. Its implementation did indeed induce the Dutch legislator to abolish the geschriftenbescherming in respect of computer programs. It took this step on the grounds that the Directive stipulates that a computer program must be original in the sense that it must be the author's own intellectual creation in order to enjoy copyright, while no other criteria may be applied.[37] During the legislative process, an amendment proposing to re-introduce the geschriftenbescherming's application was rejected by the legislator as being contrary to the Directive.[38] Scholars had objected that the geschriftenbescherming should be considered not a form of copyright but protection against unfair competition, which the Directive explicitly leaves unprejudiced.[39] However, the legislator referred to the Supreme Court that had qualified the geschriftenbescherming as a form of copyright.[40] Since it does

33 P.B. Hugenholtz, 'Wetsvoorstel 19 921 ten onrechte gewijzigd', *NJB* 1988, p. 262-263; Verkade, 'Preadvies Gegevensbescherming en privaatrecht', p. 49-50.

34 Supreme Court of the Netherlands, 27 June 1986, *NJ* 1987, no. 191 (Holland Nautic v. Decca); Supreme Court of the Netherlands, 20 November 1987 (Staat v. Den Ouden), *NJ* 1988, no. 311 note L. Wichers Hoeth; *Ars Aequi* 1988, p. 869 note H. Cohen Jehoram. The Supreme Court requires that the achievement for which protection is requested is on a par with subject matter protected by intellectual property rights. This condition is not easily met.

35 D.W.F. Verkade, 'Computerprogramma's en geschriften: een onverstandige Nota van Wijziging (Tweede-Kamer-stukken 1987-1988, nr 19 921/7)', *BIE* 1988, p. 46-52; D.W.F. Verkade, 'Opinie Piraterijwetgeving', *NJB* 1988, p. 1076; A.A. Quaedvlieg, 'Originaliteit van computerprogramma's als wettelijke voorwaarde?', *IER* 1988, p. 40-43.

36 H. Cohen Jehoram, 'Computerprogramma's in de Auteurswet', *NJB* 1988, p. 355-357; H. Cohen Jehoram, 'Herovering van koloniaal bezit. Het NJV-preadvies Gegevensbescherming en privaatrecht van Prof. mr D.W.F. Verkade', *NJB* 1988, p. 784-787; H. Cohen Jehoram in: *Gegevensbescherming*, Handelingen Nederlandse Juristen-Vereniging 1988, Part 2, p. 61-62 (arguing that all computer programs will meet the originality threshold); S. Gerbrandy in: *Gegevensbescherming*, Handelingen Nederlandse Juristen-Vereniging 1988, Part 2, p. 24-25.

37 Article 1(3).

38 Amendement Jurgens, *Kamerstukken II* 1992/93, 22 531, nr. 10.

39 D.W.F. Verkade, 'Computerprogramma's in de Auteurswet 1912: het vierde regime…', *Computerrecht* 1992, p. 89-90. Also compare E.J. Dommering, 'De software richtlijn uit Brussel en de Nederlandse Auteurswet', *AMI* 1992, p. 84-85 arguing that member states may provide more protection because the Computer Programs Directive prescribes minimum harmonization.

40 Supreme Court of the Netherlands, 25 July 1965 (Radioprogramma's III or Televizier), *NJ* 1966, no. 116 note L. Hijmans van den Bergh; *Ars Aequi* 1966, p. 345 note E. Hirsch Ballin.

not require any originality or intellectual creation, the geschriftenbescherming had to give way according to the legislator.[41] In 1993, this resulted in 'computer programs and preparatory materials' being listed in Article 10(1)(12)[42] and the following addition, currently in Article 10(5) of the DCA: 'Computer programs are not writings as named in the first paragraph sub 1°.'[43] Dutch courts have since then continued to afford copyright to computer programs almost by definition, thus leaving no reason to mourn over the geschriftenbescherming's abolition.

*Databases*

Again, on the occasion of the implementation of the European Database Directive, the Dutch legislator had to decide whether it was permitted to maintain the geschriftenbescherming for databases. The Database Directive is known for its two-tier protection regime: databases enjoy the *sui generis* right (or database right) if they represent a substantial investment and can additionally qualify for copyright protection. For the latter, the Database Directive uses the same threshold as the Computer Programs Directive, prescribing as the sole criterion that the selection or arrangement of a database be the author's own intellectual creation. It would thus have been merely logical to abolish the geschriftenbescherming for databases as well. In the doctrine this was indeed rightly favoured by many copyright scholars.[44] Nevertheless, the legislator chose otherwise and in 1999 added the following paragraphs to Article 10, which are currently in Articles 10(3) and 10(4):

*Article 10(3):*

Collections of works, data or other independent materials arranged in a systematic or methodical way and individually accessible by electronic or other means, shall be protected as separate works, without prejudice to other rights in the collection and without prejudice to copyright or other rights in the works, data or other materials incorporated in the collection.

41 De Vries, *Parlementaire Geschiedenis van de Auteurswet 1912*, Part 1, p. 10.55-10.56.

42 Their specific protection regime was implemented in Articles 45h to 45n of the DCA.

43 Interestingly, the preparatory material is omitted here. The text of the DCA thus seems to leave room to still apply the geschriftenbescherming to this material. Nevertheless, the legislative documents make clear that the legislator also wanted it abolished for this material in order not to go against the Directive.

44 Such as W.B.J. van Overbeek, 'De ontwerp EG-richtlijn betreffende de rechtsbescherming van databanken', *AMI* 1992, p. 125; H. Cohen Jehoram, 'Ontwerp EG-Richtlijn Databanken', *IER* 1992, p. 132; P.B. Hugenholtz, 'Het einde van het omroepbladenmonopolie nadert', *Mediaforum* 1995, p. 86; P.B. Hugenholtz, 'Het wetsvoorstel implementatie Databankrichtlijn', *IER* 1998, p. 246; H. Speyart, 'De databank-richtlijn en haar gevolgen voor Nederland (II)', *AMI* 1996, p. 177; T. Cohen Jehoram, 'Copyright in Non-Original Writings. Past-Present-Future?', in: J.J.C. Kabel, G. Mom (eds), *Intellectual Property and Information Law. Essays in Honour of Herman Cohen Jehoram*, The Hague: Kluwer Law International 1998, p. 109-112. The opposite opinion was held by M.J. Frequin, 'Extra vangnet voor de producent van een databank. De Nederlandse implementatie van de Databank-richtlijn', *Computerrecht* 1999, p. 15.

*Article 10(4):*
Collections of works, data or other independent materials within the meaning of the third paragraph, which show a substantial investment in the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, are not writings as named in the first paragraph sub 1°.

From the fourth paragraph it follows that databases which do not represent a substantial investment still qualify for the geschriftenbescherming in case they do not enjoy regular copyright for lack of originality. Remarkably, the Minister of Justice argued this time that the geschriftenbescherming by its nature is a regulation of competition law permitted under the Directive,[45] notwithstanding his rejection of precisely this reasoning for computer programs. He also put forward a pragmatic argument: maintaining the geschriftenbescherming was important especially for listings of radio and television programming information.[46] In the Netherlands, this information traditionally enjoys extra strong protection via the geschriftenbescherming, as will be discussed in the next paragraph. Mainly for pragmatic reasons, the implementation thus resulted in a partial abolition of the geschriftenbescherming, namely for databases which represent a substantial investment. They enjoy the *sui generis* right, whereas the geschriftenbescherming still is available for the remaining non-original databases. However, under the Directive and the *Football Dataco* judgment of the European Court of Justice still to be discussed, all databases are subject to an originality threshold to qualify for copyright protection, so that the DCA arguably is in conflict with the Directive.[47]

Before the introduction of the Database Directive, the doctrine and case law accepted that collections of data, including electronic ones, could qualify for the geschriftenbescherming.[48] After the Directive's implementation, several Dutch courts denied the *sui generis* right to databases on the basis of the so-called spin-off theory.[49] Subsequently, the European Court of Justice adopted its *British Horseracing Board* and *Fixtures Marketing* decisions in 2004, establishing that costs incurred for the creation of new information may not be taken into

45 *Handelingen II* 1998/99, 26 108, p. 3668. Article 13 of the Directive states that the Directive shall be without prejudice to laws on unfair competition, amongst other things.

46 Also see D.W.F. Verkade, D.J.G. Visser, *Inleiding en parlementaire geschiedenis Databankenwet*, Den Haag: Boom 1999, p. 132.

47 See further section 4.2 and e.g. Beunen, *Protection for databases*, p. 80. Also compare J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 639-640.

48 See e.g. Verkade, 'Preadvies Gegevensbescherming en privaatrecht', p. 51; P.B. Hugenholtz in: *Gegevensbescherming*, Handelingen Nederlandse Juristen-Vereniging 1988, Part 2, p. 26; Verkade/Visser, *Inleiding en parlementaire geschiedenis Databankenwet*, p. 5, 27.

49 Beunen, *Protection for databases*, p. 108-116.

account for the substantial investment required for a database's protection by the *sui generis* right, as opposed to costs incurred for the collection of existing information.[50] Under the Court's ruling, databases merely involving investments in the creation of new information would lack protection by the *sui generis* right. Moreover, given that Dutch courts very rarely afford regular copyright to databases, in practice the maintained geschriftenbescherming has proven not to be without significance for databases as a protection to fall back on.

*Radio and television programming information*

Given the peculiar nature of the Dutch public broadcasting system, broadcasters' programming information has given rise to extensive case law. Public broadcasters must recruit paying members among the public, because their number of members determines the amount of public funding and broadcast time they each get. In their battle for members, programme guides are an important asset for the broadcasters. Up until 1997, subscribing to a broadcaster's programme guide automatically involved membership. Although one can now also subscribe without becoming a member, programme guides remain significant sources of income for broadcasters. They share their programming information among themselves to include it in their weekly programme guides, and furnish this information to newspapers for daily overviews. So far they have refused to supply their programming information to third parties for weekly guides, thus maintaining their own monopoly. In court, they have successfully invoked the geschriftenbescherming to protect their programming information against unauthorized copying by other publishers.

Since 1967, public broadcasting corporations have explicitly been granted protection for their radio and television programming information in Dutch media legislation by way of the geschriftenbescherming.[51] The current Dutch Media Act states that without authorization the reproduction or making available of listings of programming data amounts to copyright infringement.[52]

50 European Court of Justice, 9 November 2004, cases C-46/02 (Fixtures Marketing Ltd v. Oy Veikkaus Ab), *ECR* 2004, p. I-10365, C-203/02 (British Horseracing Board Ltd v. William Hill Ltd), *ECR* 2004, p. I-10415, C-338/02 (Fixtures Marketing Ltd v. Svenska Spel AB), *ECR* 2004, p. I-10497 and C-444/02 (Fixtures Marketing Ltd v. Organismoa Prognostikon Agnon Podosfairou AE (OPAP)), *ECR* 2004, p. I-10549.

51 In 1967 this protection was introduced in Article 22 of the Broadcasting Act, and is currently in Article 2.140 of the Media Act (*Staatsblad* 2008, 583) that came into force on 1 January 2009. Commercial broadcasting corporations have over time been granted the same protection, compare Article 3.28 of the current Media Act. Also see Hugenholtz, 'Het einde van het omroepbladenmonopolie nadert', p. 82-87.

