Private Copying

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Private Copying

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1. Introduction

This chapter deals with private copying and copying for internal use. Some other limitations to copyright in the Dutch Copyright Act, namely limitations regarding quotation and parody, and the concept of fair use in Dutch copyright law are discussed in Chapter 13 by Martin Senftleben. Limitations regarding newspaper clipping services and news reporting are discussed in Chapter 15 by Lucie Guibault.

Private copying has grown from a simple, harmless and uncontroversial limitation in 1912 to a very complicated, important and hotly debated political issue in 2012, especially in the Netherlands. In this chapter the development of the private copying limitation will be described from the uncontroversial beginning of copying of paintings and making notes by hand, to the problems of photocopying and home taping and their levies and other remuneration systems and, finally, downloading from the Internet.

2. Private copying

2.1 De minimis

Private copying was not a controversial issue from 1912 up to the invention and subsequent widespread use of photocopiers and home-taping equipment in the second half of the last century. In the first half of the 20th century all private copying of texts had to be done by hand or with a typewriter. It never was a threat to the commercial reproduction of copies through a printing process. Private

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copying of music, let alone film, simply was not possible, because the equipment was not available to members of the general public. Private copying of pictures, paintings or sculptures was either impossible as well or it involved such a lengthy and costly process that it could not possibly be a threat to the normal exploitation of the work. The private copying exception was in fact a de minimis exception, 'coupled with an acknowledgement that authors' rights should not impinge upon what is done in the purely private sphere'.[1]

2.2 *Home copying*

The introduction of home-taping equipment and photocopiers, however, changed this situation. The German Supreme Court ruled in 1955 in its *Tonband* decision that home taping was an infringement of copyright, because it was not covered by the then existing limitation on private copying in Germany:[2]

> For the interpretation of the copyright legislation it is relevant that the control of his work by the author is the fundamental rule of copyright which is the natural consequence of his intellectual property. The legislation of copyright is just the recognition and elaboration of this rule. According to this rule new uses of copyrighted works which technology creates are in principle covered by the exclusive right of the author. There is no general rule in copyright that the rights of the author should stop short of the private sphere of the individual.

In 1964 the German Supreme Court ruled that the plan of the German collecting society GEMA to demand of all sellers of audio recording equipment that the buyers of such equipment show their identification papers ('Personalausweise'), in order for GEMA to be able to check whether these buyers had a licence for home taping, would be a violation of the constitutional right to privacy as laid down in Article 13 of the German Constitution.[3]

In 1965 Germany introduced a levy system on audio and video home-taping equipment, followed by a levy on audio and video tapes in 1985. Many European countries followed this example and introduced levy systems to compensate for the private copying through home taping. In the United States, the Supreme

1 S. Ricketson, *The Berne Convention for the protection of literary and artistic works; 1886-1986*, Kluwer 1987, p. 485-486.
2 German Supreme Court 18 May 1955, *GRUR* 1955, p. 492 ('Tonband'- Grundig reporter).
3 German Supreme Court 29 May 1964, *GRUR* 1965, p. 104 ('Personalausweise').

Court ruled in 1984 in its *Betamax* decision that private copying through home taping is allowed under the fair use exception.[4]

2.3 Photocopying

After the introduction of the photocopying machine by Xerox in 1959, photocopying for internal use in offices of any kind became widespread. Photocopying for private purposes by members of the public was usually done in libraries or in copyshops. Photocopying for internal use may or may not have been covered by the existing private copying exceptions of individual countries, but it was certainly not possible to prevent or control this type of copying. Therefore, remuneration systems comparable to those for home taping were introduced in many countries.[5]

2.4 Digital copying

With the digitization of information and with the Internet, private copying acquired a whole new dimension because of the fact that the digital copies are identical to the original as far as quality is concerned and that the network environment of the Internet makes it possible to download a copy without the need to be in possession of an original copy. At the same time the storage capacity of data carriers such as DVDs, hard disks, USB flash drives and the memory of mobile smartphones and tablets increases so quickly that levies no longer seem to be a viable option.[6] The problem is aggravated by the massive amount of illegally and anonymously uploaded or otherwise 'shared' copyrighted material on the Internet.

2.5 Three-step test

In 1967 the current Article 9(2) was introduced in the Berne Convention, containing the so-called three-step test:

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4 Universal City Studios Inc. and Another v. Sony Corporation of America and Others, 464 U.S. 417 (1984) (Betamax).

5 For an overview see: 'The Reprography Levies across the European Union', IViR study by Lucie Guibault (2003). For more recent information see: www.ifrro.org.

6 K.J. Koelman, 'The Levitation of Copyright: An Economic View of Digital Home Copying, Levies and DRM', *Entertainment Law Review* 4/2005, p. 75-81. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682163

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The three-step test applicable to all exploitation rights, not just to the reproduction right, is included in Article 13 of the TRIPs Agreement, which entered into force in 1994:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Finally, the three-step test is also included in Article 5(5) of the Information Society Directive.

For a comprehensive discussion of the three-step test in general and in relation to private copying in particular, reference is made to the 2004 thesis of Martin Senftleben.[7]

The three steps to be distinguished are:

1. certain special cases
2. no conflict with a normal exploitation of the work
3. no unreasonable prejudice to the legitimate interests of the right holder.

As far as traditional analogue copying is concerned, it is generally accepted that limitations allowing private use copying are in conformity with the three-step test. Private use copying is 'a certain special case' and it does not conflict with a normal exploitation of the work. It might in some cases 'unreasonably prejudice the legitimate interests of the right holder', but this prejudice is neutralized by a levy system of some sort. For digital private copying, especially if private copying from illegal sources is concerned, the situation regarding the three-step test is not clear at all and hotly debated. It can be and it is often argued nowadays that private copying is no longer a 'certain special case', that it does conflict with a normal exploitation of the work and that it does unreasonably prejudice the legitimate interests of the right holder, despite any compensation scheme.

7 Martin Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 53-58, 158-162, 203-206.

3. Private copying in the Dutch Copyright Act

3.1 Legislative history

The previous Dutch Copyright Act of 1881 did not contain a limitation relating to private copying. There was no need for that because copyright only applied to the making of copies by a printing process. As the new Copyright Act in 1912 applied to all forms of reproduction, the need was felt to introduce a limitation for private copying. The article relating to private copying was Article 17 of the Dutch Copyright Act of 1912. The government draft for this article read as follows:

> It shall not be deemed an infringement of the copyright in a literary, scientific or artistic work to reproduce it in a limited number of copies for the sole purpose of private practice, study or use. Where a work mentioned in Article 9.6 is concerned [drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like], the copy must differ appreciably in size or process of manufacture from the original work.
> This provision does not apply to the imitation of works of architecture.