52 It was decided that these lists did not enjoy regular copyright for lack of originality in Court of Appeal The Hague, 30 January 2001 (NOS v. De Telegraaf), *Mediaforum* 2001, p. 90 note T. Overdijk; *AMI* 2001, p. 73 note H. Cohen Jehoram; J. Houdijk, 'De strijd om de programmagegevens in Nederland: een

Moreover, it strengthens the position of broadcasters by reversing the burden of proof: an alleged reproducer must prove that he did not directly or indirectly extract the programming information from the broadcaster's lists. The legislator introduced this extra strong protection after the Supreme Court in the cases *Radioprogramma's II* and *III* (discussed in the next section) had instructed the broadcasting corporations to provide proof that the defendants had indeed extracted the programming information from their own lists. As the required proof could not be furnished in the case of *Radioprogramma's II*, the broadcasters lost.[53] The case of *Radioprogramma's III* was settled between the parties, while the new legislation containing the reversal of the burden of proof in favour of the broadcasting corporations was in preparation.

Public broadcasting corporations in the Netherlands are still very sparing in their issue of licences to third parties. To protect the demand for their own programme guides, they have so far refused to supply programming information for weekly guides. This has resulted in abundant case law, in which potential competitors claimed that this licence refusal (by both public and commercial broadcasters) goes against competition law.[54] The newspaper *De Telegraaf*, wishing to produce a weekly guide, started proceedings against the public broadcasters in 1998, which ended only in 2005 and resulted in judgments of both administrative and civil courts. The highest administrative court finally concluded that the broadcasters by their licence refusal did not abuse their dominant position because *De Telegraaf* did not meet the condition laid down by the European Court of Justice[55] requiring its guide to represent a 'new product'.[56] Yet in the same case, several civil courts had found the opposite, including the Supreme Court which passed judgment in the summary proceedings.[57]

The ultimately sanctioned licence refusal created much discussion among politicians and lawyers on the desirability of the strong protection in the Media Act. Broadcasters can thus prevent third parties from entering the market for

---

nieuwe episode in een bekend omroepfeuilleton', *Mediaforum* 2005, p. 357. Also see the Explanatory Memorandum accompanying the new Media Act, *Kamerstukken II* 2007/08, 31 356, nr. 3, p. 57, adding that enriched programming information in a TV guide, including e.g. abstracts of films, may well be protected by regular copyright.

53 Ruling on remand: Court of Appeal Arnhem 28 November 1961, *NJ* 1962, no. 189.

54 An overview is given by S. van Loon, *Databankenrecht en mededinging. Ontwikkelingen vanaf 1996 en evaluatie*, Den Haag: Sdu 2004, p. 56-68.

55 European Court of Justice, 6 April 1995, joined cases C-241/91 and C-242/91P (Magill), *ECR* 1995, p. I-743, and European Court of Justice, 29 April 2004, case C-418/01 (IMS Health v. NDC Health), *ECR* 2004, p. I-5039.

56 College van Beroep voor het Bedrijfsleven (Trade and Industry Appeals Tribunal), 15 July 2004 (NOS v. NMa), *AMI* 2005, p. 72 note J. Houdijk.

57 Supreme Court of the Netherlands, 6 June 2003 (NOS v. De Telegraaf), *AMI* 2003, p. 141.

weekly TV guides, as independent compilation of the programming information is nearly impossible as far as comprehensive, faultless information is concerned.[58] A sweeping bill was therefore introduced in parliament in 2004, which proposed to amend the Media Act in order to have public broadcasters supply their programming information for free to requesting third parties.[59] This drastic compulsory licence would, however, not apply to commercial broadcasters. On the occasion of the recent revision of the Media Act, which entered into force on 1 January 2009, the government rejected this change and left the strong protection unaltered. Yet, it did express the wish that programming information be supplied against a licence fee corresponding to market prices,[60] which was stated again by the Minister of Culture in 2009[61] and by the current government. In 2011, the Minister urged broadcasters to negotiate a licence agreement with publishers, but this failed. The government will now force the broadcasters to license their information against regularly evaluated fees according to a licensing model proposed by the Dutch Media Authority.[62] Legislative developments will continue as the government is preparing a thorough revision of the general organization and funding of the Dutch public broadcasting system. Moreover, the *Football Dataco* judgment of the European Court of Justice (discussed in section 4.2) will probably affect the geschriftenbescherming as included in the Media Act for non-original lists of radio and television programming information.[63]

### *3.3 Developments in case law and doctrine*

*Scope of the geschriftenbescherming*

The case law of the Supreme Court is the leading authority on the conditions and scope of the protection afforded by the geschriftenbescherming. Its three most important judgments on the subject unsurprisingly all concern the allegedly

58 Houdijk, 'De strijd om de programmagegevens in Nederland', p. 357.

59 Voorstel van wet van de leden Örgü en Bakker tot wijziging van de Mediawet (regeling verstrekking programmagegevens), *Kamerstukken II* 2003/04, 29 680, nr. 2. Also see *Handelingen II* 2006/07, nr. 80.

60 Vaststelling van nieuwe regels over de organisatie en uitvoering van de publieke mediaopdracht (Mediawet 20..), *Kamerstukken* II 2005/06, 30 571, nr. 3.

61 Brief Persbeleid 30 September 2009, *Kamerstukken II* 2009/10, 31 777, nr. 18, p. 20. In this letter, the Minister gave his reaction to the 2009 report of the Temporary Committee on Innovation and Future of the Press (Commissie Brinkman), which had urged the government to further that programming information become available to third parties for product innovation.

62 Brief uitwerking regeerakkoord onderdeel media, 17 June 2011, *Kamerstukken II* 2010/11, 32 827, nr. 1, p. 21. The Dutch Media Authority studied several licensing models in its report *Is er nog iets op de tv?* of May 2011 commissioned by the Minister of Culture.

63 In April 2012, an amendment to the Media Act was proposed which deletes the reference to the geschriftenbescherming and introduces a duty to supply the programming information to third parties against fixed fees (*Kamerstukken II* 2011/12, 33 019, nr. 9).

infringing reproduction of radio programming information from public broadcasting corporations.

The Supreme Court endorsed the legislator's inclusion of all writings in the 1912 Copyright Act in judgments of 1937[64] and 1953 (the latter, *Radioprogramma's I*, being the first judgment on radio programming information).[65] According to the Court all writings are indeed protected by copyright without having to meet any threshold of literary value.

In its second decision on radio programming information (*Radioprogramma's II*) in 1961, the Supreme Court established that, in line with the old copijrecht, non-original writings according to the legislator's evident intention are merely protected against reproduction of the writing's content by extracting it from the writing itself.[66] It considered that the person who puts the work in writing owns no copyright in the writing's content apart from its written-down form. The Court continued that copyright in non-original writings only exists because and in so far as their content has been written down; for such writings no distinction can be made between the content which is not protected and the written-down form which is. According to the Court, no infringement is at issue where a writing with corresponding content has been compiled other than by way of extracting it from the protected writing. In other words: independent compiling does not amount to an infringement.[67] The Court thus followed its Procureur General Langemeijer who had argued for the extraction requirement in order to prevent the monopolization of mere factual data.

In the third decision (*Radioprogramma's III*) in 1965, the Supreme Court established further restrictions on the scope of the geschriftenbescherming, which it explicitly recognized as a form of copyright protection.[68] Yet, the Court found that it could not have been the legislator's intention that provisions in the DCA which apply to works because of their special character as being fruits of the author's creative labour, would also apply without reservation to works which lack that special character. The question whether and in what way these provisions must be applied to non-original writings should, for lack of a general rule on this in the law,

64 Supreme Court of the Netherlands, 1 November 1937 (Telefoongids Brummen), *NJ* 1937, no. 1092. Advocate General Berger also concluded that the Court should follow the legislator's explicit intention.

65 Supreme Court of the Netherlands, 17 April 1953 (Radioprogramma's I), *Ars Aequi* 1954, p. 128 note L. Hijmans van den Bergh; *NJ* 1954, no. 211 note D.J. Veegens.

66 Supreme Court of the Netherlands, 27 January 1961 (Radioprogramma's II or Explicator), *NJ* 1962, no. 355 note L. Hijmans van den Bergh; *Ars Aequi* 1961, p. 179 note E. Hirsch Ballin.

67 For example, extraction could not be proven by the claimant in a case on alleged reproduction of a title list of door-to-door publications in President District Court The Hague, 27 December 2007 (IDMC v. Free Publicity), *BIE* 2009, p. 29.

68 Supreme Court of the Netherlands, 25 June 1965 (Radioprogramma's III or Televizier), *NJ* 1966, no. 116 note L. Hijmans van den Bergh; *Ars Aequi* 1966, p. 345 note E. Hirsch Ballin.

be answered for each provision individually according to its purpose. Moreover, referring to the old copijrecht, the Court held that the geschriftenbescherming is only available for writings that have been made available to the public or are so destined,[69] whether in the Netherlands or abroad. The Supreme Court also refined the extraction rule from its judgment *Radioprogramma's II*. It established that reproducing a non-original writing through indirect means, such as via a third party reading the writing's content aloud or via extraction from a transcript or copy made of the writing by a third party, may also amount to an infringement of the geschriftenbescherming. The same holds true for translating a non-original writing (even if the translation is not verbatim or literal) and for less drastic adaptations, including where the reproduction is not entirely or largely verbatim or literal and contains additions or deletions.

Spoor, Verkade and Visser conveniently arranged all these requirements and characteristics of the geschriftenbescherming in a comprehensive list:[70]

1. For each provision of the Copyright Act, it must be assessed according to its purpose whether it applies to non-original writings.
2. Protection presupposes that the subject matter has been put in writing. Only this written-down form is the object of protection.
3. The compiled data do not get protection as such, apart from (extraction from) their written-down form.
4. Protected writings include not only printed matter, but also other writings (manuscripts, typescripts and the like).
5. To enjoy protection, writings must be made available to the public or be so destined.
6. To enjoy protection in the Netherlands, it is irrelevant whether the writings at issue are (solely) destined for publication abroad.

69 The Supreme Court again affirmed this rule in its decision of 8 February 2002 (EP Controls v. Regulateurs), *NJ* 2002, no. 515 note J. Spoor; *AMI* 2002, p. 122 note P.B. Hugenholtz; *IER* 2002, p. 128 note F.W. Grosheide; *BIE* 2004, p. 27 note A. Quaedvlieg. This rule resulted in several judgments denying geschriftenbescherming to, for example, an internal directory of advertisers (President District Court Haarlem, 5 December 1989 (VNU v. Speets), *IER* 1990, p. 9; *BIE* 1992, p. 66 note C. van Nispen), a submitted tender (Court of Appeal Leeuwarden, 9 December 2008, www.rechtspraak.nl LJ-nr. BG6638 (Ingenieursbureau Ir. X B.V. v. DVJ Infra en Milieu BV)), confidential technical drawings (Court of Appeal Leeuwarden, 22 June 2010 (IFE-Tebel Technologies B.V. v. Tecair Holding B.V.)), internal architectural drawings (Court of Appeal Arnhem, 31 May 2005 (Verweij & Partners v. Reilman), *BIE* 2008, p. 792 note A. Quaedvlieg), and a chip algorithm (District Court Arnhem, 18 July 2008 (NXP v. RUN), *NJ* 2008, 544; *Computerrecht* 2008, p. 242 note S. Verdonck).

70 Spoor/Verkade/Visser, *Auteursrecht*, p. 90-91.

7. Protection against reproduction presupposes provable extraction. Independent compiling of a corresponding writing, without (alleged and, if need be, proven) extraction from a protected writing, does not amount to an infringement.
8. An infringing extraction also occurs where the extraction is made from a copy or from a reading of the writing.
9. An infringement may also be at issue where an (extracted) reproduction contains non-drastic changes or a translation. However, no infringement is at issue where, even in the case of extraction, the new written-down form cannot be considered a simple repetition of the earlier written-down form.

It is difficult to deduce from the case law a coherent picture of how the courts apply these requirements in practice. This is because the question whether infringement is at issue is very much a matter of case-by-case assessment. The outcomes are therefore highly casuistic. Moreover, the Supreme Court's rules on the scope of the geschriftenbescherming are not entirely clear. What is certain is that the geschriftenbescherming protects against not only literal reproduction – like the old copijrecht – but also against reproduction with non-drastic changes. However, it is uncertain to what extent. For example, the courts struggle with the question whether the extraction of only a small part from a writing can also qualify as an infringement.[71] The same uncertainty exists in case of a rearrangement of (a part of) the writing; it is unclear where the Supreme Court draws the line between non-drastic and drastic adaptations,[72] also given its (seemingly contradictory) requirement that the extraction must be a simple repetition of the reproduced writing.[73] Moreover, the Supreme Court regrettably

71 This was indeed upheld in District Court Utrecht, 28 July 2010 (Ryanair v. PR Aviation), *IER* 2011, p. 18 notes F.W. Grosheide and S.J. Schaafsma; *Computerrecht* 2010, p. 330 note A.A. Kappert. However, the opposite was found in President District Court Breda, 5 October 2007 (NVV v. NRIT), case-nr. 177650, KG ZA 07-401. Also compare President District Court Arnhem, 10 November 2005 (Syncera v. Synthese), *IER* 2006, p. 10, considering that the presumption that extraction is at issue is not established by the simple fact that points of similarity exist, but requires a qualified extent of similarity between the writings.

72 In a 2007 judgment, the court seemed to also take into account the (very trivial) character of the 'rudimentary' writing mainly consisting of a few technical data and numbers (descriptions of second-hand cars). Given this, the court decided that the partial reproductions at issue did not amount to an extraction with non-drastic changes, so that there was insufficient evidence of an infringement of the geschriftenbescherming. President District Court Utrecht, 21 November 2007 (Wegener v. Innoweb), *Mediaforum* 2008, p. 42 note D. Visser; *AMI* 2008, p. 109 note K. Koelman; *Computerrecht* 2008, p. 62 note O. Volgenant.

73 Independent compilation is not an infringement, so that extraction from the writing at issue must be proven. Claimants regularly succeed in this by indicating that specific spelling errors have been reproduced from their writings; for proof purposes, they sometimes deliberately include these errors and/or ghost words. Compare President District Court Arnhem, 25 March 2009 (De Roode Roos v. De Rooij), *AMI* 2009, p. 106 note J. Spoor; *Computerrecht* 2009, p. 149 note S. van Loon; *IER* 2009, p. 41

did not further elaborate on its statement that each provision of the Copyright Act must be assessed according to its purpose to decide whether it applies to non-original writings. Another question is whether the geschriftenbescherming merely provides protection *ex post* or also includes the right to claim protection *ex ante* against anyone intending to publish one's writing.[74] Thus, no legal certainty exists as yet as to the precise scope of the geschriftenbescherming.

The Supreme Court's judgments met with opposing reactions in the doctrine of that time. Many scholars objected to the 1937 and 1953 decisions in which the Court accepted that all writings are protected by copyright, including those that lack any originality. The objectors contended that protection for non-original writings is contrary to the very nature of copyright and to the Berne Convention.[75] This was the same doctrinal opinion put forward in 1912 against the legislator's inclusion of the geschriftenbescherming into the DCA. On the other hand, supporters reasoned that the Supreme Court had no choice other than to follow the unambiguous intention of the legislator.[76] The Court's judgments *Radioprogramma's II* and *III* of the 1960s were commented upon by Hijmans van den Bergh and Hirsch Ballin, the former a supporter and the latter a critic of the Supreme Court's stand. Although a principled objector, Hirsch Ballin also saw the merits of the *Radioprogramma's II* judgment with its introduction of the extraction requirement preventing the monopolization of factual data.[77] However, on the occasion of the *Radioprogramma's III* judgment he turned against the Supreme Court arguing, among other things, that the Court caused legal uncertainty because it was arbitrary in its eclectic picking from DCA provisions for its definition of the geschriftenbescherming's scope. Hirsch Ballin remained a doctrinal opponent of the geschriftenbescherming's inclusion in the DCA. Opinions of present-day copyright scholars on the subject are discussed in section 5.1.

---

note F.W. Grosheide, and President District Court Arnhem, 10 November 2005 (Syncera v. Synthese), *IER* 2006, p. 10.

74 Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 121. The possibility to issue licences against a fee is accepted for the special geschriftenbescherming for radio and TV programming information of broadcasters. In the Media Act, an umbrella foundation of the public broadcasters is given the right to authorize and license the re-use of such information by third parties.

75 In 1953: Advocate General Langemeijer (referring to many earlier copyright scholars for support), D.J. Veegens in *NJ* 1954, no. 211; E.D. Hirsch Ballin, 'De herziening der Auteurswet (slot)', *WPNR* 1953, p. 277-278. The latter two supported a 1952 study committee which had proposed the abolition of the geschriftenbescherming by deleting the word 'all' in 'and all other writings' in Article 10(1)(1).

76 Hijmans van den Bergh in *Ars Aequi* 1954, p. 128, who referred to the similar conclusion of Advocate General Berger in the 1937 judgment of the Supreme Court.

77 Hijmans van den Bergh in *NJ* 1962, no. 355, and Hirsch Ballin in *Ars Aequi* 1961, p. 179. Although a principled objector himself, Procureur General Langemeijer considered it undesirable for the Supreme Court to deviate from its 1953 precedent judgment, so that in his conclusion he had alternatively argued for the extraction requirement.

*Subject matter: what is a writing?*

The term 'writings' in Article 10 DCA is broadly interpreted by the courts. Thus the courts have granted the geschriftenbescherming not only to writings composed merely of letters but also to a combination of descriptions and photos of property for sale[78] and to technical drawings.[79] An appeal court rejected protection by neighbouring rights for a person (a diskjockey) who read a non-original writing aloud, because the Dutch Neighbouring Rights Act does not confer such protection.[80]

As for the length of the writings, the courts do not seem to set any quantitative requirements. This made Hugenholtz wonder whether one sentence, one word or even one letter is entitled to the geschriftenbescherming. He concluded that indeed no lower limit is provided by the Supreme Court.[81] In this aspect, the geschriftenbescherming differs from the Scandinavian 'catalogue rule', which requires catalogues, tables and similar compilations to contain a large number of elements.[82]

The same lack of requirements pertains to the form of the writings. They can have the form of typed or handwritten text on paper, but may also have a digital form such as texts stored on a CD-Rom, a computer hard disk or an Internet server. Examples of non-original writings which have been afforded geschriftenbescherming in Dutch case law include advertisements, product catalogues, instructions for use, bestseller lists, timetables, telephone directories, and lists of radio and TV programming information among other things.[83] Recent Internet-related examples are descriptions of properties for sale,[84] property

78 President District Court Alkmaar, 7 August 2007 (Stichting Baas in Eigen Huis v. Plazacasa), *AMI* 2007, p. 145 note K. Koelman; *NJ* 2007, no. 458; *Computerrecht* 2007, p. 174. It was held here that the text and photos together formed a whole. This broad interpretation was criticized by L. Bruinhof, www.boek9.nl (B9 4517).

79 Supreme Court of the Netherlands, 8 February 2002 (EP Controls v. Regulateurs), *NJ* 2002, no. 515 note J. Spoor; *AMI* 2002, p. 122 note P.B. Hugenholtz; *IER* 2002, p. 128 note F.W. Grosheide; *BIE* 2004, p. 27 note A. Quaedvlieg; Court of Appeal Leeuwarden, 13 October 1999 (GEC v. EP Controls), *NJ* 2000, no. 448; Court of Appeal Leeuwarden, 22 June 2010 (IFE-Tebel Technologies B.V. v. Tecair Holding B.V.). Another appeal court left open the possibility that architectural drawings may be thus protected as well, in Court of Appeal Arnhem, 31 May 2005 (Verweij & Partners v. Reilman), *BIE* 2008, p. 792 note A. Quaedvlieg.

80 Court of Appeal Amsterdam, 3 April 2008 (X v. Q-Music), *IER* 2008, p. 75 note JMBS.

81 Hugenholtz, *Auteursrecht op informatie*, p. 49. For example, geschriftenbescherming was afforded to a commercial slogan consisting of five words ('Baking cake in the fridge') in Court of Appeal Leeuwarden, 14 January 1981 (Taart bakken in de koelkast), *BIE* 1982, p. 243; *AMR* 1985, p. 74.

82 Bensinger, *Sui-generis Schutz für Datenbanken*, p. 27-30.

83 See more examples including case law in Spoor/Verkade/Visser, *Auteursrecht*, p. 84.

84 President District Court Arnhem, 16 March 2006 (NVM v. Zoekallehuizen.nl), *AMI* 2006, p. 93 note Chr. Alberdingk Thijm; *Mediaforum* 2006, p.114 note T. Overdijk, and President District Court Alkmaar, 7 August 2007 (Stichting Baas in Eigen Huis v. Plazacasa), *AMI* 2007, p. 145 note K. Koelman; *NJ* 2007, no. 458; *Computerrecht* 2007, p. 174.

descriptions and auction conditions on a notary's website,[85] a webshop catalogue with product descriptions,[86] a database with descriptions of second-hand cars for sale,[87] and a database with flight information.[88] Protection is thus available for non-original texts which have been written down in whatever form on whatever medium, or in the words of Hugenholtz: 'fixed alphanumeric information'.[89]

However, in one aspect the Supreme Court has restricted the non-original writings entitled to the geschriftenbescherming. They must have been made available to the public or must be so destined, according to its judgment *Radioprogramma's III*.[90] This means that information which is not meant to be made public,[91] such as confidential know-how, is excluded from protection.[92] Furthermore, as a result of the implementation of the European Computer Programs Directive and the Database Directive, the legislator has excluded databases which represent a substantial investment and computer programs from the writings entitled to geschriftenbescherming, as was discussed in section 3.2.

*Right holder: natural person or publisher?*

Given that the object of protection is the writing's fixation in written-down form (and not its content as such), the subject of the geschriftenbescherming according to the Supreme Court is he who has put the subject matter in writing.[93] In the literature, opinions differ on who this is in practice: the natural person

85 President District Court Almelo, 11 February 2008 (Internetnotarissen v. Openbareverkopen), *IER* 2008, p. 243 note F.W. Grosheide.

86 District Court Arnhem, 25 March 2009 (De Roode Roos v. De Rooij), *AMI* 2009, p. 106 note J. Spoor; *Computerrecht* 2009, p. 149 note S. van Loon; *IER* 2009, p. 41 note F.W. Grosheide.

87 President District Court Utrecht, 21 November 2007 (Wegener v. Innoweb), *Mediaforum* 2008, p. 42 note D. Visser; *AMI* 2008, p. 109 note K. Koelman; *Computerrecht* 2008, p. 62 note O. Volgenant. The database also enjoyed *sui generis* right. This excludes geschriftenbescherming, which was wrongly granted here cumulatively, see section 3.2.

88 District Court Utrecht, 28 July 2010 (Ryanair v. PR Aviation), *IER* 2011, p. 18 notes F.W. Grosheide and S.J. Schaafsma; *Computerrecht* 2010, p. 330 note A.A. Kappert. This database lacked originality and a substantial investment.