The Explanatory Memorandum of 1912 made clear that this exception would apply uniformly to 'the whole field of copyright'. Only for some specific categories of works of art there is the specific condition of differing size or process of manufacture.

> On the basis of this article it is for instance allowed to translate a book for the purpose of practicing one's command of a foreign language or just for one's own pleasure, but it is not allowed to publish such a translation. A student will be allowed to make notes of the lecture of a professor, even if the notes contain exactly the same wording as the lecture, but these lecture notes may not be communicated to the public in any way. A painter or a sculptor may copy a painting or a sculpture, – albeit within the limits set out in the article –, but he may not sell the copy. Etcetera, etcetera. The copy must fall within and be limited to the purpose mentioned in the article. (Explanatory Memorandum of 1912)

The 1912 Dutch Article 17 was based on Article 15(2) of the German Copyright Act of 1901:[8]

> The making of a copy for one's own use is allowed, when it does not have a commercial purpose.

And on Article 18(1) of the German Copyright Act of 1907:[9]

> The making of a copy for one's own use is allowed, with the exception of the copying of a building, provided it is done without payment.

The exception in the last sentence of Article 17 of the 1912 Dutch Act regarding works of architecture comes from this German example and has been retained in the Dutch private copying exception ever since. In 1972 it was transferred to Article 16b(7) and it was moved to Article 16b(6) in 2004.

In 1912 several members of parliament were of the opinion that this article was too broad. According to them, private copying for one's own 'practice' or 'study' should be permissible, but it would be taking it too far, if copying for one's own 'use' were also to be allowed. The government answered as follows:

> If copyright were limited to works of art in the narrow sense of the word, that is paintings, sculptures and works of 'high literature', then indeed, also in the opinion of the government, it would suffice to introduce a limitation on the reproduction right for 'practice' or 'study'. However, because an all-encompassing regulation of copyright has a much broader scope, the privilege to copy for one's own 'use' cannot be done without. One should for example think of letters, which have to be presented in a court case; of works of applied art; of garden design, which one would like to repeat in a new garden, etcetera, etcetera. [Footnote in the original:] The two German Acts on copyright also allow reproduction for private use, Article 15.2 of the Act of 1901 and 18.1 of the Act of 1907.

The private copying exception was not controversial at all in 1912, and there was little further discussion in parliament. The legal literature at the time did little more than mention the few issues raised in the Explanatory Memorandum and in the reply by the government mentioned above. In the time preceding audio

8 [German] Act on Copyright in literary and musical works 1901. [Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst (LUG) 1901].

9 [German] Act on Copyright in visual works and photographic works 1907. [Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (KUG) 1907].

copying and photocopying, private copying simply was not an issue of any importance.

3.2 The Act of 1912 and subsequent amendments

Overview of amendments

The private copying provision in the Dutch Copyright Act remained unchanged until 1972. In 1972 several specific rules for specific kinds of works were introduced. These changes followed the general discussion on the impact of photocopying on copyright and the publishing industry.

In 1974 a special regulation on photocopying for internal use in the public sector containing a levy per photocopied page was introduced, namely the Repro Right Regulation of 1974. In 1985 this regulation was amended to appoint collecting society Reprorecht as the entity to which the photocopying levy should be paid. In 1992 a bill was introduced in parliament to regulate photocopying for internal use in both the private and the public sector. In 1997 this bill was retracted after much criticism in the Dutch Senate. In 2001 a new bill on photocopying for internal use was introduced which came into force in 2003 together with a new Repro Right Regulation of 2002.

In 1990 a home-taping levy on blank media was enacted in Articles 16c-16g.

In 2004 the Information Society Directive was implemented in the Dutch Copyright Act. The private copying exception was split into two parts and covered in Articles 16b and 16c.

Case law before 1972

In 1952 the Dutch Supreme Court ruled in its *Stemra v. NRU* decision[10] that the exception for private copying did not include the making of a copy of a recording of a musical work for the purpose of broadcasting that work (even once). The Supreme Court ruled that

> 'Private use' in Article 17 cannot be taken to mean anything but use in one's own closed circle.

It follows implicitly from this *Stemra v. NRU* decision that the private copying exception could apply to legal entities and not just to private persons.

10 Supreme Court of the Netherlands, 23 May 1952, *NJ* 1952, 438 (Stemra v. NRU).

3.3 The 1972 Revision and the Repro Right Regulation of 1974

By 1972 photocopying and the copying of musical works on tape had already become a widespread phenomenon that was growing bigger every day. Copying on demand by libraries was a new phenomenon. The 1972 Revision of the Dutch Copyright Act was inspired by the Stockholm Revision of the Berne Convention and the German Copyright Act of 1965. Articles 53 and 54 of the German Copyright Act contained a detailed regulation of private copying. At the time, the publishing industry considered photocopying to be a threat to its very existence. Therefore, private copying exceptions had to be reined in and copying for internal purposes within government agencies and businesses had to be regulated as well.

The 1972 Revision of the Dutch Copyright Act split Article 17 into two distinct provisions. Private copying in the narrow sense was covered by a new Article 16b and photocopying for internal use by businesses and government agencies and educational institutions was covered by a brand new Article 17 and by an administrative regulation based on Article 16b.6. In the new Article 16b the influences of photocopying and the copying of music on tape were taken into account. Also, copying on demand for someone else's private use was a phenomenon that was covered explicitly, but with the exception of music, which could not be copied 'on demand'. Copying on demand of texts, for instance by libraries, for the private use of private individuals was still allowed.

Main provision (Article 16b(1))

> It shall not be deemed to be an infringement of the copyright in a literary, scientific or artistic work to reproduce it in a limited number of copies for the sole purpose of private practice, study or use of the person who makes the copies or orders the copies to be made exclusively for himself.

It should be mentioned that the private copying exception was not and probably still is not limited to the making of exact copies. It also covers the making of an adaptation, albeit only for one's own private use. The Dutch Supreme Court confirmed this in 1987 in its *Queen Beatrix stamp* decision.[11] This also follows from the reference to translation in the 1912 Explanatory Memorandum cited above. Article 16b(1) did not contain a limitation to private copying of works which have been made available for the first time with permission of the right holder, nor a limitation to private copying on the basis of 'original copies', copies

11 Supreme Court of the Netherlands, 29 May 1987, *NJ* 1987, 1003 (Unger v. Struycken; Beatrix stamp).

which were themselves created with permission of the right holder. The limitation to 'a limited number of copies' was never made more specific. This limitation probably follows from the limitation of the purpose: why would one need more than one or two copies for one's own private use? Any larger number of copies would therefore probably not be allowed.[12]

Since 1972 Article 16b(1) explicitly includes in the private copying exception copying on demand for someone else's private use. It was made clear in the Explanatory Memorandum that it was only allowed to make such copies after an actual and specific request by the person for whose private use the copies would be employed. It was not allowed to make copies in advance in view of possible demand for such copies and it was also not allowed to make copies based on a general request for copies of works on a certain subject, from a certain source or by a certain author. Apparently, the legislator was well aware of the risk that document delivery as a service by for instance libraries, could turn into a very attractive service and an industry which would be a threat to the publishing industry, especially to journal publishing.