89 Hugenholtz, *Auteursrecht op informatie*, p. 46.

90 Supreme Court of the Netherlands, 25 June 1965 (Radioprogramma's III or Televizier), *NJ* 1966, no. 116 note L. Hijmans van den Bergh; *Ars Aequi* 1966, p. 345 note E. Hirsch Ballin.

91 Radio and television programming information does not have to meet this condition due to its special position in Dutch media legislation as from 1967, see Hugenholtz, *Auteursrecht op informatie*, p. 118; Spoor/Verkade/Visser, *Auteursrecht*, p. 93.

92 Some authors have advocated extending this protection also to non-published information, e.g. Verkade, 'Preadvies Gegevensbescherming en privaatrecht', p. 51-52 and Grosheide in his note on Supreme Court of the Netherlands, 8 February 2002 (EP Controls v. Regulateurs), *IER* 2002, p. 128. Instead, Hugenholtz, *Auteursrecht op informatie*, p. 49 argued that this should be left to criminal law.

93 Radioprogramma's II and III judgments. In the latter, the Supreme Court remarks that this may be a natural person, while considering that a writing which is destined for publication is at issue not only where the maker has the intention to make the writing available to the public personally, but also where he intends to supply it to third parties for their making it available.

who actually puts the subject matter in writing (or fixes it), or the one who economically makes possible the writing's fixation.

The first view is supported by Hugenholtz, who stresses that the right holder is in principle not the printer/publisher.[94] Van Engelen advocates the second view, arguing that the geschriftenbescherming merely protects the economic achievement consisting of the (financial) efforts relating to the compilation, arrangement and publication of the writing's content.[95] According to him, the geschriftenbescherming has a purely economic rationale, which results in protection for publishers, as the parties who bear the economic risk of fixing and making the non-original writing available to the public. He argues that sometimes, but not always, this party is the same as the person who put the subject matter in writing and/or the printer. Langemeijer states that the maker of a writing may be a commercial printer or publisher wishing to recoup its investments, but in his view a profit motive is not required to be a right holder of the geschriftenbescherming.[96] He argues that someone who without a profit motive puts factual data in writing (such as a genealogy or observational data of passing migratory birds) is also entitled to protection.

In legal practice, this issue does not appear to cause problems. In case law, the geschriftenbescherming is often invoked by legal persons (such as broadcasting corporations, estate agents, publishers, firms which make products accompanied by manuals or instructions for use, etc.).[97] Whether they are indeed the right holders is hardly ever questioned by the courts. The reason may be that legal persons can qualify as right holders under the DCA in several ways. Under Article 7, employers are entitled to copyright in the works made by their employees,[98] while under Article 8, a legal person under whose name a work is published is

94 Hugenholtz, *Auteursrecht op informatie*, p. 47. He also refers for support to the annotation of Hirsch Ballin on the judgment Radioprogramma's II in *Ars Aequi* 1961, p. 184.

95 Van Engelen, 'De geschriften-bescherming in de Auteurswet', p. 250 and Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 118-120. On the other hand, W.J. Soetenhorst, 'Ein verwandtes Schutzrecht für Verleger. Ansatzpunkte in Deutschland, Großbritannien und den Niederlanden', *GRUR Int* 1989, p. 768 wrote that the right holder can either be a natural person or a publishing company.

96 Conclusion of Advocate General Langemeijer in Supreme Court of the Netherlands, 8 February 2002 (EP Controls v. Regulateurs), para. 2.3, *NJ* 2002, no. 515 note J. Spoor; *AMI* 2002, p. 122 note P.B. Hugenholtz; *IER* 2002, p. 128 note F.W. Grosheide; *BIE* 2004, p. 27 note A. Quaedvlieg.

97 Spoor/Verkade/Visser, *Auteursrecht*, p. 81-82 do not speak out explicitly on the issue but appear to acknowledge that legal persons/companies can be right holders of the geschriftenbescherming, as they state that the same party can for a database alternatively try to claim firstly regular copyright, secondly *sui generis* right (which requires an investing producer) and thirdly the geschriftenbescherming.

98 Compare District Court Arnhem, 25 March 2009 (De Roode Roos v. De Rooij), *AMI* 2009, p. 106 note J. Spoor, where the court considered: Since it has not been contested that De Roode Roos (one of her employees) has put the collection of non-original product descriptions down in writing, as can be seen on her website, and made them available to the public, the requirement for protection is met.

presumed to be its right holder (unless contrary proof is provided). Thus, even if the natural person actually fixing the writing would indeed be the one entitled to the geschriftenbescherming, these Dutch provisions cause his/her employer to be the subject of protection.

From the beginning of the 1980s, publishers internationally pleaded in favour of protection of their own,[99] via a right akin to the neighbouring right for phonogram producers of the duration of 50 years or through protection for typographical arrangements. This would provide them with protection for both non-original and original writings, next to regular copyright for the author (which he may or may not transfer to the publisher), and for publications of works in the public domain. Publishers argued that their achievements are similar to those of phonogram producers. The matter was put on the agenda of the WIPO, which in order to act required agreement among the publishers on the desirability and the form of such protection. This could, however, not be reached.[100] In the Netherlands, publishers fall back on incidental copyright protection for a work's layout,[101] for original collections,[102] the *sui generis* right for databases, or the geschriftenbescherming for non-original writings. The first three can exist alongside regular copyright protection for the author.[103] However, this is arguably not the case for the geschriftenbescherming. Quaedvlieg, Spoor, Verkade and

99 See Soetenhorst, 'Ein verwandtes Schutzrecht für Verleger', p. 771; F.W. Grosheide, 'Copyright and Publishers' Rights: Exploitation of Information by a Proprietary Right', in: W.F. Korthals Altes, E.J. Dommering, P.B. Hugenholtz, J.J.C. Kabel (eds), *Information Law towards the 21st Century*, Deventer/Boston: Kluwer Law and Taxation Publishers 1992, p. 302-307; F.W. Grosheide, F.W. Obertop, 'Proeve van een Wet op het Uitgeversrecht. Een pleidooi voor een naburig uitgeversrecht', *AMI* 1992, p. 163-168; H. Cohen Jehoram, 'Hybrids on the borderline between copyright and industrial property law', in: H. Cohen Jehoram, *Kernpunten van auteursrecht*, Nijmegen: Ars Aequi 1993, p. 82; H. Cohen Jehoram, 'Uitgeefovereenkomst en auteursrecht', in: H. Cohen Jehoram, *Kernpunten van auteursrecht*, Nijmegen: Ars Aequi 1993, p. 153-154; W.J. Soetenhorst, *De bescherming van de uitgeefprestatie. Een onderzoek naar het functioneren van het uitgeefovereenkomstenrecht en het mededingingsrecht in Nederland en Duitsland met aandacht voor de situatie in Groot-Brittannië*, Zwolle: W.E.J. Tjeenk Willink 1993 (Ph.D. thesis Utrecht University).

100 Cohen Jehoram, 'Hybrids on the borderline', p. 82-83.

101 For example, layout was deemed to be protected by copyright (for a company, not a publisher) for a website in District Court Almelo, 22 December 2005 (Air Time Paragliding Sport V.O.F. v. Paragliding Inferno B.V.), www.rechtspaak.nl LJ-nr. AV1919, and for a product brochure in District Court Zwolle, 5 March 2009 (ABK InnoVent v. Örnell B.V), www.rechtspaak.nl LJ-nr. BI1912. It was rejected in respect of a publisher for the layout of the advertisements and cover of an advertising publication in Court of Appeal Arnhem, 2 November 2004 (Agrio Uitgeverij B.V. v. Agri Trader B.V.), www.rechtspaak.nl LJ-nr. AR8280.

102 For example, such copyright was enjoyed by the publisher together with the graphic designer in President District Court Rotterdam, 28 September 2009 (Uitgeverij 010 v. Pale Pink Publishers), case-nr. 333570, KG ZA 09-622.

103 In 2011, a Dutch bill strengthening the position of authors in their relation with publishers/producers was proposed, prompted also by the digital developments; see Chapter 7.

Visser state that as a rule cumulation is not possible for the same subject matter;[104] a work either enjoys copyright for its originality or geschriftenbescherming in case it lacks originality.[105]

## 4. European context

### *4.1 Comparison with other countries*

The geschriftenbescherming has some characteristics in common with specific forms of intellectual property protection afforded elsewhere in Europe, which makes it not entirely unique. In several other European countries, courts have (at least before the implementation of the Database Directive) regularly granted copyright protection to subject matter with a very low degree of originality. Well-known examples profiting from this safety net are collections of information, e.g. in Germany, France and the United Kingdom (and also the United States).[106] These three European countries are treated here in more detail to allow a closer study of the similarities between foreign forms of protection and the geschriftenbescherming.

In Germany, a low-threshold protection is provided for subject matter called 'kleine Münze'. Under the German originality test, a work must express the author's individuality, which may manifest itself in varying levels in different work categories.[107] A minimum of individuality suffices for music, songs and literary writings like novels and poetry, including the kleine Münze of these work categories, causing courts to also grant copyright to writings such as catalogues, price lists and collections of recipes.[108] Nevertheless in the 1980s and 1990s,

104 Quaedvlieg, *Auteursrecht op techniek*, p. 59-60; Spoor/Verkade/Visser, *Auteursrecht*, p. 82. The latter contend (in note 101) that cumulation may nevertheless be possible for different parts of the same object or for a combination of objects. Also compare District Court Arnhem, 25 March 2009 (De Roode Roos v. De Rooij), *AMI* 2009, p. 106 note J. Spoor; *Computerrecht* 2009, p. 149 note S. van Loon; *IER* 2009, p. 41 note F.W. Grosheide. In this judgment, regular copyright was afforded to a web shop as a database for its original selection and arrangement and, cumulatively, geschriftenbescherming was granted to its content, this being the catalogue descriptions. One could ask whether the objects of protection here do not (largely) overlap in practice, which would exclude cumulative protection, or whether such overlap is not at issue (theoretically) because copyright protects a database's original selection or arrangement, whereas the geschriftenbescherming protects the content's written-down form.

105 However, Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 122 is of the opinion that the geschriftenbescherming can cumulatively rest in a work which enjoys regular copyright, because he believes this is a separate protection for publishers. He therefore wonders why Dutch publishers pleaded for a publishers' right.

106 Compare Hugenholtz, *Auteursrecht op informatie*, p. 53-59 and 119-133; Davison, *The legal protection of databases*, p. 103-159; Beunen, *Protection for databases*, p. 80-84.

107 Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar*, München: Beck 2006 (3rd ed.), nr. 24 p. 63.

108 Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar*, nr. 38 p. 70.

the German Supreme Court set the level of individuality higher for utilitarian writings,[109] to which the doctrine objected that these writings did merit protection from an economic perspective, all the more so given the lack of an alternative protection against unfair competition.[110] Opponents of copyright protection for kleine Münze argue that such long-term protection for fairly trivial achievements is undesirable; they should instead get protection under unfair competition law or neighbouring rights.[111] Photographs are another interesting example. In the German doctrine, the EU originality criterion of 'own intellectual creation of the author' introduced for computer programs, photographs[112] and databases in subsequent directives is regarded as a protection for kleine Münze, requiring merely a minimum level of originality. Interestingly, Germany provides statutory protection for all photographs whether or not they meet the European threshold.[113] A non-original photograph (or film) can fall back on a neighbouring right[114] provided that it shows evidence of at least some personal achievement.[115] This neighbouring right is accorded for the extensive financial and technical means used for the photograph's production, while it protects against mere identical reproduction.[116] Although its term of protection differs (ending 50 years from the publication of the photograph), both the rationale and scope of this neighbouring right thus resemble those of the Dutch geschriftenbescherming for non-original writings.[117]

The German generosity towards kleine Münze is also known in French copyright law. Here, the originality criterion is traditionally defined in the doctrine as requiring works to express the personality of the author. In case law, this has evolved into a less subjective criterion which requires intellectual effort, so as to also accommodate new technological products; originality may thus manifest itself differently in the different work categories. French courts do not set a high threshold for originality and have especially been generous with written

109 Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar*, nr. 34 p. 68; W. Nordemann, A. Nordemann, J.B. Nordemann (eds), *Fromm/Nordemann: Urheberrecht. Kommentar zum Urheberrechtgesetz, zum Verlagsgesetz und zum Urheberrechtswahrnehmungsgesetz*, Stuttgart: W. Kohlhammer 2008 (10th ed.), nr. 61 p. 136.