Literary works (Article 16b(2))

In Article 16b(2) a limitation on private copying of literary works was introduced to cater for the influence of photocopying and the threat that too broad an exception for private copying would pose for the publishing industry:

> Where the work is one of those referred to in Article 10, first paragraph, under (i) [literary works], including the score or parts of a musical work, the reproduction shall furthermore be confined to a small portion of the work, except in the case of:
> *(a)* works of which, in all probability, no new copies are made available to third parties for payment of any kind;
> *(b)* short articles, news items or other texts which have appeared in a daily or weekly newspaper or weekly or other periodical.

What is meant by 'a small portion of the work' is not defined anywhere. A possible point of reference could be a rule developed by the Dutch Publishers Association in another context that is for educational copying on the basis of Article 16 of the Dutch Copyright Act: not more than 10% of a book and not more than 10 000 words. The limitation to 'a small portion of the work' only applies to the literary works themselves. Pictures and photographs contained in literary works can be copied in their entirety.

12 See J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 230.

Books could no longer be copied in their entirety, unless they were out of print. It follows from the phrase 'in all probability' ('no new copies are made available to third parties for payment of any kind') that if a book is temporarily out of print it cannot be copied in its entirety. Obviously, these limitations were and are ignored in practice by many.

Visual works (Article 16b(3))
Article 16b(3) contained the already existing limitation on the private copying of works of visual art:

> Where the work is one of those referred to in Article 10, first paragraph, under (vi) [drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like], the copy must differ appreciably in size or process of manufacture from the original work.

In 1972 the idea was still that a private copy of a work of visual art should not be identical as far as size and process of manufacture are concerned, because then it could actually replace the original. As we shall see, this condition was struck in 2004 as far as digital copying is concerned because the legislator believed that with digital copying of works of visual art this condition would be meaningless. In practice, it was the quality of the copying technique rather than its legal status that limited the effect of private copying of visual works on the commercial value of copyright.

Music and film (Article 16b(4))
In Article 16b(4) a limitation on copying on demand for someone else's private use was introduced. It was felt at the time that private copying on demand of music or film would be especially detrimental to the interests of the music and film industry.

> The provisions of the first paragraph concerning reproduction made to order shall not apply to reproduction made by recording a work or a part thereof on an article intended for causing the work to be heard or seen.

Apparently, it was also felt that private copying of music and film would be too complicated to be done by members of the general public and would only be done by a small number of specialists that would then turn it into a service for others. This limitation was abolished in 2004, for obvious reasons.

No delivery to third parties (Article 16b(5)):

> In the case of reproduction permitted under this Article, the copies made may not be delivered to third parties without the consent of the copyright owner, except where such delivery takes place for the purposes of a judicial or administrative proceeding.

This part confirms that Article 16b only allows copying for one's own private use and does not allow the making of copies for delivery to others. Once a copy has been made under this privilege it cannot be delivered to anyone, without 'turning into' an illegal copy. Such a copy can however be used in judicial or administrative proceedings. For that purpose additional copies can also be made on the basis of Article 22 of the Dutch Copyright Act.

The repro right for the public sector (Article 16b(6)):

> An administrative regulation [issued by the Queen] may provide that, with respect to the reproduction of works referred to in Article 10, first paragraph, under (i) [literary works], the provisions of one or several of the foregoing paragraphs may be waived for the operation of the public service and for the performance of the tasks incumbent on public service institutions. Directions and precise conditions may be fixed to this end.

Article 16b(6) provided for the possibility of introducing further secondary regulation by royal decree regarding the conditions for copying for internal use by the government and for public services. This regulation came about in 1974 in the form of the Repro Right Regulation of 1974 which will be discussed below.

The Repro Right Regulation of 1974

The Repro Right Regulation of 1974,[13] based on Article 16b(6) of the Dutch Copyright Act, contained specific rules and conditions for photocopying for internal use in the public sector. Government agencies, libraries and educational institutions were allowed to copy literary works within the same limits as mentioned in Article 16b(2) for private copying. The main feature of this regulation was that 10 (Dutch Guilder) cents (which equals 4.5 Eurocents) had to be paid per photocopied page. Non-academic educational institutions had to pay 2.5 (Dutch Guilder) cents (which equals 1.1 Eurocents). In 1985 the Repro Right Regulation of 1974 was amended to appoint Stichting [foundation] 'Reprorecht' as the sole entity which could collect the applicable equitable remuneration for the copying

13 Administrative Regulation of 20 June 1974, *Staatsblad* 351.

for internal use mentioned in Article 16b(6).[14] Reprorecht was the first 'own right' organization, which did not have to rely on membership or licences. Government agencies, libraries and educational institutions were the only entities that paid any remuneration for photocopying for internal use between 1974 and 2003.

3.4 The repro right and the private sector

The 'new' Article 17 (1974 – 2003)

In 1972 a brand new Article 17 was introduced which contained an exception for copying for internal use against payment of an equitable remuneration:

> Without prejudice to the provisions of the foregoing article [Article 16], it shall not be deemed to be an infringement of the copyright in the works referred to in Article 10, first paragraph, under (i) [literary works], to reproduce, on behalf of an enterprise, organization or other establishment, articles, information or other separate texts which have appeared in a daily or weekly newspaper or weekly or other periodical, or small portions of books, pamphlets or other writings, provided that they are scientific works and that the number of copies made does not exceed that which the enterprise, organization or establishment may reasonably need for the purposes of its internal activities. Copies may only be delivered to persons employed by the enterprise, organization or establishment.
>
> Any person who makes copies or orders the making of copies shall pay equitable remuneration to the author of the work thus reproduced or to his successors in title.
>
> An administrative regulation [issued by the Queen] may fix provisions concerning the maximum number of copies, the maximum size of copies, the amount of remuneration, the mode of payment of remuneration and the number of copies in respect of which no remuneration is payable.

The general idea of this article for private sector internal copying is clear and the same as Article 16b(6) in its 1972 version was for public sector internal copying. However, where the administrative regulation for public sector copying was introduced in 1974, the regulation referred to in this article for private sector internal copying never materialized. No collecting society was given the exclusive right to collect the equitable remuneration mentioned in this new Article 17. The lobby of the employers' organizations was apparently stronger than the lobby for the right owners, especially the publishers. The private sector never did pay for photocopying for internal use under Article 17. Article 17 and Article 16b(6) were

14 Administrative Regulations of 19 December 1985, *Staatsblad* 1986, 79-81.

replaced in 2003 by Articles 16h - 16m which deal with internal photocopying both in the public and the private sector. One reason for the delay in the adoption of these amendments during the last decade of the last century was a bill which met with much resistance in parliament because it was rather unbalanced.

Bill 22.600

In 1992 a bill was introduced in parliament containing a proposal to extend the Repro Right Regulation to the private sector, to strengthen the position of the collecting society Reprorecht and to put a heavy administrative burden on users. It was also suggested that the levy should be raised from 10 to 24 (Dutch Guilder) cents per photocopied page. The bill contained the obligation for users to supply Reprorecht with the number of 'reprographic reproductions' (photocopies) and the total number of such copies relevant under copyright that were made. The statement of incorrect or incomplete numbers to Reprorecht could be punished by a jail sentence of up to three months. On top of that, Reprorecht would be granted the authority to make an estimate of these numbers, should the parties not agree on the actual numbers of relevant photocopies. This estimate would be binding, unless the user was able to prove the correct number of photocopies made relevant under copyright. This complete reversal of the burden of proof regarding the relevant number of photocopies made, combined with a high degree of uncertainty as to which copies would actually be relevant under copyright, made this bill the subject of fierce criticism. In 1995 the Senate criticized the bill so heavily that the Minister of Justice decided to suspend the debate. In 1997 the bill was retracted.

The amendment and the Repro Right Regulation of 2002

In 2001 a new bill was introduced in parliament to extend the provisions of the Repro Right Regulation to the private sector, which was less far-reaching and less one-sided than its 1997 predecessor. This bill passed parliament without much trouble and was accepted by the end of 2002. The amendment to the Copyright Act and the new Repro Right Regulation of 2002 entered into force on 1 February 2003. Photocopying of published works for internal use is allowed on the condition that an equitable remuneration is paid.

Main provision: photocopying of published works (Article 16h):

1. A reprographic reproduction of an article in a daily or weekly newspaper or weekly or other periodical, or of a small part of a book and other works it contains is not regarded as an infringement of copyright, provided that compensation is made.

No definition of 'reprographic reproduction' is given, but there is no doubt that it mainly covers photocopying, the making of an identical paper copy from a paper original. It probably also covers the use of a fax machine, and possibly the printing of a microfilm. It does not cover the printing of a digital original or digital scanning which does not result in another paper copy. The existence of multipurpose machines which can print, scan, fax and photocopy makes it very hard to determine what exactly is a reprographic reproduction and how many of such reproductions are made. Unlike bill 22.600, the current article is limited to published works on paper. Correspondence and other material not published in print are therefore excluded. It does not cover material published in digital form on the Internet.

2. The reprographic reproduction of the whole work is not regarded as an infringement of the copyright if it may reasonably be assumed that no new copies of the book will be made available to third parties for payment of any kind, provided that compensation is paid for this reproduction.

The reprographic reproduction, in the case of books, has to be limited to small parts, unless the book is sold out and will not be reprinted. This clause is comparable to Article 16b(2).

3. By Order in Council it may be provided that, in relation to the reproduction of works within the meaning of Article 10, first paragraph at 1°, derogation may be made from the provisions of one or more of the foregoing paragraphs for the benefit of public administration as well as for the performance of tasks entrusted to establishments operating in the public interest. Further terms and conditions may be specified by Order in Council.

The Repro Right Regulation of 2002,[15] which is based on Article 16h(3), is almost identical to the Repro Right Regulation of 1974 in its description of what kind of photocopying for internal use is allowed in the public sector.

Payment per page, level of the payment (Article 16i)

The compensation meant in Article 16h is calculated on the basis of each page on which a reprographic reproduction is made of a work as meant in the first and second paragraphs of said Article. By Order in Council the level of compensation will be specified; further terms and conditions may be provided.

15 Government Order of 27 November 2002, *Staatsblad* 575.

By a Government Order of 27 November 2002,[16] the level of the payment for both public and private sector internal copying was set at 4.5 Eurocents per page copied, except for non-academic educational institutions, which have to pay 2.5 Eurocents per page copied.

Only photocopying for internal use is allowed and copies made under this exception may not be delivered to third parties (Article 16j). The obligation to make payment, as specified in Article 16h, shall lapse after the expiry of three years from the time when the reproduction is made. The payment will not be due if the person obliged to make that payment demonstrates that the author or his successor in title has waived the right to payment (Article 16k).

The payment specified in Article 16h has to be made to Stichting Reprorecht, a collecting society which has been exclusively entrusted by the Minister of Justice with the collection and distribution of this payment (16l(1)).[17] Stichting Reprorecht is supervised by the Supervisory Board specified in the Act on Supervision of Collective Management Organizations for Copyright and Related Rights. Distribution takes place through publishers and through other collecting societies. There is a 50/50 split between publishers and authors laid down in the distribution scheme approved by the Supervisory Board mentioned above.

It is possible to deviate from the obligation to make the payment to Stichting Reprorecht when those who are under an obligation to make such payment, can demonstrate that they have agreed with the author or his successors in title to make the payment directly to him or them (16l(5)).

Whoever is obliged to make the payment to Stichting Reprorecht is obliged to submit a return of the total number of 'reprographic reproductions' he makes each year. This return does not need to be submitted if the annual number of photocopies is less than 50 000.[18]

Reprorecht in the private sector in practice

Because it is very unclear what a 'reprographic reproduction' covered by Articles 16h to 16m actually is, it is impossible for users to meet the obligation to provide exact data on the total numbers and pay accordingly. An agreement was reached between Stichting Reprorecht and employers' organizations, which resulted in an 'Introductory arrangement on Reprorecht for the private sector' in March 2004.[19] This arrangement has continued to be applied until the present day. All

16 *Staatsblad* 574.

17 *Staatscourant* 2003, nr. 9, p. 11, see: www.reprorecht.nl.