110 Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar*, nr. 35 p. 69; Nordemann/Nordemann,/ Nordemann, *Fromm/Nordemann: Urheberrecht*, nrs. 63-66, p. 136-137.

111 Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar*, nr. 39 p. 71.

112 Article 6 of the Term Directive.

113 This is permissible under the Term Directive, which states in Article 6 and recital 16 that member states, if they wish to, may also provide protection for photographs that fail to meet this originality threshold.

114 § 72 of the German Copyright Act. § 95 is its equivalent for non-original films.

115 A. Nordemann, 'Germany', in: Y. Gendreau, A. Nordemann, R. Oesch (eds), *Copyright and Photographs. An International Survey*, London/The Hague/Boston: Kluwer Law International 1999, p. 140.

116 Vogel in G. Schricker (ed.), *Urheberrecht: Kommentar*, nr. 13 p. 1413 and nr. 30 p. 1420.

117 Also see Hugenholtz, *Auteursrecht op informatie*, p. 46.

technical works and utilitarian compilations which do not evidently express the author's personality. They are therefore called 'petite monnaie' (French for kleine Münze).[118] In the French doctrine, the European originality criterion for computer programs, databases and photographs is considered comparable to the low threshold for petite monnaie.[119] After the implementation of the Database Directive, French courts have more often than not granted copyright to databases.[120] Moreover, they tend to be quite generous in offering protection against profiting from another's investments under the provisions of tort law, in case a product is not protected by intellectual property rights.

In the United Kingdom 'original literary works' are mentioned in the Copyright Act as a category which merits protection.[121] For this, a two-fold test is applied to writings. Firstly they must be a literary work, which requires them to provide sufficient information, instruction or literary enjoyment.[122] Almost any writing fulfils this test, except for those too trivial or banal. Secondly, the originality test has to be applied, which in the UK traditionally represents a very low threshold merely requiring the expenditure of skill, labour or judgment. Courts have thus granted copyright protection to lots of kleine Münze in the form of writings and compilations, such as trade brochures, the rules of a game, schedules of broadcasting programmes, fixture lists of football clubs, lists of stock exchange prices and suchlike.[123] Since the implementation of the Database Directive in 1998, a two-tier system of copyright protection exists for compilations: those that are not databases qualify for copyright under the low UK threshold sooner than databases, which must meet the higher EU threshold.[124] Moreover, the UK Copyright Act since 1956 also lists 'the typographical arrangement of published editions' as a separate work category meriting copyright protection.[125] This is accorded for the skill and effort a publisher puts in designing the typographical layout of literary works and provides protection against literal facsimile copying. According to Copinger and Skone James, its rationale thus resembles the *editio princeps* right introduced in the European Term Directive in 1993, even though that

118 A. Lucas, H.-J. Lucas, *Traité de la propriété littéraire et artistique*, Paris: Litec 2006 (3rd ed.), nr. 83 p. 75 and nr. 90 p. 78-80. The French Supreme Court sought to limit this leniency in its Coprosa judgment (Cour de cassation, 2 May 1989 (Coprosa), *Juris-Classeur Périodique* 1990.II.21932 note A. Lucas).

119 Lucas/Lucas, *Traité de la propriété littéraire et artistique*, nr. 98 p. 85 and nr. 114 p. 102.

120 Lucas/Lucas, *Traité de la propriété littéraire et artistique*, nr. 114 p. 103 and nr. 20 p. 20-22.

121 Section 1(1)(a) of the UK Copyright Act.

122 K. Garnett, G. Davies, G. Harbottle (eds), *Copinger and Skone James on Copyright*, London: Sweet & Maxwell 2005, Volume 1 (15th ed.), nr. 3-15 p. 60 and nr. 3-26 p. 69.

123 Garnett/Davies/Harbottle, *Copinger and Skone James on Copyright*, nr. 3-15 p. 60 and nr. 3-26 p. 69-70.

124 Garnett/Davies/Harbottle, *Copinger and Skone James on Copyright*, nr. 3-21 p. 65-66.

125 Section 1(1)(c) of the UK Copyright Act. See Garnett/Davies/Harbottle, *Copinger and Skone James on Copyright*, nrs. 3-102 to 3-104, p. 109-111.

right is merely available for the first publication of previously unpublished works in which copyright has expired. The UK protection is broader in that it can apply to published typographical arrangements of any work, irrespective of whether this is out of copyright or previously unpublished. This UK copyright protection for typographical arrangements is similar to the Dutch geschriftenbescherming in that it requires an act of publication and rests merely in the written-down layout, not in the published content itself. Nevertheless, typographical arrangements must still meet the UK's originality threshold, but this seems satisfied by mere investments in the layout. The rationale of this special British copyright protection thus also resembles that of the geschriftenbescherming. However, the former already expires 25 years from publication, like the *editio princeps* right.

Indeed, the EU-wide *editio princeps* right also deserves to be mentioned here. Introduced by the Term Directive in 1993, this right provides protection for the one who first publishes a previously unpublished work in which copyright has expired. The Directive prescribes that this protection must be equivalent to that of the exploitation rights of the author.[126] It has been implemented in the member states either as a form of copyright or as a neighbouring right. The latter seems more suitable given the rationale of the *editio princeps* right and its limited duration. Its rationale is not to protect originality but the efforts and costs incurred in finding the work and recognizing its value, and in preparing it for publication. This resembles the rationale of the geschriftenbescherming and, interestingly, the *editio princeps* right is subject to a similar discussion on who is its right holder: the researcher who found the work or the publisher? The German Copyright Act from which this right originates is not conclusive[127] and opinions in the German doctrine differ; a majority of scholars contend that the right holder is the person who found and edited the work[128] (or his/her university or research institution), whereas a minority argues for the publisher.[129] As to the subject matter that they protect, the *editio princeps* right and the geschriftenbescherming do not overlap. According to the Term Directive the *editio princeps* right is only available for first publications of public domain material which was formerly protected by

126 Article 4 of the Term Directive.

127 § 71 of the German Copyright Act. The right was introduced in the German Copyright Act in 1965 in the form of a neighbouring right.

128 A German neighbouring right of 25 years from publication also exists for researchers who have expended substantial research efforts in order to publish material in which no copyright subsists. Examples are annotated and/or painstakingly reconstructed old texts (§ 70). The Term Directive states in Article 5 that member states may protect critical and scientific publications of works fallen into the public domain.

129 Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar,* nr. 13 p. 1408 provides an overview of these opinions. Views differ in the Netherlands as well, see A.A. Quaedvlieg, 'Artikel 450. Een ongewerveld intellectueel eigendomsrecht', *AMI* 1996, p. 88 giving an overview of them.

copyright having met the originality threshold. The geschriftenbescherming does not protect public domain but more recent material given that it is an alternative fall-back protection for writings that do not meet the originality threshold.[130]

The explicit mentioning in the copyright act of subject matter that lacks any originality appears to be unique to the Netherlands and Scandinavia. The Dutch geschriftenbescherming thus is very similar to the 'catalogue rule' in the copyright acts of the Scandinavian countries, which protects non-original catalogues, tables and similar compilations against reproduction.[131] They also share the same rationale: protection for incurred investments. Interestingly, the Icelandic Copyright Act protects 'published writings' and as such resembles the Dutch geschriftenbescherming even more, since the latter also protects writings and not just catalogues, while these too must be published (or so destined) in order to benefit from protection. On the other hand, the Scandinavian protection lasts only ten years from publication.

In theory, there is a difference between statutory copyright protection for non-original subject matter and protection via case law of kleine Münze that still give evidence of a minimum of originality. In practice, however, this difference may be rather cosmetic. The presence of the geschriftenbescherming as a fall-back protection could well induce Dutch courts to qualify as non-original writings subject matter which courts in countries without such a safety net would qualify as kleine Münze with just enough originality. Although the geschriftenbescherming provides less protection than regular copyright, the strength of copyright protection in other countries may also vary with the work's level of originality.[132] Moreover, other safety nets exist abroad; for example, French and German courts are more generous in granting protection against unfair competition than Dutch courts.

---

130 Moreover, it cannot protect subject matter which statutorily is denied copyright, such as primary and secondary legislation and judgments of the Dutch courts. However, collections of such material can be protected by copyright and, according to Spoor and Quaedvlieg, also alternatively by the geschriftenbescherming if their selection or arrangement lacks originality. See President District Court The Hague, 20 March 1998 (Vermande v. Bojkovski), *Computerrecht* 1998, p. 144 note J. Spoor; *BIE* 1998, p. 390 note A. Quaedvlieg. The geschriftenbescherming has partly become obsolete given that collections representing substantial investments are currently protected by the database right. Nevertheless, it is still (unjustly) available for databases produced by public authorities as these are excluded from the database right in the Netherlands, see Beunen, *Protection for databases*, p. 223.

131 See G.W.G. Karnell, 'The Nordic Catalogue Rule', in: E.J. Dommering, P.B. Hugenholtz (eds), *Protecting Works of Fact. Copyright, Freedom of Expression and Information Law*, Deventer/Boston: Kluwer 1991, p. 67-72 and Bensinger, *Sui-generis Schutz für Datenbanken*, p. 3-76.

132 This is the case in Germany, see Loewenheim in G. Schricker (ed.), *Urheberrecht: Kommentar*, nr. 24, p. 63-64. Lucas/Lucas, *Traité de la propriété littéraire et artistique*, nr. 93 p. 83 and nr. 99 p. 87 argue for this in France, while approvingly referring to Grosheide, *Auteursrecht op maat*. Lucas/Lucas especially question the availability of moral rights for factual and functional works.

## *4.2 Originality in the Netherlands and the EU after Infopaq and Football Dataco*

Regular copyright is available for literary works which meet the Dutch originality threshold, while the geschriftenbescherming protects non-original writings.[133] The originality test thus decides whether a writing is entitled to regular copyright or to the geschriftenbescherming.

The Dutch Copyright Act does not contain an originality criterion; this has been developed in Dutch case law. In its 1991 judgment *Van Dale v. Romme I*,[134] the Dutch Supreme Court established that a work, firstly, must have an original character of its own and, secondly, has to bear the personal imprint of the author. In 2008, the Supreme Court gave an in-depth analysis of these two components in its much-debated judgment on the *Endstra tapes* (comprehensively discussed in Chapter 2).[135] According to the Court, the required presence of the personal imprint of the author means that the work's form must be the result of creative human work and thus of creative choices, resulting in a creation of the human intellect. This excludes all that has a form so banal or trivial that no creative work whatsoever is involved. This has to be apparent from the work itself and therefore it is not required that the author consciously intended to create a work or consciously made creative choices. Several commentators have criticized the Supreme Court's elaborations for their vagueness.[136] Some fear that the Court has thus lowered the originality threshold, risking daily-life conversations to qualify for copyright at the expense of the free flow of information.[137] Indeed, the Supreme

133 As a result of the implementation of the European Database Directive and Computer Programs Directive, databases which represent a substantial investment and computer programs have been excluded from the writings entitled to geschriftenbescherming, as discussed in section 3.2.