18 Article 16m and the Government Order of 27 November 2002, *Staatsblad* 574.

19 Available in English at: www.reprorecht.nl http://www.reprorecht.nl/uploads/files/file/Reprorecht2010/Introductory_Reprographic_Reproduction_Scheme.pdf

businesses can pay a fixed amount based on the number of employees and on whether they are active in a 'photocopy-intensive sector' or not. The amounts rise slightly every few years. In 2004 the amount that any small business with less than 20 employees had to pay under the arrangement was € 15.62 per year. This amount rose to € 16.78 in 2005 and 2006 and to € 17.12 in 2008, 2009 and 2010. Businesses that do not own a photocopier do not have to pay anything. Businesses with over 500 employees in a 'photocopy-intensive sector' had to pay € 4350 in 2004, rising to € 4765 in 2008/2009/2010. Businesses can deviate from this arrangement if they can prove they photocopy significantly less than average in their sector. In order to prove this, Stichting Reprorecht suggests that they should follow detailed and rather complicated survey methods. Because the amounts businesses have to pay for photocopying are relatively low, no conflicts over Reprorecht have become known, let alone litigation, since the entry into force of this arrangement in 2004.

In 2002, before the entry into force of the arrangement for the private sector, Stichting Reprorecht collected a little over € 6 million from the public sector. Collection from the public sector rose only slightly in recent years. Collection from the private sector has risen from zero in 2002 to a little over € 20 million in 2008. The average yearly figure for the private sector is lower however, because the collection from the private sector is done on a biennial basis. In 2009 the collection from the private sector was a little over € 10 million.

The importance of photocopying compared to scanning, printing and above all digital copying is obviously diminishing fast.

3.5 The home-copying levy

In the late 1970s and in the 1980s, several reports on the need for a home-copying levy were commissioned by the Dutch mechanical rights organization Stemra and the Dutch branch of IFPI, NVPI. As early as 1972, the then existing Advice Committee on Copyright had been asked for its advice on the matter, but the advice was not given before 1981.

At the time the discussion on the need for a home-taping levy was overshadowed and put aside by the discussion on the need for the introduction of neighbouring rights in the Netherlands. Neighbouring rights were finally introduced in the Dutch Neighbouring Rights Act as late as 1993. By 1983 the Dutch Government had decided to join the 1971 Geneva Convention for the Protection of Producers of Phonograms, but not the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Joining the latter was considered to be too costly for Dutch public broadcasting. However, a few years later, the Dutch Government changed its position. Joining the Rome Convention

as well was considered necessary for the proper exploitation of the Olympic Games which Amsterdam wanted to host in 1992.

By 1985 the Ministry of Justice had actually prepared a bill for the introduction of a home-taping levy. The Ministries for Economic Affairs and Culture were however hesitant. The Ministry of Culture wanted to include the allocation of a 25% share of the levy for cultural purposes, to which the right owners were opposed. In the end a compromise was reached at a 15% share. In 1987 the discussion was complicated by the advent of the Digital Audio Tape (DAT) which could and would include a Serial Copying Management System (SCMS). Right owners did not want a home-taping exception regarding this kind of digital copying which would be limited by technical means. The Digital Audio Tape was no success, neither was the Digital Compact Cassette which followed it.

In August 1988 the bill regarding the home-taping levy was sent to parliament. In 1990 a home copying levy was introduced into the Dutch Copyright Act[20] in Article 16c:

> A remuneration is owed to the author or his successor in title for the reproduction in accordance with article 16b, paragraph 1, for personal practice, study or use, of a work or part thereof by fixing it on an object which is intended to show the images or play the sounds recorded on it.

The manufacturer or importer of these objects is liable for payment of the remuneration.[21] The remuneration has to be paid to a legal person designated by the Minister of Justice: a collecting society called 'Stichting de Thuiskopie'. The level of the remuneration is determined by a foundation designated by the Minister of Justice; a foundation called 'Stichting Onderhandelingen Thuiskopie' (SONT). The board of SONT is composed evenly of representatives of right-owners and of representatives of the persons liable for payment and has an independent chairman appointed by the Minister of Justice.[22] The only guidance given in the Copyright Act as to the appropriate level of the remuneration was the following:

> The running or playing time of the object in question shall be of particular importance in determining the level of the remuneration.[23]

20 Act of 30 May 1990, *Staatsblad* 305.
21 Article 16c(2) DCA.
22 Article 16e DCA.
23 Article 16e(2) DCA.

As of 1 October 1991 the level of remuneration was set at 0.35 Dutch Guilders per hour for (analogue) blank audio tapes and cassettes. A 20% discount was then given after Stichting Thuiskopie and the organization representing manufacturers and importers entered into a standard contract, resulting in a levy of 0.28 Guilders.[24] Starting from 1 February 1992 the level for blank videotapes was set at 0.47 Guilders per hour.[25] Later on, the levy rose to 0.59 Guilders per hour for analogue audio tapes and 0.72 for analogue videotapes, due to the entry into force of the Dutch Neighbouring Rights Act in 1993.

In the 1990s there were relatively few problems with the home-taping levy in the Netherlands. There were relatively few importers, all of whom were united in an association called FIAR, which participated in the negotiations within the SONT foundation. There were relatively few 'grey imports' from other countries; there were as yet no sales over the Internet. Another important factor was that the levy was relatively low compared to the price of the tapes in question. For these reasons, including the levy in the price for the consumers was not very problematic.

All this changed with the advent of recordable CDs and later DVDs. The number of importers rose and competition became stronger. Cross-border trade from countries without levies or with lower levies and downright illegal imports from the Far East became more widespread. Subsequently, the prices of the blank media fell steadily. By 2005 the price of a blank CD or DVD had fallen to € 0.15 and consequently the home-taping levy in the Netherlands was by now 100% or more. Opposition against its level and against the levy as such rose. Litigation was started by the importers against the collecting society 'Stichting Thuiskopie' on many aspects of the levy system.

As from 1 January 1999 the levy was set at 1.08 Guilders per hour for digital blank audio carriers (audio CDs and minidisks).[26] With effect from 1 September 1999 a levy was set for cd-R-data and cd-RW-data at 0.20 Guilders per disc.[27]

After the introduction of the Euro, the following rates were applicable:[28]

audio analogue blank tape:	€ 0.23 per hour;
video analogue blank tape:	€ 0.33 per hour;
digital blank minidisk:	€ 0.32 per hour;

24 *AMI* 1991, p. 166.
25 *AMI* 1991, p. 205.
26 *Staatscourant* 1998, nr. 231.
27 *Staatscourant* 1999, nr. 104.
28 *Staatscourant* 2002, nr. 222.

digital blank audio cd-r/rw: € 0.42 per hour;
digital blank data cd-r/rw: € 0.14 per disc.

As of 1 July 2003 the following levies were added:[29]

blank dvd-r/rw: € 1.00 per 4.7 gigabyte;
blank dvd+r/rw: € 0.50 per 4.7 gigabyte.

The distinction between those two types of blank DVDs is that the latter is sensitive to a particular kind of copy protection system. As of 1 July 2004 a levy was added for a particular kind of High Intensity Mini Disc of € 1.10 per 1 gigabyte.

On 1 September 2004 the implementation of the Information Society Directive in the Dutch Copyright Act entered into force. This amendment of the Dutch Copyright Act will be discussed below together with the current European framework.

As of 1 February 2005 the levy on blank DVDs was lowered:[30]

blank dvd-r/rw: € 0.60 per 4.7 gigabyte;
blank dvd+r/rw: € 0.40 per 4.7 gigabyte.

In 2006 the levies were set at the same level for the same objects for the last time by SONT.[31]

In 2005 and 2006 negotiations had been taking place on the possible introduction of levies on hardware, such as MP3-players and Hard Disk-recorders. It turned out that the structure of the negotiation foundation SONT had to be changed first, because the importers of hardware were not represented within the foundation. After the structure had been changed to accommodate this problem, some organizations representing the hardware industry declined to participate in the negotiations. The president of SONT wanted to go ahead with the introduction of a hardware levy, which would in the beginning be set at zero, pending further European developments. However, in 2007 the Dutch Government decided to intervene, following heavy criticism on Stichting Thuiskopie by the Supervisory Council regarding the (lack of) distribution of monies[32] and general criticism on the levy system. The government issued an

29 *Staatscourant* 2003, nr. 103.
30 *Staatscourant* 2004, nr. 240.
31 *Staatscourant* 2006, nr. 245.
32 The Supervisory Council found in 2006 that as of 31 December 2005 € 57 million had not been distributed. (annual report of the Supervisory Council on 2006, p. 8) http://www.cvta.nl/wp-content/

administrative decree in which the existing levies were 'frozen' and expansion to other digital media, such as MP3-players or hard disks was ruled out.[33] This decision to 'freeze' home copying levies was initially to expire in 2009, but was extended until 2013 by a subsequent administrative decree.[34] The initial reasons for this 'freezing' of the levies by the government were the distribution problems discussed below, the possibility of future European harmonization and the fact that negotiations within SONT had come to a standstill. In March 2012 the Court of Appeal of The Hague ruled that the 'freezing' of the levies was unlawful and gave rise to liability of the state, because the 'freezing' violated the obligation of the state under the Information Society Directive to provide for 'fair compensation' for private copying.[35]

Stobi discount

In the current private copying levy system in the Netherlands, the members of the blank media sellers' organization Stobi get a 20% discount on the applicable levy. A seller of blank media that was not a member of Stobi when the discount was introduced, Imation Europe, did not know of the existence of this discount and reclaimed the discount retroactively later. The Court of Appeal of The Hague ruled in 2008 that Thuiskopie had acted unlawfully by not communicating the existence of the discount sufficiently to interested parties such as Imation.[36]

Distribution problems

One of the reasons for the 'freezing' of the levies in 2007 was the fact that large amounts of money had not been distributed in time. It turned out that by the end of 2004 € 5.6 million of collected levies remained undistributed. In a Government Order of 5 November 2007 it was ordered that any amount of money which had not been distributed to right holders by the end of 2004 and which, in the opinion of the Supervisory Body of the Collecting Societies in The Netherlands, could no longer be distributed had to be deducted from what levies would have to be paid in 2008. On 23 September 2008 the Supervisory Body of the Collecting Societies decided that the amount of € 5.6 million of collected levies in 2004 could no longer be distributed. Thuiskopie and several collective distribution organizations started administrative proceedings against this decision by the Supervisory Body of the Collecting Societies. On 31 March 2010 the District Court of The Hague annulled

uploads/2010/12/CVTA_Jaarverslag2006.pdf

33 Decree of 5 November 2007, *Staatsblad* 435.

34 Decree of 16 November 2009, *Staatsblad* 480.

35 Court of Appeal The Hague, 27 March 2012, IEF 11110, LJN BV9880 (Norma v. State of the Netherlands).

36 Court of Appeal The Hague, 10 July 2008, *IEF* 6512 (Thuiskopie v. Imation Europe).

the decision by the Supervisory Body of the Collecting Societies.[37] According to the district court the assessment that € 5.6 million of collected levies could no longer be distributed was incorrect. Thuiskopie had in the meantime proposed to the Supervisory Body several new distribution schemes for distributing the money. The Supervisory Body had not reacted in time to these proposals and consequently Thuiskopie had actually distributed a large part of the amount before September 2008, which the Supervisory Body had not prevented from happening. Therefore, according to the court, the Supervisory Body could not decide as it did. The Supervisory Body did not appeal against this decision.

Abolishment of the private copying levy?

In 2009 a parliamentary working group on copyright published a report containing recommendations on private copying.[38] The Committee proposed to actively promote business models that offer online content to consumers under attractive terms; to prohibit private copying (downloading) from illegal sources, following the German example; to gradually abolish home copying levies; and to introduce legislation on author's contracts.[39]

In 2011 the Secretary of State for Justice announced the intention of the Dutch Government to prohibit private copying from illegal sources and to abolish the private copying levy.[40] There was however considerable opposition to this proposal in parliament, especially because the abolishment of the private copying levy has to be combined with an explicit ban on private copying from illegal sources. There is a general fear among members of parliament and consumer organizations that the enforcement of a ban on private copying from illegal sources will have an undesirable effect on the privacy of individual Internet users. The process is accompanied by extensive lobbying. On the one hand, the hardware and blank media industry would like to see the levies abolished. On the other hand, the collecting societies, which would lose a considerable part of their turnover if levies were abolished, are anxious to retain and expand the levies to all kinds of hardware. The ruling by the Court of Appeal of The Hague of 27 March 2012 mentioned above might well lead to the introduction of levies on hardware.[41]

In early 2012 it was still unclear what legislative action was to be expected in the Netherlands.

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37 District Court of The Hague, Administrative Chamber, 31 March 2010, *IEF* 8725 (Stichting De Thuiskopie, VEVAM and Sekam Video v. the Supervisory Body of the Collecting Societies).

38 Final Report of Parliamentary Working Group on Copyright (Gerkens Committee), Tweede Kamer (Second Chamber), 2008-2009, 29 838 and 31 766, no. 19.