134 Supreme Court of the Netherlands, 4 January 1991, *NJ* 1991, no. 608 note D. Verkade; *Computerrecht* 1991, p. 86 note P.B. Hugenholtz; *Informatierecht/AMI* 1991, p. 178 note J. Spoor.

135 Supreme Court of the Netherlands, 30 May 2008 (Endstra sons v. Nieuw Amsterdam), *AMI* 2008, p. 136 note M. Senftleben; *IER* 2008, p. 230 note J. Seignette; *EIPR* 2008, p. N73 by J. Krikke; *NJ* 2008, no. 556 note E.J. Dommering; www.boek9.nl (B9 6289) note D. Visser; *Ars Aequi* 2008, p. 1 note P.B. Hugenholtz; I.M. Tempelman-van Hunen, 'Een werkbare werktoets?', *Maandblad voor Vermogensrecht* 2008, p. 190-194. Moreover, in his conclusion in the Supreme Court case, Advocate General Verkade provides a comprehensive overview of all the annotations on the first instance and appeal judgments and of the advices of the copyright professors Spoor, Quaedvlieg, Hugenholtz and Grosheide commissioned by the litigating parties (also published in *AMI* 2007, p. 122-128).

136 Dommering, Senftleben, Visser and Hugenholtz in their notes mentioned in the preceding footnote; Spoor in his note on District Court Arnhem, 25 March 2009 (De Roode Roos v. De Rooij), *AMI* 2009, p. 106. Also see P.B. Hugenholtz, 'Auteursrecht op alles', *NJB* 2008, p. 309.

137 Yet, after the Endstra decision a provisional judgment denied copyright to literal statements given after an air disaster to a journalist by a nurse and a chauffeur, who lent their assistance. The judge found that their statements consisted of impersonal, businesslike information and did not involve creative choices. See President District Court Den Bosch, 6 November 2009 (Boek Herculesramp), www.rechtspraak.nl LJ-nr. BK2290. These air disaster statements and the Endstra interviews arguably did not alternatively

Court's elaborations arguably did not help clarify its leading 1991 originality criterion. In the context of the geschriftenbescherming, this means that it is not clear beforehand where the line lies between original and non-original writings; the Dutch courts must assess this on a case-by-case basis. It also remains to be seen whether, as some fear, more writings will qualify for regular copyright than before the *Endstra tapes* judgment of the Supreme Court of 2008.

An issue of great interest is whether this Dutch judgment has been superseded by the 2009 *Infopaq* decision of the European Court of Justice,[138] and its subsequent similar decisions on the originality criterion.[139] These judgments all appear to imply an EU-wide harmonization of the originality criterion for all types of works. In its *Infopaq* decision, the European Court of Justice held that the reproduction of fragments of 11 words taken from newspaper articles could amount to copyright infringement, if the national courts determine that they qualify for copyright. For this, the 11-word fragments must meet the criterion of being an 'own intellectual creation of the author', according to the Court. European directives already established this criterion for software, photographs and databases, but the European Court of Justice now generalizes it for all categories of works. Soon after the *Infopaq* judgment was adopted, commentators differed on whether this decision indeed implied a general EU-wide harmonization of the originality criterion. Opinions seemed divided between scholars supporting this view[140] and those (mostly intellectual property experts) who expressed serious doubts, also as to the Court's competence.[141] The supporters refer to the European Court of Justice's case law in stating that terms in European directives must be

---

qualify for the geschriftenbescherming, because the claimants stressed the confidentiality of the texts and sought to forbid their publication. See footnote 16 of Advocate General Verkade's conclusion in the Endstra judgment.

138 European Court of Justice, 16 July 2009, case C-5/08 (Infopaq v. Danske Dagblades Forening), *ECR* 2009, p. I-6569; *AMI* 2009, p. 198 note K. Koelman; *IER* 2009, p. 318 note F.W. Grosheide; *NJ* 2011, no. 288 note P.B. Hugenholtz; www.boek9.nl (B9 8077) note L. Bruinhof; www.boek9.nl (B9 8122) note D. Visser. An extensive discussion can be found in Chapter 2.

139 Cases C-393/09 (Bezpečnostní softwarová asociace), joined cases C-403/08 and C-429/08 (Football Association Premier League and Others) and C-145/10 (Painer).

140 C. Handig, 'The Copyright Term "Work" – European Harmonisation at an Unknown Level', *IIC* 2009, p. 671 (predating the Infopaq decision); H.M.H. Speyart, 'Infopaq: het werkbegrip geharmoniseerd?', *Nederlands Tijdschrift voor Europees Recht* 2009, p. 335-342; E. Derclaye, 'Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The Impact of the CJEU ruling in Infopaq on UK copyright law', *EIPR* 2010, p. 248; P. Ras, *Auteursrechtrevolutie: de gevolgen van het Infopaq-arrest voor het auteursrechtelijke beschermingscriterium in Nederland, Engeland en Duitsland*, Tilburg: Celsus juridische uitgeverij 2011, p. 66.

141 Koelman and Grosheide in their annotations on the *Infopaq* decision in *AMI* 2009, p. 204 and *IER* 2009, p. 318 respectively; G. Schulze, 'Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs? Anmerkung zu EuGH „Infopaq/DDF"', *GRUR* 2009, p. 1022. Also see M.M.M. van Eechoud, 'Het Communautaire Acquis voor auteursrecht en naburige rechten: Zeven zonden of zestien gelukkige jaren?', *AMI* 2007, p. 112-113.

given an autonomous and uniform interpretation throughout the Community as long as these directives do not explicitly refer to the law of the member states for determining their meaning and scope.[142] If indeed the European originality criterion has thus superseded the Dutch one for all work types, several Dutch lawyers have stressed that this will make no difference in practice because in their view the European Court of Justice's originality criterion is fully consistent with the criterion developed by the Dutch Supreme Court.[143]

Koelman, however, has posed the legitimate question whether the *Infopaq* decision would mean the end of the Dutch geschriftenbescherming.[144] Is it not contrary to the European criterion requiring an 'own intellectual creation of the author' to still keep conferring a form of copyright protection on non-original writings? Interestingly, the same question was already discussed on the occasion of the Dutch implementation of the 1996 Database Directive. This Directive has established that a database is entitled to copyright provided that it constitutes, by reason of the selection or arrangement of its contents, the author's own intellectual creation.[145] The Directive explicitly continues that no other criteria shall be applied. In spite of this, the Dutch legislator still chose to maintain the geschriftenbescherming for databases which do not meet the threshold for regular copyright nor the conditions for the Database Directive's *sui generis* right. This was all the more remarkable given that earlier the legislator had abolished the geschriftenbescherming for software, arguing that the Computer Programs Directive's originality criterion was now the only one applicable.[146] Therefore, many scholars have rightly criticized the legislator's decision to maintain the geschriftenbescherming for databases and advocated its abolition.[147] Moreover, if the European originality criterion is indeed the one and only criterion to be applied to all types of work since the 2009 *Infopaq* decision, then following this reasoning the geschriftenbescherming should arguably now cease to exist altogether.

---

142 Also see consideration 27 of the *Infopaq* decision which mentions as precedents case C-245/00 (SENA v. NOS), *ECR* 2003, p. I-1251, and case C-306/05 (SGAE v. Rafael Hoteles SA), *ECR* 2006, p. I-11519.

143 Visser and Koelman in their notes at www.boek9.nl (B9 8122) and *AMI* 2009, p. 205; Speyart, 'Infopaq', p. 341-342. Also compare Court of Appeal The Hague, 22 December 2009 (X v. KSI), www.rechtspraak.nl LJ-nr. BL2812 where the European and Dutch criterions are combined to assess whether specific lamps enjoy copyright.

144 In his note on the *Infopaq* decision in *AMI* 2009, p. 205.

145 Article 3(1) of the Database Directive. The same criterion is in Article 10(2) of the TRIPS Agreement and Article 5 of the WIPO Copyright Treaty.

146 Interestingly, the Explanatory Memorandum accompanying the implementation bill (*Kamerstukken II* 1991/92, 22 531, nr. 3, p. 4) mentions that the question was posed to the European Commission whether the Directive permits that non-original computer programs still be protected by copyright by way of the geschriftenbescherming, which the Commission answered in the negative.

147 See section 3.2.

An aspect of importance could be whether the *Infopaq* decision implies an exhaustive maximum harmonization of the originality criterion, forbidding national deviation, or a mere minimum harmonization. Opinions differ internationally; Ras argues for maximum harmonization, whereas Von Ungern-Sternberg states that the European Court of Justice has only fixed a minimum threshold for all works, which does not exclude the application of a higher level of originality for specific work categories.[148] In support of this, he refers to the EU Designs Directive which explicitly leaves it to the member states to decide the level of originality required for copyright protection of works of applied art,[149] and which in Germany is fairly high.[150] However, even if the *Infopaq* criterion would merely imply a minimum threshold, the geschriftenbescherming would not meet this as it requires no originality at all, like the Scandinavian catalogue rule. The (too) low British originality threshold of skill, labour or judgment also could well be affected,[151] which could prejudice the current British copyright protection for e.g. typographical arrangements, tables that are not databases and photographs. However, the latter seem to be a special case because protection for photographs that do not satisfy the European originality criterion seems permitted under the Term Directive; this explicitly leaves it to the discretion of the member states to protect other photographs as well.[152]

Recently, the European Court of Justice has also specifically elaborated on the originality criterion for databases in its 2012 *Football Dataco* decision.[153] It concerned the annual fixture lists of the English and Scottish football leagues, produced by Football Dataco and others. They claimed that by using the fixture lists without paying financial compensation, Yahoo and others infringed their *sui*

148 Ras, *Auteursrechtrevolutie*, p. 70; J. von Ungern-Sternberg, 'Die Rechtsprechung des Bundesgerichtshofs zum Urheberrecht und zu den verwandten Schutzrechten in den Jahren 2008 und 2009 (Teil I)', *GRUR* 2010, p. 273.

149 Article 17 of Directive 98/71/EC of 13 October 1998 on the legal protection of designs, *OJ* 1998 L 289/28.

150 On the other hand, C. Handig, 'Was erfordert "die Einheit und die Kohärenz des Unionsrechts"? – das urheberrechtliche Nachspiel der EuGH-Entscheidung Football Association Premier League', *GRUR Int* 2012, p. 9-14 argues against a German deviating originality level for works of applied art.

151 Derclaye, 'Infopaq International A/S v Danske Dagblades Forening', p. 248-251; E. Rosati. 'Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision', *EIPR* 2011, p. 746-755.

152 Article 6 and recital 16 of the Term Directive. The *Infopaq* decision would in any case not affect the German protection for non-original photographs and ditto films given that this has the form of a neighbouring right. In the opinion of Y. Harn Lee, 'Photographs and the Standard of Originality in Europe: Eva-Maria Painer v Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG (C-145/10)', *EIPR* 2012, p. 291-293, photographs that do not come up to the *Infopaq* criterion may still be protected by copyright under the national laws of the member states.