39 P.B. Hugenholtz, 'Chronicle of Dutch copyright law, 2001-2010', *RIDA*, 2010-226, p. 281-349.

40 Tweede Kamer (Second Chamber) 2010-2011, 29 838, nr. 29.

41 Court of Appeal The Hague, 27 March 2012, *IEF* 11110, LJN BV9880 (Norma v. State of the Netherlands).

4. European context

Of the current European directives on copyright, the Information Society Directive is most relevant for private copying. The Computer Programs Directive contains a mandatory but limited exception for back-up copies of computer programs. The Database Directive does not allow a private copying exception for electronic databases. The other directives have no bearing on private copying.

4.1 Private copying of computer programs and databases

Since 1993 the Dutch Copyright Act contains Articles 45k, l and m, which allow the making of a back-up copy of a computer program, reverse engineering and decompilation for the purpose of interoperability by the lawful user. These articles are based on and should be interpreted in conformity with Articles 5(2), 5(3) and 6 of the Computer Programs Directive.

Since the same implementation in 1993 of this Directive Article 45n of the Dutch Copyright Act sets out that the private copying exception does not apply to computer programs.

Since the implementation in 1999 of the Database Directive, which does not allow for a private copying exception for electronic databases, Article 16c(8) DCA contains a clause making clear that private copying of an electronic database is not allowed:

> This Article does not apply to the reproduction of a collection accessible by electronic means within the meaning of Article 10, third paragraph.

Consequently, private copying of non-electronic copyright protected databases is allowed. This is in conformity with Article 6(2) sub a of the Database Directive:

> Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases: (a) in the case of reproduction for private purposes of a non-electronic database;

4.2 Private copying in the Information Society Directive

The Information Society Directive aims at harmonization of the limitations and exceptions on copyright. Article 5(2) of the Information Society Directive contains some of the permitted limitations to the reproduction right, including those on private copying:

> Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
>
> (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation;
> (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

Article 5(5) contains the three-step-test limitation on the limitations:

> The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

4.3 Fair compensation

Recital 35 of the Information Society Directive refers to the fact that some exceptions or limitations should be offset by the payment of fair compensation:

> In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the right holders resulting from the act in question. In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

It is important to note that 'fair compensation' is distinct from the 'equitable remuneration' for performers mentioned in Article 8(2) of the Rental Right

Directive and the 'remuneration' for lending mentioned in Article 6 of the same directive.[42]

The European Court of Justice has elaborated on the meaning of 'fair compensation' in its *Padawan*[43] and *Thuiskopie*[44] decisions. These decisions will be discussed below, together with the Dutch implementation of this concept in the context of private copying.

4.4 The implementation of the Information Society Directive

With the implementation of the Information Society Directive, the Dutch legislator decided to split the existing private copying exception into two parts. Photocopying for private use and any kind of copying by hand, which is relatively 'harmless', is covered by Article 16b DCA and is not compensated by any levy scheme or other kind of 'fair compensation'. The harm done by this kind of copying was considered to be minimal and not to require any 'fair compensation'.

Photocopying for internal use as described by Article 5(2) sub a of the Information Society Directive is covered by the Repro Right Regulation of 2002 and Article 16h of the Dutch Copyright Act. These rules and regulations probably do provide sufficient fair compensation for these kinds of photocopying. There have been no questions or comments, let alone court cases regarding the implementation of the Information Society Directive as far as photocopying is concerned.

Audio, video and all digital private copying are covered by Article 16c DCA and are compensated by the levy on blank media, which already existed since 1990. The distinction between these two types of copying is made clear by the phrase 'an article intended for causing a work to be heard or seen' in Article 16c DCA. This phrase is meant to encompass all analogue and digital audio and video private copying and all digital private copying. Article 16b(6) DCA makes clear that any such private copying which falls under Article 16c DCA, is not covered by Article 16b DCA.

After the entry into force of the government order regarding the 'freezing' of the existing levies and preventing the introduction of levies on hardware, attempts have been made by several organizations to force the Dutch Government in court to undo this government order and introduce a hardware levy. In 2008 the Court of Appeal of The Hague denied such a claim in summary proceedings.[45]

42 See: CJEU, 30 June 2011, C-271/10 (Vereniging van Educatieve en Wetenschappelijke Auteurs).
43 CJEU, 21 October 2010, C-467/08 (PADAWAN).
44 CJEU, 16 June 2011, C-462/09 (Stichting de Thuiskopie).
45 Court of Appeal of The Hague, 11 November 2008, *IEF* 7163 (NORMA v. The Netherlands).

In 2010 and in 2011 the District Court of The Hague denied comparable claims in procedures on the merits.[46] On all three occasions the court ruled that there was no evidence that the total amount of compensation generated by the existing levies on blank media was 'unfair', i.e. did not amount to 'fair compensation'. However, on 27 March 2012 the Court of Appeal of the Hague ruled that the 'freezing' of the levies was unlawful and gave rise to liability of the state, because the 'freezing' violated the obligation of the state under the Information Society Directive to provide for 'fair compensation' for private copying.[47]

In 2010 the Court of Appeal of The Hague ruled in the litigation brought by the importers against Stichting De Thuiskopie that private copying from an illegal source is also permitted under the existing private copying exception and should be compensated by the private copying levy.[48] Therefore, in determining the amount of fair compensation through the levy, private copying from illegal sources should be taken into account. According to the court there was no ground to request a preliminary ruling from the European Court of Justice on the question of a possible violation of the three-step test. This was based on the following reasoning by the court as to the position taken by the Dutch legislator. Either there is no violation of the three-step test because the levy does suffice to compensate the harm of private copying from illegal sources, also in view of the fact that an exclusive right against private copying from illegal sources could not be enforced anyway, or there is a violation of the three-step test, but then an interpretation of the Dutch private copying clause which would exclude copying from an illegal source, would amount to an interpretation *contra legem*. In 2012 an appeal against this decision was pending before the Supreme Court of the Netherlands.

An exception for professional users?

In its *Padawan* decision[49] the European Court of Justice ruled in 2010 that Article 5(2)(b) of the Information Society Directive must be interpreted as meaning that

> the 'fair balance' between the persons concerned means that fair compensation must be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception. It is consistent with the requirements of that 'fair balance' to provide that persons who have digital

46 District Court of The Hague, 23 June 2010, *IEF* 8934 (NORMA v. The Netherlands) and District Court of The Hague, 19 October 2011, *IEF* 10377 (Thuiskopie v. The Netherlands).

47 Court of Appeal The Hague, 27 March 2012, *IEF* 11110, LJN BV9880 (Norma v. State of the Netherlands).

48 Court of Appeal of The Hague, 15 November 2010, LJN BO3982 (ACI c.s. v. Thuiskopie).

49 CJEU, 21 October 2010, C-467/08 (PADAWAN).

> reproduction equipment, devices and media and who on that basis, in law or in fact, make that equipment available to private users or provide them with copying services are the persons liable to finance the fair compensation, inasmuch as they are able to pass on to private users the actual burden of financing it.

The European Court of Justice also ruled in that decision that

> Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying. Consequently, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29.

A levy on reproduction equipment, devices or media not made available to private users, but to professional users is therefore not permitted.

In the current levy system in the Netherlands there is no exception for blank media for professional users, which suggests an incompatibility with the *Padawan* decision. Stichting De Thuiskopie takes the position that the current levy system is compatible with *Padawan*, because professional use was taken into account in setting the current level of the levy. The blank media industry does not agree with that position. In 2012 a court case on this issue is pending before the District Court of The Hague.

Selling over the Internet from another member state

In its *Thuiskopie* decision[50] the European Court of Justice ruled in 2011 that the Information Society Directive

> in particular Article 5(2)(b) and (5) thereof, must be interpreted as meaning that the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation provided for in Article 5(2)(b). However, it is open to the Member States to establish a private copying levy chargeable to the persons who make reproduction equipment, devices and media available to that final user, since they are able to pass on the amount of that levy in the price paid by the final user for that service.

50 CJEU, 16 June 2011, C-462/09 (Stichting de Thuiskopie).

The Court also ruled that

> it is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm. In that regard, the mere fact that the commercial seller of reproduction equipment, devices and media is established in a Member State other than that in which the purchasers reside has no bearing on that obligation to achieve a certain result. It is for the national court, where it is impossible to ensure recovery of the fair compensation from the purchasers, to interpret national law in order to allow recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

This decision ended the conflict about whether or not the sale of blank recording media over the Internet by a German company to purchasers in the Netherlands was covered by the Dutch levy system. The Dutch national courts had ruled that the German company in question could not be considered an 'importer' within the meaning of the Dutch Copyright Act. Therefore, the German company was not under an obligation to pay the levy in the Netherlands. The judgment of the European Court of Justice reversed this decision and the case was subsequently settled. Many questions remain however as to which levies apply in what situation.

5. Assessment and future developments

In the first 50 years of the Dutch Copyright Act, private copying and copying for internal use did not constitute a serious or interesting problem. The Dutch private copying clause was very broad and technology neutral. For technological reasons, private copying was always *de minimis*: either very limited in quantity and very labour intensive or of very low quality and therefore no commercial threat to the original copies in the marketplace.

Photocopying changed this. The quality and quantity of the copies rose and photocopying soon started to be considered as a threat for original copies in the marketplace. In the Netherlands it took more than 30 years, from 1972 to 2003, to introduce a levy for internal photocopying in the private sector. Officially it is a levy per photocopy. In practice it is a relatively low lump-sum payment levy, dependent on the number of employees in a company. There is hardly any

correlation between actual photocopying and the levy. The reason why the levy is not challenged is because it is so low and the burden of proof to show that even less should be paid is almost insurmountable.

Audio and video private copying on tape recorders and video recorders was addressed by a blank media levy on the tapes in 1991. In the beginning the levy was relatively low compared to the price of the tapes and there were just a few importers that could easily make the levy a part of an acceptable price for the consumer. Tapes were replaced by CDs and DVDs. Prices fell and the number of importers grew. In the first decade of the 21st century opposition to private copying levies grew rapidly and all kinds of complications arose. Illegal and grey imports distorted competition. The distribution of the money proved to be seriously flawed. The levy was becoming very high compared to the price of the products. There was no political support for applying the levy to hardware, such as MP3-players.

In the meantime private copying (downloading) from illegal sources became an ever-increasing problem. The Dutch legislator suggested that private copying from an illegal source was probably undesirable, but permissible, because it was part of the justification for the levy system.

At the European level, the Information Society Directive introduced the concept of fair compensation for private copying. On the one hand, this was a very broad concept to accommodate all existing levy systems in Europe and to allow not having a levy system at all such as in the United Kingdom. On the other hand, the Directive was clearly inspired by the idea that new technological solutions would make levies superfluous and that they should in time be abolished.

The European Court of Justice has in its first two decisions taken a very hands-on approach to the fair compensation for private copying. A levy system is not obligatory, but when a member state chooses to have a levy system, the European Court of Justice prescribes in great detail what can be done and what cannot be done. A levy on blank media for professional use is not permissible. Cross-border sales from a seller in one member state to consumers in another member state have to be submitted to a levy.

This attitude of the European Court of Justice will lead to many more detailed questions on private copying and levy systems. The questions referred to the European Court of Justice by the German Supreme Court in cases C-457/11 to C-460/11 provide an example:

> Do reproductions effected by means of printers constitute reproductions effected by the use of any kind of photographic technique or by some other process having similar effects within the meaning of Article 5(2)(a) of the directive?

> If [the above question] is answered affirmatively: can the requirements laid down in the directive relating to fair compensation for exceptions or limitations to the right of reproduction under Article 5(2) and (3) of the directive, having regard to the fundamental right to equal treatment under Article 20 of the EU Charter of Fundamental rights, be fulfilled also where the appropriate reward must be paid not by the manufacturers, importers and traders of the printers but by the manufacturers, importers and traders of another device or several other devices of a chain of devices capable of making the relevant reproductions?
>
> Does the possibility of applying technological measures under Article 6 of the directive abrogate the condition relating to fair compensation within the meaning of Article 5(2)(b) thereof?
>
> Is the condition relating to fair compensation (Article 5(2)(a) and (b) of the directive) and the possibility thereof (see recital 36 in the preamble to the directive) abrogated where the right holders have expressly or implicitly authorised reproduction of their works?

The answers to these questions might have an effect on the existing home-taping levy in the Netherlands, but also on the regulation of photocopying, both for private use and for internal professional use.

6. Conclusion

The problems of private copying and internal copying in the digital age are global. The Dutch approach of a low and arbitrary yearly lump-sum payment for users of photocopying machines and a per carrier levy on blank CDs and DVDs is unlikely to constitute a solution for the future. Collecting societies distributing these levies are in favour of applying more levies to more users and more objects, without any clear idea of what this will bring in the long run. In the Netherlands political resistance to extra levies of any kind is strong. Strengthening the possibilities of enforcement of an exclusive right against private copying is not popular either. At the European level views differ widely. A 'high level mediator' is supposed to bring some kind of voluntary further harmonization.

In the meantime, the European Court of Justice has taken it upon itself to decide cases on private copying levies in considerable detail on the basis of the Information Society Directive. Maybe this kind of judicial activism will give some kind of direction to the debate on private copying and how to deal with it in the context of copyright issues.