153 Court of Justice of the EU, 1 March 2012, case C-604/10 (Football Dataco and Others v. Yahoo! UK Ltd and Others).

*generis* right and copyright under the Database Directive and the UK Copyright, Designs and Patents Act. The national courts had rejected protection by the *sui generis* right judging that the lists merely involved investments in the creation of new data. As to copyright, the referring court of appeal asked the European Court of Justice to explain the meaning of the Database Directive's originality criterion and, given the low 'skill and labour' threshold traditionally applied under the UK Copyright, Designs and Patents Act, whether the Directive precludes 'national rights in the nature of copyright' in databases other than those provided for by the Directive. The European Court of Justice answered that a database is protected by the copyright laid down by the Database Directive provided that the selection or arrangement of the data amounts to an original expression of the creative freedom of its author, which is a matter for the national courts to determine. Moreover, the Court found that this Directive, subject to its transitional provision, precludes national legislation which grants databases copyright protection under conditions which are different to those set out in the Directive. Thus the *Football Dataco* judgment may well rule against maintaining the geschriftenbescherming for non-original databases for incompatibility with EU law.[154]

Interestingly, the argument against the geschriftenbescherming for databases was already put forward in several Dutch cases, including a 2010 case where geschriftenbescherming was claimed for a database of flight information.[155] The defendant argued that by maintaining the geschriftenbescherming, the Database Directive has been implemented incorrectly. The court explicitly chose not to give an opinion on this, reasoning that an interpretation in conformity with the Database Directive is not possible given the unambiguous wording of Article 10 of the Copyright Act and its drafting history which gives evidence of the deliberate choice to maintain the geschriftenbescherming; although national legislation must as far as possible be interpreted in conformity with the Directive, this interpretation cannot go against an explicit choice of the legislator.[156] The court stated that this would lead to an interpretation *contra legem*[157] to which a national court is not obliged under the jurisprudence of the European Court of Justice. The court continued that the same holds true for the question whether the Dutch legislation, offering protection for non-original writings, is in conformity

154 As argued (again) by e.g. T. Cohen Jehoram and Hugenholtz, www.boek9.nl (B9 10954 and B9 10958).

155 District Court Utrecht, 28 July 2010 (Ryanair v. PR Aviation), *IER* 2011, p. 18 notes F.W. Grosheide and S.J. Schaafsma; *Computerrecht* 2010, p. 330 note A.A. Kappert.

156 The same had also been stated in President District Court Alkmaar, 7 August 2007 (Stichting Baas in Eigen Huis v. Plazacasa), *AMI* 2007, p. 145 note K. Koelman; *NJ* 2007, no. 458; *Computerrecht* 2007, p. 174. In the same sense also President District Court Amsterdam, 28 July 2005 (SBS v. Quote Media and MTV), www.rechtspraak.nl LJ-nr. AU0253.

157 This was questioned by Ras, *Auteursrechtrevolutie*, p. 82-85.

with the Information Society Directive in view of the *Infopaq* decision. The court considered: 'If, and insofar as, 1) the European legislator has wanted to introduce an exclusive "work" concept, and 2) the geschriftenbescherming cannot be fitted into that concept, and 3) the geschriftenbescherming in our national law must contrarily be regarded as a form of copyright protection, the situation remains that this possible contradiction in maintaining the geschriftenbescherming has been a (deliberate) choice of the legislator.'[158]

An essential and much-debated question indeed remains whether the geschriftenbescherming must be considered as copyright protection.[159] This has been discussed for long. Although it is clear that the geschriftenbescherming is not proper copyright, it has characteristics in common with copyright, the neighbouring rights and the protection against unfair competition. The Dutch legislator has showed pragmatic flexibility in its answers, stressing either the copyright character or the unfair competition character of the geschriftenbescherming, whenever either suited it best depending on the legislative occasion at hand. The Dutch Supreme Court on the other hand, even though it has established that the regular copyright provisions in the DCA do not all automatically apply to the geschriftenbescherming, has qualified this protection as a form of copyright. Ras thus contends that maintaining the geschriftenbescherming is contrary to the *Infopaq* judgment, whereas in 1997 Van Eechoud anticipatorily argued that a harmonized originality criterion would leave other unharmonized national rights, including the Dutch geschriftenbescherming, unprejudiced.[160] Other opinions on the character of the geschriftenbescherming that have over time been put forward in the Dutch doctrine (preceding the European judgments discussed here) are dealt with in section 5.1. Hugenholtz and Visser opine that, after the Football Dataco decision, the Dutch legislator should finally abolish the geschriftenbescherming for lists of radio and television programming information and other databases.[161] Indeed,

158 District Court Utrecht, 28 July 2010 (Ryanair v. PR Aviation), consideration 4.34 (our translation).

159 In her comments on the *Football Dataco* judgment at www.kluwercopyrightblog.com/2012/03/01/football-dataco-skill-and-labour-is-dead, Derclaye considered the English skill and labour copyright protection, the Dutch geschriftenbescherming and the Scandinavian catalogue rule all as forms of copyright protection which cannot subsist after the *Football Dataco* decision. She also put the question whether this judgment would, apart from proper copyright, also affect copyright-like protection such as protection against parasitism or slavish copying based on national tort or unfair competition statutes. She argued that these forms of protection must also give way since it would adversely affect the functioning of the internal market and free movement of goods and services if databases could still obtain quasi-copyright protection through unfair competition law provisions. However, she thus overlooked Article 13 of the Database Directive, which leaves national law on unfair competition unprejudiced.

160 Ras, *Auteursrechtrevolutie*, p. 80; Van Eechoud, 'Het Communautaire Acquis voor auteursrecht', p. 113.

161 Hugenholtz, www.boek9.nl (B9 10958); D.J.G. Visser, 'Kroniek van de Intellectuele Eigendom', *NJB* 2012, p. 1049.

following the *Infopaq* and *Football Dataco* judgments of the European Court of Justice, national copyright regimes that protect works including databases with a lower originality level or no originality at all, could well be in danger.

## 5. Assessment and future developments

### *5.1 Assessment: current doctrine*

In the Dutch doctrine the geschriftenbescherming has been given diverse qualifications. It has been called pseudo-copyright,[162] para-copyright,[163] proto-copyright,[164]quasi-copyright,[165] or mini-copyright.[166] The legislator of 1912 and the Supreme Court consider it a (special) form of copyright. Other scholars argue that the geschriftenbescherming is a *sui generis* right,[167] or is comparable to a neighbouring right.[168] Indeed, the question of what the legal nature of the geschriftenbescherming is and whether maintaining it in the Copyright Act is desirable has been at the centre of doctrinal debate since its introduction in the Dutch Copyright Act in 1912 (and even before that under the Copyright Act of 1881).

Many of the Dutch scholars active at the dawn of the 20th century were doctrinal opponents of the geschriftenbescherming for non-original writings, among them De Beaufort and Hirsch Ballin.[169] Contending that the geschriftenbescherming is contrary to the very nature of copyright, they were very much inspired by the Berne Convention to which the Netherlands had just acceded in 1912. Hirsch Ballin opined that the geschriftenbescherming is an anachronism and a *corpus alienum* in the Dutch Copyright Act. Illustratively, he wrote: 'It is indefensible to assimilate copyright … to a right which does not originate from creation but from fixation, the subject of which is not an author but a fixator, whose object is not an intellectual creation but a mechanical product, whose scope cannot be derived from the application of the law as such … but from selective research into

162 Hirsch Ballin in his annotation on Supreme Court of the Netherlands, 25 June 1965 (Radioprogramma's III), *Ars Aequi* 1966, p. 349; H. Cohen Jehoram, 'Schrap één onzalig woordje uit de Auteurswet 1912', *NJB* 1992, p. 1543; Quaedvlieg, *Auteursrecht op techniek*, p. 60; N. van Lingen, *Auteursrecht in hoofdlijnen*, Groningen/Houten: Wolters-Noordhoff 2007, p. 59.

163 Spoor/Verkade/Visser, *Auteursrecht*, p. 87.

164 E.J. Dommering, 'Gegevensbescherming. Bespreking van de vier preadviezen voor de vergadering van de Nederlandse Juristen Vereniging 1988', *Computerrecht* 1988, p. 66.

165 S. Gerbrandy, *Auteursrecht in de steigers*, Arnhem: Gouda Quint 1992, p. 46.

166 J.H. Spoor, *De gestage groei van merk, werk en uitvinding*, Zwolle: W.E.J. Tjeenk Willink 1990, p. 59.

167 Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 46.

168 Hugenholtz, *Auteursrecht op informatie*, p. 46.

169 Hugenholtz, *Auteursrecht op informatie*, p. 44-46 and Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 43-44 also mention Scholten, Veegens, Snijder van Wissenkerke and Drion.

the purport of each individual provision of the Copyright Act'.[170] Whilst others remarked that the Supreme Court's radio programmes judgments upholding the geschriftenbescherming merely followed the wish of the legislator of 1912 (Hijmans van den Bergh and Advocate General Berger), opponents argued that the text of the DCA's Article 10 could well be read otherwise, in such a way that only original writings are entitled to copyright.[171] Yet, it was recognized among the opponents that protection for non-original writings could be justified in specific cases, albeit not in the Copyright Act but under unfair competition law. Present-day doctrinal opponents of the geschriftenbescherming are Gerbrandy and Cohen Jehoram.[172]

Taking a different view (before the *Infopaq* and *Football Dataco* decisions) are many pragmatic supporters of the geschriftenbescherming, among whom the Dutch legislator. The legislator made a pragmatic choice in 1912 by maintaining the geschriftenbescherming, which had earlier been upheld in case law,[173] stressing that in practice it evidently met a need. Many scholars, such as Grosheide, Verkade, Van Engelen, Hugenholtz and Spoor,[174] appreciate the geschriftenbescherming as a fall-back protection. Some at least argue that it should not be abolished before an adequate form of protection for non-original writings with high economic value against unfair competition is in place (which up until now is absent in the Netherlands). Many agree that the geschriftenbescherming is an unfair competition regulation by nature.[175] Hugenholtz and Van Engelen specifically compare it to the neighbouring right of phonogram producers protecting the first fixation of a phonogram against reproductions, while Soetenhorst argues that the geschriftenbescherming like neighbouring rights protects pure investment costs.[176] The Dutch legislator, on the other hand, has proven to be pragmatically inconsistent

170 In his annotation on Supreme Court of the Netherlands, 25 June 1965 (Radioprogramma's III), *Ars Aequi* 1966, p. 349.

171 Recently upheld again by Ras, *Auteursrechtrevolutie*, p. 84 while rejecting the Utrecht District Court's consideration that interpreting national legislation in conformity with a European directive but against the legislator's deliberate intention would be *contra legem*. District Court Utrecht, 28 July 2010 (Ryanair v. PR Aviation), *IER* 2011, p. 18 notes F.W. Grosheide and S.J. Schaafsma; *Computerrecht* 2010, p. 330 note A.A. Kappert.

172 Gerbrandy, *Kort Commentaar op de Auteurswet 1912*, p. 79; Gerbrandy, *Auteursrecht in de steigers*, p. 49-50; H. Cohen Jehoram, 'Schrap één onzalig woordje uit de Auteurswet 1912', *NJB* 1992, p. 1542-1543.

173 Also compare Quaedvlieg, *Auteursrecht op techniek*, p. 122.

174 Grosheide, *Auteursrecht op maat*, p. 305-306; Verkade, 'Preadvies Gegevensbescherming en privaatrecht', p. 48-53; Van Engelen in: *Gegevensbescherming*, Handelingen Nederlandse Juristen-Vereniging 1988, Part 2, p. 35; Hugenholtz, *Auteursrecht op informatie*, p. 178; Spoor, *De gestage groei van merk, werk en uitvinding*, p. 60.

175 Hugenholtz, *Auteursrecht op informatie*, p. 45; Grosheide, *Auteursrecht op maat*, p. 263; Verkade, 'Computerprogramma's in de Auteurswet 1912', p. 90; Spoor/Verkade/Visser, *Auteursrecht*, p. 87; Van Lingen, *Auteursrecht in hoofdlijnen*, p. 59.

176 Hugenholtz, *Auteursrecht op informatie*, p. 45-46; Soetenhorst, 'Ein verwandtes Schutzrecht für Verleger', p. 768.

in its views on the legal nature of the geschriftenbescherming. In the context of computer programs, it stressed that this protection was a form of copyright which had to give way because it did not conform to the copyright threshold prescribed in the Computer Programs Directive. On the occasion of the Database Directive's implementation, the legislator remarkably took a different stance, arguing that the geschriftenbescherming by nature was a form of protection against unfair competition. According to the legislator the geschriftenbescherming could thus be maintained for non-original databases lacking a substantial investment, which especially helped to secure the broadcasters' monopoly on their radio and television programming information. This change in approach may serve to illustrate the ultra-pragmatic flexibility of the Dutch legislator.

Even after 100 years the precise scope of the geschriftenbescherming developed by the Dutch Supreme Court remains uncertain. According to the Supreme Court a writing must be made available to the public or so destined in order to be protected. The geschriftenbescherming protects merely its written-down form against provable extraction by means of literal reproduction, reproduction with non-drastic changes or translation, whether made from the writing itself or a copy of it, or from a reading of the writing. Moreover, the Court held that it must be assessed for each provision of the Copyright Act according to its purpose whether it applies to non-original writings. The doctrine agrees with the Supreme Court that the scope of the geschriftenbescherming is and ought to be less broad than that of copyright. Many scholars have justly argued that moral rights, which protect the personal bond between a work and its author, do not apply to non-original writings.[177] Some have also advocated that such writings should be entitled to a shorter term of protection than is provided by copyright.[178] Others support the applicability of the private use exception, compulsory licensing[179] and the DCA provision that the employer owns copyright in an employee's work.[180] It has also been argued that the DCA's special copyright

177 L. Wichers Hoeth, annotatie bij Hoge Raad 25 juni 1965 (Radioprogramma's III), in: *2000 weken rechtspraak*, feestbundel mr. C.R.C. Wijckerheld Bisdom, Zwolle: W.E.J. Tjeenk Willink 1978, p. 94; Grosheide, *Auteursrecht op maat*, p. 307; Van Engelen, 'De geschriften-bescherming in de Auteurswet', p. 250; Hugenholtz, *Auteursrecht op informatie*, p. 47; Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 121; Spoor/Verkade/Visser, *Auteursrecht*, p. 88.

178 Grosheide, *Auteursrecht op maat*, p. 307; Spoor/Verkade/Visser, *Auteursrecht*, p. 88 and 640. The latter suggest a term of 15 years just like the *sui generis* right for databases, or even shorter. By comparison, the Scandinavian catalogue rule only provides protection for 10 years, see Bensinger, *Sui-generis Schutz für Datenbanken*, p. 56.

179 Grosheide, *Auteursrecht op maat*, p. 307.

180 Wichers Hoeth, annotatie bij Hoge Raad 25 juni 1965 (Radioprogramma's III), in: *2000 weken rechtspraak*, p. 94. Not applicable in his view is the DCA provision which vests copyright in the one who made the design of the work and supervised its execution, for this requires an original work.

enforcement instruments such as seizure apply to the geschriftenbescherming, which would make it better equipped against infringement than the protection against unfair competition on the basis of tort that lacks these instruments.[181] Such suggestions lead to a tailor-made geschriftenbescherming that would fit in with the pluriform, tailored law of copyright advocated by Grosheide. Quaedvlieg considers the geschriftenbescherming as a flexible form of protection creatively adaptable to practical needs.[182] On the other hand, one may object to the legal uncertainty which this flexible scope brings, given that the Supreme Court did not give clues on how to assess whether specific DCA provisions apply to non-original writings.

The table below compares the geschriftenbescherming with other forms of protection. Having its roots in the Dutch copijrecht, the geschriftenbescherming seems to be a hybrid; to copyright it owes its nature as an exclusive right and the fact that its subject is a natural person, while on the other hand it owes its rationale to the old copijrecht, the neighbouring right of phonogram producers, the database right and the tenet of unfair competition. This combination does not appear a perfect fit. For example, it is not exactly clear whose interests the geschriftenbescherming seeks to protect. Whereas the old privileges and the copijrecht protected investments of publishers and printers, the subject of the geschriftenbescherming according to the Supreme Court is the person who actually fixes the text, even though it is his/her employer who carries the financial risk and investments. The geschriftenbescherming thus tries to somewhat uncomfortably join the subject of copyright to the rationale of investment protection. Still, in practice the employer/publisher will indeed enjoy the geschriftenbescherming as the DCA stipulates that the employer is entitled to the copyright in his employee's works. Another peculiarity is that the geschriftenbescherming is alternative and not cumulative with copyright, even though they have a different rationale.[183] The geschriftenbescherming in our view mostly resembles the neighbouring right of phonogram producers and the database right because they all are exclusive rights without moral rights and have the same rationale. The unwritten scope of the geschriftenbescherming appears to tread the middle way between the copijrecht's protection against literal reprint and the much broader database right. They all permit independent production without extraction from someone else's earlier

181 Spoor/Verkade/Visser, *Auteursrecht*, p. 87.

182 Grosheide, *Auteursrecht op maat*, p. 317; Quaedvlieg, *Auteursrecht op techniek*, p. 169.

183 Compare the cumulative British protection for typographical arrangements. Also see Van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, p. 122 arguing that the geschriftenbescherming can cumulate with copyright, for he considers it a separate protection for publishers.

achievement. Thus, the geschriftenbescherming arguably is a hybrid which shares characteristics with past and existing forms of protection.

| Type of protection | Object | Subject | Scope | Term | Rationale |
|---|---|---|---|---|---|
| Geschriften-bescherming | Fixed written-down form (including electronic) of a non-original writing, which must be made available to the public or so destined. Excluded are computer programs and databases which required a substantial investment. | Actual 'fixator' (natural person), or his/her employer or a publishing legal person via Articles 7 or 8 DCA. | Exclusive right protecting against (in)direct literal reproduction and reproduction with non-drastic changes, and translation (more limited in scope than copyright). Extraction from the protected writing must be proven. Arguably no moral rights. Cannot cumulate with copyright. | Arguably shorter than copyright, which lasts 70 years from first publication in case a legal person is the right holder, or 70 years from the right holder's death in case a natural person is the right holder. | Protection of efforts and investments in collecting, arranging, fixing and, if applicable, publishing the writing. |
| Neighbouring right of phonogram producers | First fixation of a phonogram. | Phonogram producer. | Exclusive right protecting against reproduction, whether adapted or not, and making available to the public. No moral rights. | 50 years from the phonogram's publication. | Protection of investments in the phonogram's production. |
| Dutch protection against unfair competition | Achievement that required considerable investments and does not enjoy IP rights. Achievement must be on a par with subject matter that does enjoy such rights. | Party who undertook the investments. | No exclusive right. | Depends on the specific case at hand. | Protection of investments against unfair competition. |
| Sui generis or database right | Database which required a substantial investment. | Database producer who undertook the production initiative and investments. | Exclusive right, protecting against (in)direct reproduction and making available of the whole database or substantial parts of it, whether re-arranged or not. Broader protection than copyright as less exceptions. Can cumulate with copyright. No moral rights. | 15 years from the database's first publication. Term renews with every substantial change of the database. | Protection of investments against unfair appropriation by both competitors and non-competitors. |

### 5.2 *Future developments*

As for radio and television programming information the situation is about to change with regard to the extra strong geschriftenbescherming enjoyed by broadcasters. The Dutch Government is planning to force broadcasters to license their information to third parties against a fee. Its aim is to broaden the market for weekly TV guides, which up until now were produced only by the broadcasters, who kept their programming information among themselves. Moreover, the *Football Dataco* judgment of the European Court of Justice could well undermine the availability of the geschriftenbescherming for such information.

Some German scholars recently have again advocated a neighbouring right for publishers for their substantial investments and the risk they take.[184] Currently, this plea is especially fervent among German publishers of newspapers who wish to be able to fight Internet copying, and their claim appears to be finding support within the German political arena.[185] Newspaper publishers especially are experiencing economically difficult times and seem to be winning more and more cases against news aggregators on the Internet, for example in Belgium and the United Kingdom.[186] The European Court of Justice could well have made their legal position stronger via its *Infopaq* judgment, when deciding that passages of 11 words in principle are eligible for copyright provided that these represent the author's own intellectual creation. In the Netherlands, newspaper publishers assiduously charge for the incidental re-use of newspaper articles on both commercial and non-commercial websites, and often win lawsuits on the matter. At the same time, however, the circumstances for introducing a neighbouring right for publishers seem to be less favourable than before, now that digital technology is eroding the traditional role and tasks of publishers and new online intermediaries are investing in publishing services as well. Given these shifting roles, defining the subject qualifying for a neighbouring right would not be easy. The desirability of introducing such a right arguably is less evident in today's rapidly changing and innovating digital market.

184 See e.g. I.K. Hanewinkel, 'Urheber versus Verleger. Zur Problematik des § 63 a S. 2 UrhG und dessen geplanter Änderung im Zweiten Korb', *GRUR* 2007, p. 381; W. von Bernuth, 'Leistungsschutz für Verleger von Bildungsmedien', *GRUR* 2005, p. 199-200.

185 See the Federation of German Newspaper Publishers at www.bdzv.de/leistungsschutzrecht-verlage.html.

186 Compare T. Höppner, 'Reproduction in Part of Online Articles in the Aftermath of Infopaq (C-5/08): Newspaper Licensing Agency Ltd v Meltwater Holding BV [2010] EWHC 3099 (Ch)', *EIPR* 2011, p. 331-333.

## 6 Conclusion

The geschriftenbescherming is a hybrid form of protection which has been housed in the Dutch Copyright Act for a century, even though its rationale is not to protect originality but the expenditure of efforts and investments in making a writing's written-down form. It is a remnant of the old copijrecht and provides alternative protection for non-original writings which fail to qualify for copyright. In the doctrine, the geschriftenbescherming has had both strong opponents and pragmatic supporters. The opponents dogmatically object to its place in the Copyright Act, while supporters appreciate its flexibility and fall-back nature given the lack of viable protection against unfair competition in the Netherlands. Illustratively, the geschriftenbescherming had also been proposed as a suitable form of protection for non-original computer programs and for databases prior to the enactment of European legislation on this subject matter. Despite the uncertainty on its precise scope, the geschriftenbescherming arguably still fulfils a useful role as the sole fall-back protection for writings available in the Netherlands. The Dutch legislator has shown to be one of its most pragmatic supporters.

However, the geschriftenbescherming has lately come under attack as a result of several decisions of the European Court of Justice. Its survival for non-original databases which lack a substantial investment is questionable after the 2012 *Football Dataco* judgment. This depends on the crucial question whether the geschriftenbescherming is to be considered a form of copyright or protection against unfair competition. The Database Directive leaves the latter unprejudiced. Given the hybrid characteristics of the geschriftenbescherming, a definitive answer is difficult to provide. If one regards it as a form of copyright, like the legislator in 1912 and the Supreme Court, the *Infopaq* judgment of the European Court of Justice implying a harmonization of the originality criterion for all work categories may well threaten its general existence.